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# NEGLIGENCE

## RULES—DECISIONS—OPINIONS

SECOND EDITION

BY  
EDWARD B. THOMAS  
UNITED STATES JUDGE

IN TWO VOLUMES

**VOL. I**

BANKS & COMPANY  
ALBANY, N. Y.

1904

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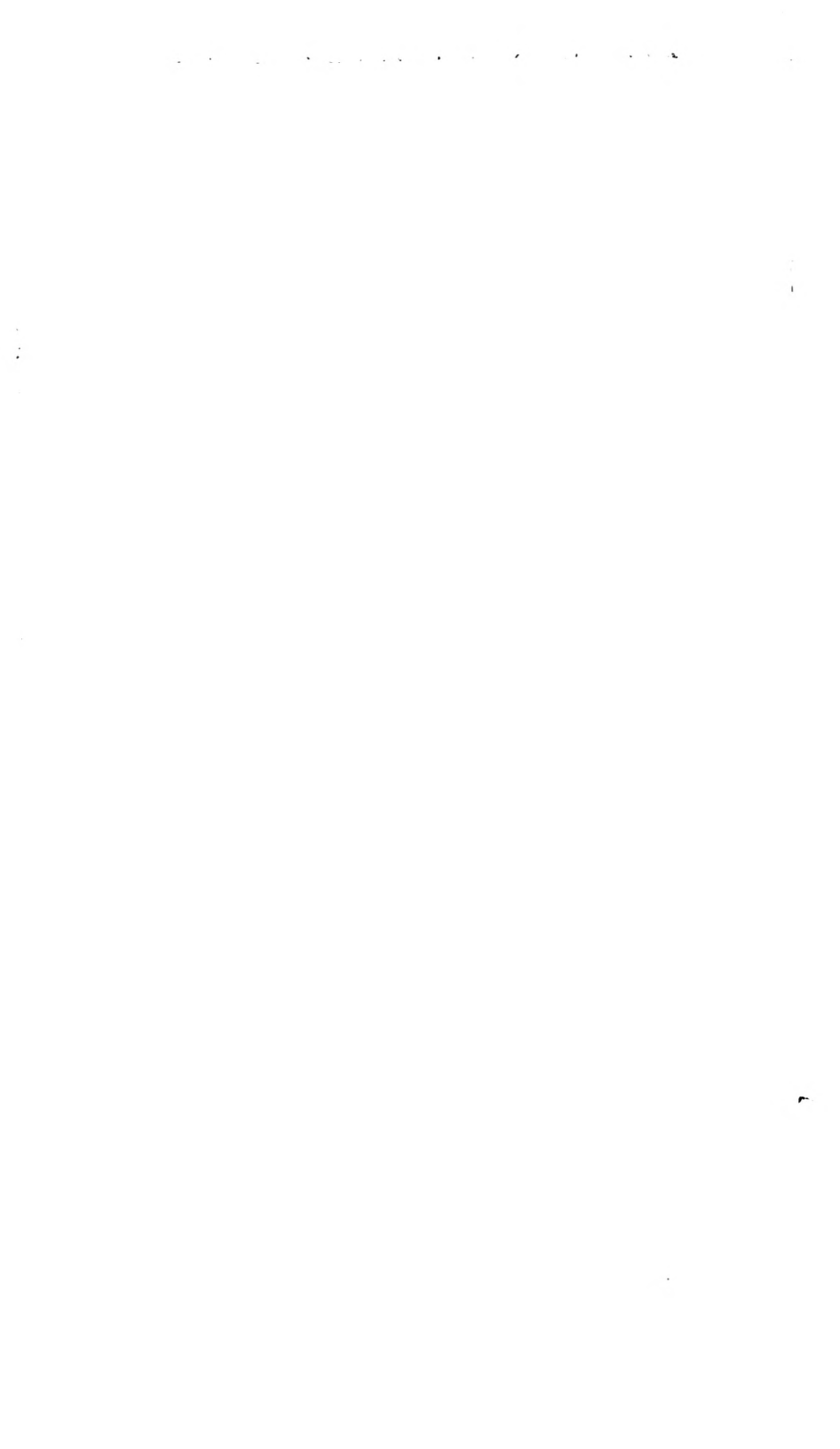
## PREFACE.

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THIS work had come into such common use that it became a duty to continue its availability by bringing in serviceable matter to the date of its reprinting. In connection with this labor a careful review of decisions has been had, omissions of an important nature supplied, and pertinent statutory changes or additions have been noted. While the original system so well approved by the profession has been continued, some rearrangement and additional subdivision of material has been made for purposes of greater convenience. This will be specially observed in the case of "Master and Servant" and "Municipality." The new work has been done under my supervision, by Mr. Berkeley C. Austin, of New York, who by legal capacity, and several years of experience in connection with other publications, has unusual equipment for the service. He has been aided by Mr. Shelley F. Austin, who has been fitted for such association by participation in similar labors. The result illustrates their fidelity and painstaking. The object sought is to keep in the hands of the profession a work that will furnish immediate and ready resource for those interested in the subject.

EDWARD B. THOMAS.

BROOKLYN, *January 18, 1904.*





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# NEGLIGENCE.

## RULES—DECISIONS—OPINIONS.

### AGENCY.

#### I. LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF HIS AGENT.

- (a) When the agency exists.
- (b) When agent is acting within scope of his employment.
- (c) When he is not acting within scope of his employment.
- (d) Willful and malicious acts of agents.

#### II. BANKS AND OTHER AGENTS FOR COLLECTION, &c.

#### III. EXECUTORS AND TESTAMENTARY TRUSTEES.

- (a) Investment.
- (b) Collection.
- (c) Distribution.
- (d) Disbursements.
- (e) Care of estate.
- (f) Liability for negligence of co-executor.

#### IV. TRUSTEES, DIRECTORS, FINANCIAL AGENTS AND OFFICERS.

#### V. PUBLIC OFFICERS.

#### VI. RECEIVERS AND ASSIGNEES.

##### I. Liability of Principal for Negligence of His Agent.

The master is liable to a third person for the negligence, or misfeasance of the servant, while the latter is acting in the master's business, and within the scope of the servant's employment, notwithstanding the fact that the servant's negligent act may be contrary to the master's direction, and, as between the two, a violation of the duty which the latter owes to the former. *Quinn v. Power*, 87 N. Y. 535.

*Schuler v. Hudson R. Co.*, 38 Barb. 553; *Toledo, etc. R. Co. v. Goddard*, 25 Ind. 185; *Johnson v. Chicago, etc. R. Co.*, 58 Iowa 348; *Buckingham v. Fisher*, 70 Ill. 124.

## (a). WHEN THE AGENCY EXISTS.

"A" bought a box of "B" and sent his porter to "B's" store to get it, and such porter, while lowering it to the sidewalk, injured passer-by. "A" was liable and not "B." *Stevens v. Armstrong*, 6 N. Y. 435; rev'g judg't for pl'ff.

One directing his servant to shovel snow from a roof, is liable to a third person for negligent execution of the work by servant, or by one who volunteers to help him. *Althorff v. Wolfe*, 22 N. Y. 355 aff'g judg't for pl'ff.

Citing *Booth v. Mister*, 7 Carr. & Payne, 66. It would have been different had defendant contracted to have the work done. *Blake v. Ferris*, 5 N. Y. 48; *Lansing v. N. Y. & C. R. Co.*, 49 N. Y. 525; *Tousey v. Roberts*, 114 N. Y. 312.

Master of boat conveying wheat consigned to Albany was, upon arrival there, directed by consignees to proceed across the river to East Albany, where cargo undelivered was injured. The carrier contended that the master in crossing the river was not acting under his employment or authority. But the agreement was construed to authorize a delivery at the port of Albany and not merely the city of Albany and it was held that there was not sufficient delivery to discharge the carrier. *Gibbs v. Van Buren*, 48 N. Y. 661; aff'g judg't for pl'ff.

Where a person was sued for negligence of his alleged coachman, in causing a collision, evidence that defendant did not own the horses and coach was evidence that he did not hire the coachman, in the absence of other evidence on that subject, and whoever owned the coach and horses was therefore liable for the injury. *Sloane v. Elmer*, 64 N. Y. 201, rev'g 1 Hun, 310.

The defendants notified the vendor of boilers, that they were defective; the vendor sent "O" to repair them, and when done, to "fire up" the boilers and test them. "N," the defendant's engineer fired up the boilers, and an explosion occurred, killing "O."

It was presumed, that the fire was started at the request of those interested in the work of repair, or that the engineer voluntarily did it, and if so, the defendants were not liable; and even if "N" were acting as a servant of defendants, there was nothing to permit any inference of negligence on his part. The defendants did not owe the same duty to "O," which they would have owed to an employé of their own, into whose hands the boiler had been placed for use. *Olive v. The Whitney Marble Co.*, 103 N. Y. 292.

An owner agreed that the rents of a house should be paid the defendant, his creditor, to meet a debt; the owner would not pay for sewer connection, and the defendant, to keep the tenant, suggested to a plumber



to make it at defendant's expense. The plumber left open a ditch and the plaintiff was thereby hurt. Defendant was not liable for plumber's act. *Kelly v. Doody*, 116 N. Y. 575.

Distinguishing *Clifford v. Dam*, 81 N. Y. 52.

"L," a stevedore, engaged the plaintiff, a gangway man, to assist in unloading the defendant's vessel. "L" was paid a price per ton and the defendant furnished the power and the men to run the winch. The plaintiff gave the signals to the winchmen to "go ahead," and the load was hoisted by a rope winding around a drum of the winch. The rope ran off the drum, and the winchmen stopped and called the plaintiff's attention to this, and the latter seized the rope to lift it on the drum, ordering the winchmen, at the same time, to "back" so as to release the rope, but the winchmen went ahead and the plaintiff's hand was drawn against the drum and injured. "L" had no power to order or control the winchmen and was not a co-employé of the plaintiff, and the plaintiff recovered against the defendant on the ground of the winchmen's negligence. *Johnson v. Netherlands Ass. Co.*, 132 N. Y. 576.

Defendant's apprentice, with his assent, took defendant's team to ride and did injury. While the apprentice was in custody the defendant entered into an agreement to pay for injuries. Defendant was liable. *Sherwood v. Fischer*, 3 Hun, 606.

Defendant let stevedores take his engine and its engineer to hoist material; stevedore's servant was injured by alleged negligence of engineer in lowering hoisting rope too rapidly. Defendant was not liable, as he owed plaintiff no duty that was broken (following *King v. N. Y. Central R. Co.*, 66 N. Y. 181, and *Burke v. DeCastro*, 11 Hun, 354). *Coyle v. Pierrepont*, 33 Hun, 311.

Reargument and held that defendant was liable for engineer's negligence (following *Gerlach v. Edelmeyer*, 15 J. & S. 292, aff'd 88 N. Y. 645). *Coyle v. Pierrepont*, 37 Hun, 379.

Defendant sent his servant to Fisher's factory to receive paper shavings thrown in bags from upper floor through a hatchway. Defendant's servant undertook to warn passers-by; plaintiff, one of Fisher's employes, in passing, through default of defendant's servant to warn, was injured. She knew that the hatchway was used for lowering papers; this did not make her liable for contributory negligence. Defendant liable for negligence of servant. *Post v. Stockwell*, 44 Hun, 28.

Where a union station is within control or ownership of several roads, though managed through the medium of a distinct corporation, any one of them is liable for the acts of a station agent. *Penfield v. Cleveland R. Co.*, 26 App Div. 413; s. c., 50 N. Y. Supp. 79.

Injury caused by servant of defendant while hired by him to another

with full control and direction for the occasion, imposed no liability on defendant. *Brown v. Smith*, 86 Ga. 274.

That negligence of a third person contributed to the general result does not relieve a principal from liability for negligence of his agent. *Chicago v. O'Malley*, 196 Ill. 197.

Defendant's soliciting agent, though off duty for the day, had been requested by a fellow servant to purchase an article for use in the business. After purchasing the article, the agent became intoxicated and injured plaintiff. Defendant was not liable. *Corper &c. Malting Co. v. Huggins*, 96 Ill. App. 144.

Power of control and discharge held necessary to the application of the rule of *respondeat superior*. *Crudup v. Schreiner*, 98 Ill. App. 337.

Damage done to a customer's building in the delivery of coal by one not an employé, whose delivery was subsequently ratified. The ratification created the relation of master and servant and established liability for the damage. *Dempsey v. Chambers*, 154 Mass. 330.

*Byington v. Simpson*, 134 Mass. 169; *Colvin v. Peabody*, 155 id. 104; *Stevenson v. Joy*, 152 id. 45.

A person employed by a servant without authority takes the risk of the employment. *Blair v. Grand Rapids &c. R. Co.*, 60 Mich. 124.

A master may be liable for the act of his sub-agent or under-servant, unless he be under the exclusive control of another. *So. Express Co. v. Brown*, 67 Miss. 260.

A person employed without master's authority or knowledge, by one of his servants, injured another. Master not liable. *Mangan v. Foley*, 33 Mo. App. 250.

One hired by defendant's servant without defendant's authority, negligently handled a crate of crockery, injuring plaintiff. Defendant not liable. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84.

For negligence of an independent contractor working according to his own methods and not subject to the control of his employer, the latter is not liable. *Powell v. Construction Co.*, 88 Tenn. 692.

See "Contractor," post p. 631.

Care in the selection of agents held no defense to an action for their negligence. *St. Louis &c. R. Co. v. Miller*, (Tex. Civ. App.) 66 S. W. Rep. 139.

That under a trackage agreement a company's trains were subjected to a joint schedule and the control of another's train dispatcher, etc., did not affect its liability for the negligence of its own engineer in the operation of the train itself. *Clark v. Geer*, 86 Fed. Rep. 447.

Contract for depot facilities held not to render a railroad company

liable for the negligence of the depot company's servants. *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100.

Injury caused by employes while doing certain things, which their employers are not under obligation to do, imposes no liability on the latter. *Dells v. Stollenwerk*, 78 Wis. 339.

Father offered his son money for all crows killed in his fields. The son negligently injured another with his gun while two miles away, squirrel hunting. Son was held not to be father's servant. *Winkler v. Fisher*, 95 Wis. 355.

#### (b). WHEN AGENT IS ACTING WITHIN SCOPE OF HIS EMPLOYMENT.

Although the servant deviate from instructions of the master, yet, if a negligent act be done in the prosecution of the master's business, the master would be liable. The instructions of the master to the servant do not govern. *Cosgrove v. Ogden*, 49 N. Y. 255; aff'g judgt for pl'ff.

Goods discharged upon carrier's pier were but partially protected; while defendant's agents were engaged in placing tarpaulins over them to protect them from the storm, one of the tarpaulins was forcibly taken from them, against their protest, by persons in the carrier's employ, and used to cover the hatch of the ship. The act of the carrier's servants was wrongful, but the injury was not willful in the sense that they designed it; they were at the time engaged in the master's business, and although he did not authorize the wrong, it was done in the course of their employment and for his benefit, and he was liable for an injury resulting therefrom. Action was to recover freight charges. *Gleadell v. Thomson*, 56 N. Y. 194; aff'g judgt for def'ts, who were the owners of the goods.

Plaintiff purchased gin of the defendants, and it was shipped to him. The plaintiff shipped it back on the ground that it was deficient in quantity, and defendant's car-man took it from the depot and receipted for it. The defendants declined to receive it and directed the car-man to return it, which he did not do. The defendants, by suit, recovered the price of the gin against the plaintiff, which recovery was paid by the plaintiff upon the assurance that the gin had been re-shipped. In an action to recover back this amount, it was held, that although the car-man's receipt did not bind the defendants, yet it made them liable for the custody and safe-keeping of the property, and hence for the loss thereof, from the car-man's negligence or misconduct. *Purcell v. Jaycox*, 59 N. Y. 288.

The defendant's clerk threw down a bale of cotton and injured a longshoreman loading cotton. It was for the jury to say whether the

clerk was acting within the scope of duty. Evidence as to clerk's duties was conflicting. *Courtney v. Baker*, 60 N. Y. 1.

"C," defendant's agent, was directed to test a boiler under pressure of 150 pounds, but at the wish of the customer that it be tested under a pressure of 180 pounds, replied that "he would test it to 200, anyhow." When the steam began to escape at a pressure of 198 pounds "C" held down the lever of the escape valve, whereby the boiler exploded and a person passing in the street was injured. The act of "C" was reckless and foolhardy, and he was acting in the defendant's business, and, although in making the tests he went beyond their express wish, they were chargeable. *Ochsenbein v. Shapley*, 85 N. Y. 214; rev'g judg't for pl'ff on account of error in charge.

A ferryboat making a regular trip took on a boatman, and, without compensation, the pilot agreed to leave him on board his boat in mid-stream, and, going out of his course to do so, so collided with a part of a tow as to knock off the plaintiff's intestate, who was on a canal boat attached to said tow, and kill him. Although the owners of the ferryboat were ignorant of the transaction, they were liable. *Quinn v. Power*, 81 N. Y. 535; rev'g 17 Hun, 102, and judg't for def't. The case was retried, and a judgment for plaintiff reversed for improper evidence. 29 Hun, 183.

See *Joel v. Morison*, 6 Carr. & P. 50; *Sleath v. Wilson*, 9 id. 607; *Phila. & Read &c. R. Co. v. Derby*, 14 How. (U. S.) 486.

The plaintiff recovered for being run over in the street by careless and reckless conduct, or want of skill, on the part of a driver, defendant's servant. *Groth v. Washburn*, 89 N. Y. 615, aff'g judg't for pl'ff.

Defendant's car driver asked boy of fourteen to give him a drink from his can; boy stepped on platform to do so; driver drank, but would not stop to let boy off; whipped up the horses just as the boy was alighting. Defendant was liable. *Day v. B. C. R. Co.*, 12 Hun, 435; s. c. aff'd, 76 N. Y. 593.

Employé asked boy to walk up elevated track to hydrant for water, which he did, pail in hand. In crossing track in front of an engine, the engine was started so as to cause the plaintiff injury. Engineer saw him coming, one hundred feet away, knew he was going to hydrant and must cross the track, but saw no more of him until hurt. It was the engineer's duty to see that the boy was out of the way. Master was liable. *Corcoran v. N. Y. Elevated R. Co.*, 19 Hun, 368.

Passenger was informed by conductor or train agent, that he could get off train at station and continue his journey upon the next train on the same ticket, but the agent of the second train refused to recognize

the ticket, which had been punched, and put passenger off. Defendant was liable. *Tarbell v. Northern Central R. Co.*, 24 Hun, 51.

Citing Story's Agency, § 452; *Pa. R. Co. v. McCloskey*, 23 Pa. St. 526.

Distinguishing *Dietrich v. Penn. R. Co.*, 71 Pa. St. 432; *Oil Creek &c. Co. v. Clark*, 72 id. 231; *Denny v. N. Y. C. &c. R. Co.*, 5 Daly, 50.

Agent gave bill of lading reciting "contents unknown," but for certain amount of beans; consignor drew draft, with bill annexed, on consignee and discounted it with plaintiff. In fact, the goods were never delivered to the company. Defendant was liable for the result of its agent's act. Discussion of effect of bill as between it and shipper, and between it and third persons acting on faith thereof. *Bank of Batavia v. N. Y., L. E. & W. R. Co.*, 33 Hun, 589, ordering judg't for pl'ff on the verdict; aff'd, 106 N. Y. 195.

Citing *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; *Farmers & M. Bank v. Erie Ry. Co.*, 72 id. 188; *New York & N. H. R. Co. v. Schuler*, 34 id. 30; *Armour v. Michigan Central R. Co.*, 65 id. 111; rev'g 3 J. & S. 563, and other cases. See post, p. 1081.

**From opinion.**—"In *Grant v. Norway*, 10 C. B. 665, it was held, that a bill of lading made by a master of a ship, for goods not received, gave no right of action against the owner of the vessel to the plaintiff, who had made advances on faith of the bill of lading, and taken indorsement and delivery of it from the person named in it as the shipper. And that principle and case were adopted and followed in *Hubbersty v. Ward*, 8 Exch. 330; 18 Eng. L. & E. 551; *Coleman v. Riches*, 16 C. B. 104; 29 Eng. L. & E. 323; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182; *Pollard v. Vinton*, 105 U. S. (15 Otto) 7; *Robinson v. Memphis & Charleston Railroad Company*, 9 Fed. R. 129, 142; *Baltimore & Ohio Railroad Co. v. Wilkens*, 44 Md. 11; s. c. 22 Am. R. 26. This proposition is put upon the ground that the master of the ship, and the agent of the carrier, have no authority to issue bills of lading for property not received for shipment, that such is the limitation of his apparent authority of which everybody must take notice, and that it is a fraud on the part of the agent for which he, and not his principal, is liable to one making advances on the faith of the bill of lading. And the principle of these cases is declared as the correct and governing rule in *Brown v. Powell D. S. Coal Company*, L. R. 10 C. P. 562; s. c. 14 Moak, 420; *Sears v. Wingate*, 3 Allen 103; *Lowell F. C. Savings Bank v. Winchester*, 8 id. 109-118; and see *Daniel on Neg. Insts.* (3d ed §§ 1733, 1733a.) Directly in conflict with those first before cited on this question is *Sioux City & P. Railroad Company v. First National Bank*, 10 Neb. 556; s. c. 35 Am. R. 488, and they do not seem to have the support on principle of the courts of this state."

A carrier is not liable to an innocent holder of a bill of lading of cotton issued fraudulently by carrier's agent in conjunction with another person. *Friedlander v. Texas R. Co.*, 130 U. S. 416. See *Hickox v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7; *Lickbarrow v. Mason*, 2 T. R. 77; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. 147.

A bill of lading issued for goods not received imposes no liability upon a carrier. *Nat. Bank of Commerce v. Chicago &c. R. Co.*, 44 Minn. 224. See *Lalland v. His Creditors*, 42 La. Ann. 705.

Transfer of a bill of lading to an innocent holder for value does not preclude defense: so where the receipt of a bill of lading for cotton was accepted in the faith that the cotton would be delivered, and it was not delivered, the carrier not liable. *Hazard v. Illinois Cent. R. Co.*, 67 Miss. 32.

It was a question for the jury whether an express agent at a station had authority to keep over night, for the owner, a trunk which had been carried to its destination, and charges paid, and receipted for by the owner, and which the agent delivered on the following day to the wrong man. *Oderkirk v. Fargo Express Co.*, 61 Hun. 418.

A gang of trackmen were removing an old cattle pass on the railroad track for the purpose of rebuilding it. The two sticks, about ten feet in length by twelve inches thick, were, upon their removal, appropriated by one of the workmen, and by the assistance of his companions carried across the track and thrown in a ditch in front of the company's land about six or seven feet from the beaten track of the highway, where they remained from Thursday afternoon until Saturday-morning, when a team was scared by them and started into a run, throwing out the driver's wife and injuring her. The question whether the employ  s were engaged in the master's business when they placed the sticks beside the way, so as to bind the master, was for the jury. *Tinker v. N. Y., O. & W. R. Co.*, 71 Hun. 431, rev'g non-suit.

Citing *Phila. & C. R. Co. v. Derby*, 14 How. (U. S.) 482, 486; *Pittsburgh R. Co. v. Maurer*, 21 Ohio St. 421; distinguishing *Dells v. Stollewerk*, 78 Wis. 339,

A passer-by was struck by a box thrown from a mill door to a wagon. The act of the servant of the mill owner in throwing the box was held to be within the scope of his employment, though his master had nothing to do with the transportation of the goods from his mill. *Kelly v. Cohoes Knitting Co.*, 8 App. Div. 156.

Citing *Cosgrove v. Ogden*, 49 N. Y. 255; *Mott v. Consumers Ice Co.*, 73 id. 543.

Defendant's clerk, in the absence of the regular driver, undertook to drive defendant's wagon: though not a part of his regular duties, he had performed this service on several previous occasions. In an action for injuries from clerk's negligent driving the court refused to dismiss the complaint on the ground that he was not a servant acting within the scope of his authority. *Petersen v. Hubbell*, 12 App. Div. 372.

Defendant's servants, while engaged in carting ice to a place, deviated from the direct route and stopped for purposes of their own. Plaintiff was injured by ice falling from the wagon upon resuming their journey. The master was liable as it appeared that the injury was caused by the defective loading of the wagon and not by reason of any act following from the deviation. *Geraty v. National Ice Co.*, 16 App. Div. 174; s. c. aff'd, 160 N. Y. 658.

Defendant's clerk, while moving some of defendant's goods, borrowed, without his knowledge or authority, a handcart for the purpose; and while so engaged damaged plaintiff's property. The court charged the jury that, to find for the plaintiff, they must find that the servant was acting, if not under instructions, with the knowledge and approval of the defendant. Held erroneous, the test being whether the motive prompting the act and the purpose sought by it are within the scope of the servant's employment. *Keep v. Walsh*, 11 App. Div. 104.

A party hired a wagon from defendant, and on returning it, was told to leave it in the street, by one of defendant's employés. It was allowed to remain there with the knowledge of defendant's foreman, and over an hour afterwards plaintiff was injured by the falling of its shafts. Defendant was held liable. *Sullivan v. McManus*, 19 App. Div. 167.

Defendant's servant after using benzine to clean matrices, threw the waste benzine out of the window, contrary to instructions. It fell upon the plaintiff and caused injury. Defendant was held liable. *Reigler v. Tribune Association*, 40 App. Div. 324; s. c., aff'd, 167 N. Y. 542.

Defendant's servant deviated a couple of blocks from his route to visit a friend, and stopping, left the horses unattended in the street. They started off but were stopped and started back by a stranger who injured plaintiff in doing so. The deviation was held to be a misconduct within the scope of the servant's employment and not an abandonment of it. *Williams v. Koehler*, 41 App. Div. 426.

Employés of an electric company engaged in stringing its wires on poles receiving general directions to cut only such overhanging branches as could not be protected by insulation. The company was held liable for their acts in exceeding such necessity. *Van Sieten v. Jamaica Electric Light Co.*, 45 App. 1; s. c., aff'd, 168 N. Y. 650.

Plaintiff left defendant's restaurant without being served and without stopping at the cashier's desk. The general manager, thinking he was attempting to avoid payment, followed him to the sidewalk and had him arrested. Defendant was held liable. *Dupre v. Childs*, 52 App. Div. 306; s. c., aff'd, 169 N. Y. 585.

Defendant's driver was directed to collect the price of goods marked "C. O. D." or return them to the store. The goods in question were sent in exchange for goods returned by plaintiff but were, through some mistake, marked "C. O. D." Plaintiff sought to retain the goods and the driver procured his arrest for theft. The driver's act was within the scope of his employment and defendant was liable for false arrest. *Craven v. Bloomingdale*, 54 App. Div. 266; s. c., rev'd, 171 N. Y. 439, on ground that it was not a case for punitive damages.

President and manager of a corporation having no personal interest in the matter, but for the corporation's interest solely, made an arrest consulting with the corporation attorney before doing so. The corporation was responsible for his act. *Schwartz v. Van Wie &c. Grocery Co.*, 69 App. Div. 282.

An employé in charge of a restaurant caused the arrest of one who refused to pay for a meal. *Warren v. Dennett*, 17 Misc. 86.

The contracting agent of defendant who had agreed to send plaintiff's trunk to his home agreed to be responsible for it when it had been apparently lost, which induced the plaintiff to cease looking for it. The defendant was held liable. *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. 396.

Defendant's servants were authorized to remove obstructions to the replacing of glass in windows. They unnecessarily and against instructions interfered with a gas fixture, causing an explosion. *McCauley v. Huthoff*, 20 Misc. 97.

A servant committed assault and battery in obtaining possession of property, though the master merely directed him to take it. *Griffith v. Friendly*, 30 Misc. 393.

Citing *Cohen v. Dry Dock &c. R. Co.*, 69 N. Y. 173; *Rounds v. Delaware &c. R. Co.*, 64 id. 129.

Permission of conductor to get on a freight car, while it is being loaded, fixes liability on company for the negligent handling of a steam shovel employed on the same. *Alabama &c. R. Co. v. Varbrough*, 83 Ala. 238.

Servants of a telegraph company cut trees in constructing a line, though contrary to instruction. *Postal Telegraph &c. Co. v. Brantley*, 107 Ala. 683.

Explosion of gas through negligence of boy seventeen years old, left in charge of store, in looking for a leak with a lighted match. *Pine Bluff Water &c. Co. v. Schneider*, 62 Ark. 169; s. c., 33 L. R. A. 366.

Plaintiff's driver, returning home with a loaded wagon, took an indirect route, and, stopping on an errand of his own, left his horses unhitched in the street. They started up, ran into and injured plaintiff. *Ritchie v. Waller*, 63 Conn. 155; s. c., 27 L. R. A. 161.

See, also, *Phelen v. Stiles*, 43 Conn. 426; *Stone v. Hills*, 45 id., 44.

Defendant's foreman directed the moving of cars which were being loaded by it on a side-track leading to its mill though it did not operate such cars or track. It was within the apparent scope of his authority though he was unauthorized to do that particular act. *Camp v. Hall*, 39 Fla. 535.



Injury caused by invitation of employé, dressed in company's uniform to board a moving train. *Western &c. R. Co. v. Wilson*, 71 Ga. 22.

The Central R. &c. Co. v. Smith, 80 Ga. 526.

Where the invitation to jump on was by one in company's uniform, the court declined to rule as a matter of law that defendant was not liable. *Savannah &c. R. Co. v. Morton*, 71 Ga. 24.

Engine negligently or maliciously allows steam to escape, causing injury to plaintiff while crossing in front of engine. *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298.

Injury to a child growing out of the unauthorized loan of a push-car by the company's agent to persons unaccustomed to its use. *Pittsburg &c. R. Co. v. Thomas Bumstead*, 48 Ill. 221.

Engine was detached from train and used in conveying employés to their dinner. Such was the custom. *East St. Louis &c. R. Co. v. Reames*, 173 Ill. 582; aff'g 75 Ill. App. 28.

Injury to boy customarily allowed by defendant's servants to ride on freight cars. *Lammert v. Chicago &c. R. Co.*, 9 Ill. App. 388.

See, also *C. & A. R. R. Co. v. Murray*, 71 Ill. 601; *Weick v. Lander*, 75 Ill. 93.

(Cases of this class are collected under COMMON CARRIER OF PASSENGERS, WHO IS A PASSENGER, post 368, and under PRIVATE PREMISES, post 368.

Defendant's agent for the collection of rents, caused injuries through careless driving. *Lovington v. Bauchaus*, 34 Ill. App. 544.

A servant ordered to keep people out of a park, ordered plaintiff therefrom and threw a rock at him as he was leaving. *Alton R. &c. Co. v. Cox*, 84 Ill. App. 202.

Street car conductor charged plaintiff with passing a counterfeit coin and calling a policeman caused his arrest. *West Chicago St. R. Co. v. Luleich*, 85 Ill. App. 643.

Defendant's driver, while engaged in delivering goods, went out of his way to call upon his wife, leaving the horse unattended in the street. During his absence a child got on the wagon step and, when the wagon was started up, fell off and was injured. Held, that there was not such a turning away from the master's service as to prevent latter's liability. *Chicago &c. Bottling Co. v. McGinnis*, 86 Ill. App. 38.

Store usher's act in following a customer into the street and compelling her to return to the store for interview concerning a supposed theft was within the scope of his authority. *Field v. Kane*, 99 Ill. App. 1.

Accident due to failure of company's employés to remove the carcass of an animal killed by a train. *Baxter v. Chicago &c. R. Co.*, 87 Iowa. 488.

Defendant sent servant with son to clear up a meadow; servant with consent of son, who had general authority to act for defendant, set fire to a hay stack. The fire escaped and did damage. Held, that it was properly submitted to the jury to determine the authority of the son to set the fire. *Lewis v. Schultz*, 98 Iowa, 344.

Clerk touched customer, requiring her to enter a room, and accused her of theft. Employer liable. *McDonald v. Franchere*, 102 Iowa, 496.

A street being blocked by a freight train, brakeman told plaintiff to pass through, as there was plenty of time. *Scott v. St. Louis &c. R. Co.*, 112 Iowa, 54.

Where servant, directed to go to a certain place and kill a beef, went there and finding no animal but a bull, killed it. *Maier v. Randolph*, 33 Kas, 340.

Boy rode on construction train with permission of conductor who had been instructed not to allow passengers on his train. *St. Joseph &c. R. Co. v. Wheeler*, 35 Kas, 185.

Sale of morphine for calomel by drug clerk, held gross negligence and ground for punitive damages against his principal. *Smith v. Middleton*, (Ky.) 66 S. W. Rep. 388.

One entered a freight train by permission of conductor, although violating company's regulations, and was injured by reason of employé's negligence. *Hanson v. Railway &c. Co.*, 37 La. Ann. 111.

One engaged to unload car threw heavy board into street, without warning. *Holmes v. Tennessee Coal &c. R. Co.*, 49 La. Ann. 1465.

One employed to do general farm work, in driving cattle out of corn field, threw a stone and killed one. *Evans v. Davidson*, 53 Md. 245.

Truck was left in public streets contrary to master's directions. *Powell v. Deveny*, 3 Cush. 300.

Servants engaged in removing stones trespassed on plaintiff's land, although ordered by defendant not to do so. *Southwick v. Esles*, 7 Cush. 385.

Servant failed to observe the rule of the road; notwithstanding the person injured had a right of action under statute against the servant, master was liable. *Reynolds v. Haurahan*, 100 Mass. 313.

Street car driver without authority to do so invited girls to ride upon front platform gratis. One of them was injured through his negligence. *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

Cars obstructed a highway contrary to rule of company. *Commonwealth v. New York &c. R. Co.*, 112 Mass. 412.

Foreman of a lumber camp was within scope of his employment in ordering the burning of brush to clear land for crops, where owner had

furnished tools therefore and received the benefit of the crops raised thereon. *Smaltz v. Boyce*, 109 Mich. 382.

Person in train by permission of conductor, in absence of proof of lack of authority in conductor. *Gradin v. St. Paul &c. R. Co.*, 30 Minn. 217.

Injury to child, caused by negligent driving of agent employed to drive express wagon, who, after having delivered a trunk, engaged in carrying a load of poles for himself. *Mulrehill v. Bates*, 31 Minn. 364.

*Osborne v. McMasters*, 40 Minn. 103; *Ellegard v. Ackland*, 43 id. 352; *Gunderson v. Northwestern Elevator Co.*, 47 id. 161.

Superintendent, having general charge of premises, arrested one who entered thereon and attempted, by threats, to induce employes to quit. *Smith v. Munch*, 65 Minn. 256.

Under a statute making railroad station agents, conservators of the peace, defendant's agent though without instructions made an unjustifiable arrest of passenger. *King v. Illinois Central*, 69 Miss. 245.

Defendant's servants chased and worried plaintiff's cattle with dogs, in excess of defendant's directions. *Schmidt v. Adams*, 18 Mo. App. 432.

Detention of cattle entering through partition fence for impounding charges is within scope of servant's duty to protect premises. *Lamb v. Davidson*, 69 Mo. App. 107.

Floorwalker and superintendent of store caused arrest of customer on charge of theft by saleswomen, although directed not to arrest unless they had themselves witnessed such an act. *Knowles v. Bullene &c. Co.*, 71 Mo. App. 341.

Salesman contrary to instructions, directed customer to go down defective stairs. *Cluck v. Southern Electrical Supply Co.*, 72 Mo. App. 506.

See, also, *Harrison v. Kansas City &c. R. Co.*, 50 Mo. App. 332; *McNicols v. Nelson*, 45 id. 446; *Sparks v. Transfer Co.*, 104 Mo. 531.

An electrically propelled sprinkling car on a projection of which were hanging black coats of the employes swinging in the wind, frightened a horse of gentle disposition. *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481; s. c., 38 L. R. A. 236.

Defendant's iceman, after delivering ice, ran back to the wagon with his tongs open and ran into a child, who was injured by the tong. *Price v. Simon*, 62 N. J. L. 153.

Brakeman in charge of freight train is acting within the scope of his authority in ejecting a trespasser. *West Jersey &c. R. Co. v. Welsh*, 62 N. J. L. 655.

Defendant was under contract to deliver pure milk to a cheese factory. His servant without his knowledge delivered adulterated milk. Master was held liable for resulting damage. *Stranahan &c. Co. v. Coit*, 55 Oh. St. 398.

A railroad detective caused arrest of plaintiff on charge of passing counterfeit coin, though acting contrary to his instructions as to the caution to be exercised. *Eichengreen v. Louisville &c. R. Co.*, 96 Tenn. 229; s. c., 31 L. R. A. 792.

Employé of mill was injured while coupling cars at request of conductor in order to place a car in convenient position for the employé to load his company's goods on. The employé was acting in his employer's interests and was allowed to recover from the railroad company. *Eason v. Railway Co.*, 65 Tex. 578.

But where the employé acts as a volunteer and not in furtherance of his master's business he cannot recover. *Bonner v. Eddy*, 79 Tex. 540.

Although a tugboat company may owe no duty to one as a passenger, an invitation by its employés to a child under the age of discretion imposes a liability on it, where an accident occurs in consequence. *Cook v. Houston &c. R. Co.*, 16 Tex. 353.

Manager of a farm, having authority to keep plaintiff's hogs off it, penned them and hauled them to a ranch of defendants. *Burnett v. Oechsner*, 92 Tex. 588.

Section hands unnecessarily placing hand car over a highway while waiting for their foreman, frightened plaintiff's horse. *Sherman &c. R. Co. v. Bridges*, 16 Tex. Civ. App. 64.

Depot master, appointed at defendant's request as special policeman, arrested plaintiff for selling a ticket on the depot platform. *Missouri &c. R. Co. v. Warner*, 19 Tex. Civ. App. 463.

Switchmen engaged in piloting an engine from a roundhouse is acting within the scope of his duties in moving another engine out of the way, though thereby he disobeys the company's rules. *Galveston &c. R. Co. v. Masterson*, (Tex. Civ. App.) 51 S. W. Rep. 1091.

Defendant's salesmen failed to notify a purchaser of the explosive quality of its gasoline, and assured him it could be safely stored in a certain place, where the high temperature caused it to explode. *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508.

Employé's act of locking in party found in his employer's cars and sending for the sheriff was within the scope of his duty to protect his master's property, and, where unlawful, master was liable. *Texas &c. R. Co. v. Parker*, (Tex. Civ. App.) 68 S. W. Rep. 831.

Collision injuring one by invitation riding in defendant's trains, notwithstanding the engineer of the other colliding engine was forbidden

to run on that track at that time. *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

A company is liable for the reckless driving of its agent when he gives all his time and services to the business of the company. *Singer Manf. Co. v. Rahn*, 132 U. S. 518.

Giving of information concerning the source of the bank's deposits was within the scope of the authority of the cashier. Bank was liable for a false statement made in the interest of the bank though not expressly directed. *Hindman v. First Nat. Bank*, 112 Fed. Rep. 931.

Customer refused to pay for drink and, after an altercation, the bartender assaulted him. Whether the bartender was acting within scope of his duties was properly left to the jury. *Bergman v. Hendrickson*, 106 Wis. 434.

### (c). WHEN HE IS NOT ACTING WITHIN SCOPE OF HIS EMPLOYMENT.

An expert and boy to accompany him were sent upon request of chairman of committee by defendant's firm, who were dealers in fireworks, to arrange the fixed pieces and take charge of the display. While expert was so engaged a member of said citizens' committee, which had the display in hand, told the boy to set off rockets, which the boy did so negligently as to injure a bystander. Held, that the act of the boy was not within the scope of his employment, and defendants were not liable. *Wyllie v. Palmer*, 137 N. Y. 248, aff'g 63 Hun, 8.

**From opinion.**—"There can be no doubt, I think, that such liability, would fall upon the members of the committee and persons in general charge and not upon the defendants. *Butler v. Townsend*, 126 N. Y. 105; *Olive v. Whitney Marble Co.*, 103 id. 292; *Blake v. Ferris*, 5 id. 48.

"The doctrine of *respondent superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of some neglect or wrong, at the time and in respect to the very transaction out of which the injury arose. *Thorpe v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 406; *Dwinelle v. N. Y. C. & H. R. R. R. Co.*, 120 id. 117; *Penn. Co. v. Roy*, 102 U. S. 451; *Wood v. Cobb*, 13 Allen 58; *Kimball v. Cushman*, 103 Mass. 194; *Ward v. New England Fibre Co.*, 154 id. 419."

Plaintiff, under contract to repair defendant's elevators, requested the elevator boy to operate it, while he used it as a platform from which to do plastering. He was not allowed to recover for injuries caused by the negligence of the elevator boy, who was held to be the servant of the plaintiff for the time being. *Higgins v. Western Union Teleg. Co.*, 156 N. Y. 75; rev'g s. c., 11 Misc. 32.

Defendant's driver was directed to take his truck to the stable; but, meeting another of defendant's drivers, as a personal favor to him, undertook to carry the latter's trunk, and for this purpose took the truck

in another direction from the stable, and, while so doing, ran over a traveler in the street. Defendant not liable. *Caranagh v. Dinsmore*, 12 Hun, 465.

Citing *Sheridan v. Charlieb*, 4 Daly 338; *Wright v. Wilcox*, 19 Wend. 343; *Frazer v. Freeman*, 43 N. Y. 566; S. & R. on Negligence, 69 § 63; *Story v. Ashton*, L. R. 4 Q. B. 476.

A passenger engaged a buckboard to convey himself and wife from North Creek to Blue Mountain Lake, in the Adirondacks, of a person running a transportation line between such points. The passenger, annoyed by the dust created by teams in advance, asked the driver, if he would have to creep behind them and take their dust all day, and the driver said, "No, there is a place just beyond here where I can pass;" and the passenger said, "All right, you will do so then." At the fork of the road the driver pulled his horses to the left and urged them into a sharp trot, but the driver of the forward carriage started his horses on a run, and both teams raced, until, the road narrowing, the carriages collided, and the driver of the forward carriage was injured. The passenger was not liable. *Richardson v. Van Ness*, 53 Hun, 267.

The motorman of an electric car was alleged to have invited a boy to ride upon the car, because the boy had opened a switch for him. Motorman had been forbidden to allow anyone to ride upon such terms, and his act was not within the scope of his duty, nor was it for the company's interest or benefit, and the defendant owed the boy no duty as a passenger. *Finley v. Hudson Electric R. Co.*, 64 Hun, 313, rev'g judgt. for plff; s. c., aff'd, 116 N. Y. 369.

Citing *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104-109; *Fleming v. B. C. R. Co.*, 1 Abb. N. C. 433; aff'd 74 N. Y. 618; *Buckley v. N. Y. & H. R. Co.*, 43 Super. Ct. 187.

**From opinion.**—"The root of the master's liability for the servant's act is his consent, express or implied, and when his acts are done within the scope of his employment or for his master's benefit or in the furtherance of his interest, although not strictly in the line of his duty, yet, in the course of his employment, the master's assent is implied and he is accordingly held liable. *Meelan v. Morewood*, 52 Hun, 566; *Mulligan v. N. Y. & R. B. R. Co.*, (129 N. Y. 506.) As in the case of *Quinn v. Powers* (87 N. Y. 535), where, although the servant departed from the strict line of duty, yet, what was done was in the line of his business, for the master's benefit, in furtherance of his interests, and, what the master might naturally have done, if he had been present."

Where a station agent, in the performance of a duty imposed upon him explodes torpedoes for the purpose of signaling a train, in the vicinity of a station where persons were standing on the platform, the railroad company is liable for injuries resulting therefrom, if such act was negligent and dangerous.

If in so doing the station agent went outside of his employment in order to effect a purpose of his own and exploded the torpedoes for his own amusement, and not for the purpose of signaling a train, the company would not be liable.

It rests upon the plaintiff, in an action brought to recover damages caused by the explosion of a torpedo, to show that the person exploding the same was acting within the scope of his employment by the railroad company against which the action was brought. *Smith v. The New York Central and Hudson River Railroad Company*, 78 Hun. 524.

A carpenter employed to install a refrigerating plant requested the operator of an elevator, whose duty was confined to its operation for the hotel and its guests, to assist him in his work by operating it for him while thus engaged. The operator was not acting within the scope of his employment but solely for the carpenter's accommodation. *Jossaers v. Walker*, 14 App. Div. 303.

A man in general charge of a cotton storage business gave instructions as to the use of the building in which the business was conducted to the employes of one having a contract to paint it. Such instructions were held not within the scope of his employment and his employer not liable for injury from a defective window bar he had declared to be safe. *Wendler v. Equitable Life &c. Soc.*, 19 App. Div. 50.

Defendant's agent employed to collect installments of the purchase price of its machines, but expressly instructed not to touch or take the goods on non-payment, committed an assault and battery in seizing a machine on default in payment of one of the installments by a customer. *Feneran v. Singer Man. Co.*, 20 App. Div. 574.

Defendant employed a person to keep lamps guarding a structure in the street lit, and to keep boys away from them. While boys were playing about the structure such servant threw stones at them. It was held that he was not acting within the scope of his authority. *Kaiser v. McLean*, 20 App. Div. 326.

Plaintiff did not sustain any relation to the defendant as passenger and he was arrested by one not in the latter's employ or acting for it, though after his arrest defendant's detective searched the plaintiff without direction or authority. In the absence of proof of authority it was held that the acts of defendant's agent were not necessarily within the scope of employment of a "detective." *Penny v. New York Central &c. R. Co.*, 34 App. Div. 16.

But an allegation of unlawful arrest by defendant's "agent or servant" in its store was held good against demurrer. *Fogarty v. Wanamaker*, 60 App. Div. 433.

A packing clerk carried a person on defendant's elevator marked "for

freight only," in violation of the rules and contrary to the course of his employment though twice before he had done so with defendant's consent. Such act was held not to be within the scope of his authority. *Cogswell v. Rochester Mach. Screw Co.*, 39 App. Div. 223 (Affirming an order for a new trial, on which evidence was introduced showing authority in clerk to carry passengers. Verdict was directed for defendant and the appellate court sent the case back to be tried by a jury. *s. c., sub. nom. Mormon v. Rochester &c. Co.*, 53 App. Div. 497).

Defendant's carpenter, employed to repair its gates, was standing near, and, when plaintiff, whose duty it was to raise them, attempted to do so, negligently struck a part of the machinery causing injury to the plaintiff. The complaint was dismissed upon the pleadings because it failed to state that the carpenter's act was done in pursuance of any design to repair the gates. *Fisher v. Brooklyn Jockey Club*, 50 App. Div. 446.

Defendant was in the habit of offering rewards for property lost by its customers, placing a certain employé in charge of such matters. Another employé having no connection with the former caused plaintiff's arrest upon information from an applicant for the reward. The defendant was not liable. *Lubliner v. Tiffany & Co.*, 54 App. Div. 326.

Citing *Mulligan v. New York &c. R. Co.*, 129 N. Y. 511.

Defendant's purser, after plaintiff had left its boat and given up her ticket, required her to enter a waiting room with another who charged her with theft and detained her there until she established her innocence. It was held that the acts were done after she had ceased to become a passenger, after his duties to defendant had ceased and were beyond the scope of the purser's employment. *McKay v. Hudson River Line*, 56 App. Div. 201.

Defendant's employé was sent to repair an electrical machine, used as motive power of a press. After completing the repairs, he took his tools to go home. While standing waiting for the train, the foreman of the establishment asked him to discharge the electricity with which the press had become stored. In attempting to do so the press was moved catching and injuring plaintiff's hand. The employé's act was not within the scope of his employment. *Flinn v. World's Dispensary Med. Ass'n*, 64 App. Div. 490.

Defendant's servant, in violation of express instructions, allowed a third person to ride a horse, which became ungovernable and injured plaintiff. Defendant was not liable. *Long v. Richmond*, 68 App. Div. 466.

Firing a cannon on a pleasure yacht is no part of the duty of one in charge of it in owner's absence, and owner is not responsible for in-



juries to plaintiff caused by the firing of it. *Haack v. Fearing*, 5 Robt. (N. Y.) 528.

Coachman, directed to drive horses when necessary for exercise in the country, drove in the city, in defendant's absence, when exercise was unnecessary, and for his own pleasure. *Fiske v. Enders*, 73 Conn. 338.

Permission to ride upon train held beyond scope of employment of engineer. *Chicago &c. R. Co. v. Casey*, 9 Ill. App. 632.

Defendant's servant, in charge of its depot, properly ejected plaintiff and started to return to the room when an altercation was started by the latter which resulted in his injury. *Chicago &c. R. Co. v. Randolph*, 65 Ill. App. 208.

Brakeman ejected a trespasser, though there was a conductor on the train with express authority so to do. *Chicago &c. R. Co. v. Brackman*, 78 Ill. App. 141.

Railroad company, held not responsible for negligence of section hand in leaving, on an open switch, a hand car he had been using, without its knowledge or consent, for his own purposes. *Sammis v. Chicago &c. R. Co.*, 97 Ill. App. 28.

Knowledge of the invalidity of a note on the part of an officer is not notice to his corporation where his interests are adverse to its. *Metcalf v. Draper*, 98 Ill. App. 399.

Passerby got on slowly moving train to assist in setting brakes on the request of an employé. *Everhart v. Terre Haute &c. R. Co.*, 78 Ind. 292.

Motorman threw stones to frighten away boys, who had been placing stones on track. Employer had warned him to take especial precautions against such mischief. *Dolan v. Hubinger*, 109 Iowa, 408.

Citing *Kincade v. Railway Co.*, 107 Iowa, 682; *Golden v. Newbrand*, 52 id. 59; *Porter v. Railroad Co.*, 41 id. 358.

Stranger to the employer injured while going through a dark room by the advice of an employé. *Lachat &c. v. Lutz*, 15 Ky. L. R. 75.

Station agent employed to sell tickets and look after freight business ran company's hand car without its consent for his own profit. *Eastern &c. R. Co. v. Powell*, (Ky.) 33 S. W. Rep. 629.

Injury to person on hand car by foreman's invitation. *Hoar v. Maine &c. R. Co.*, 70 Me. 65.

Principal is not liable for false imprisonment, when none of its officers, who could bind it, without express authority, were present at the arrest, and there was no express authority. *Nat. Bank &c. v. Baker*, 77 Md. 462.

Doorkeeper of a church employed to exclude persons, not having tickets, caused the arrest of plaintiff who attempted to enter without one. *Barabasz v. Kabat*, 86 Md. 23.

Toll gatherer on a turnpike arrested persons for evading payment of toll. *Baltimore &c. Turnpike Road v. Green*, 86 Md. 161.

Plaintiff, employed to repair defendant's elevator, unnecessarily and without defendant's knowledge went into the shaft and was injured by the car, allowed by the elevator boy to descend contrary to plaintiff's instructions to him. Defendant was not liable. *Hall v. Poole*, 94 Md. 171.

Servant of warehousemen present at the burning of the warehouse in the night time, but not in the course of their employment, neglected to remove plaintiff's goods. *Aldrich v. B. & W. R. Co.*, 100 Mass. 31.

Porter of a parlor car running on defendant's railroad threw a bundle containing his soiled clothing off the car and injured a person not a passenger. *Walton v. N. Y. Cent. &c. Co.*, 139 Mass. 556.

Defendant's driver invited boy nine years old to ride and drive. The driver went to sleep and the boy fell from cart. *Driscoll v. Scanlon*, 165 Mass. 348.

Principal held not liable for negligence of agent resulting in injury to boy allowed to ride on his team in violation of orders. *Mahler v. Stott*, (Mich.) 89 N. W. Rep. 340.

Punishment administered by a servant to children who broke defendant's axe in his absence. *Brown v. Boston Ice Co.*, 178 Mass. 108.

Section men employed by defendants, to warm their coffee, kindled a fire, which subsequently spread to and destroyed plaintiff's property. *Morier v. St. Paul &c. R. Co.*, 31 Minn. 35.

Defendant's engineer took ashes from the furnace in consideration of disposing of them after hours, and a child fell into them and was hurt. *Burke v. Shaw*, 59 Miss. 443.

Boy secretly on car, and when discovered put to a dangerous service by the brakeman. *Sherman v. Hannibal &c. R. Co.*, 70 Mo. 62.

*Snyder v. Han. & St. Joseph &c. R. Co.*, 60 Mo. 413; *Higgins v. Han. & St. Joseph R. Co.*, 36 id. 418.

Violence of the second mate of a boat in compelling a deck hand to work. *Jones v. St. Louis &c. Packet Co.*, 43 Mo. App. 398.

*Whitehead v. St. Louis &c. R. Co.*, 22 Mo. App. 60.

Departure from scope of his employment by servant at request of plaintiff bars latter's recovery against master. *Snider v. Crawford*, 47 Mo. App. 8.

See also *Garretzen v. Duencel*, 50 Mo. 104.

Plaintiff was invited on defendant's premises by latter's employé while engaged in the performance of his duties, but the invitation was not in pursuance thereof. *Hartman v. Muehlbach*, 64 Mo. App. 565.

A stranger killed by servant employed to guard certain feed, and seize and detain persons found disturbing it. *Davis v. Houghtellin*, 33 Neb. 582.

*Miller v. Burl., &c. R. Co.*, 8 Neb. 219.

Servant carried brands from a fire into ploughing field without authority from the master, and the fire communicated itself to plaintiff's barn. *Wilson v. Peverly*, 2 N. H. 548.

Plaintiff was invited on defendant's premises by latter's employé while running away was shot by latter's servant whose sole duty was to clean lamps, and report the presence of loiterers. *Turley v. Boston &c. R. Co.*, 70 N. H. 348.

A railroad company, held liable to plaintiff for injury received while crossing its tracks from the negligent management of a push car by one to whom it had been loaned for his own purposes by the section foreman. *Erie R. Co. v. Salisbury*, (N. J. L.) 50 Atl. Rep. 117.

Plaintiff engaged to paint elevator shaft from the elevator objected to waiting for elevator boy to go to supper, whereupon latter showed plaintiff how and told him to operate it himself. *Arzt v. Lit*, 198 Pa. St. 519.

An invitation to jump upon a train by one not in charge as temporary brakeman or engineer, does not render the company liable. *Cotter v. Frankfort &c. R. Co.*, 15 Phila. 255.

Manager of a farm arrested plaintiff for taking a wagon from the farm which the latter claimed was his. *Comby v. Wanamaker*, 14 Mont. Co. L. Rep. 30.

Boy on handcar by the invitation of employé, but against the regulations of the company. *Gulf &c. R. Co. v. Dawkins*, 71 Tex. 228.

*Dawkins v. Gulf &c. R. Co.*, 77 Tex. 232.

Foreman, contrary to instructions, ran a handcar on a private errand. *Branch v. International &c. R. Co.*, 92 Tex. 288.

Yardman attempted to stop a runaway horse. *San Antonio &c. R. Co. v. Belt*, (Tex. Civ. App.) 46 S. W. Rep. 374.

*Citing Railway Co. v. Anderson*, 82 Tex. 516.

Defendant's clerk, a restaurant attendant at a railway station, as the result of an altercation with a customer regarding change alleged to be due the customer on a prior occasion, followed him out upon the platform and shot him. Held not to be acting within the scope of his employment. *Lutle v. Crescent News &c. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 240.

Act of conductor in causing arrest of passenger after ejecting him for non-payment of fare held beyond the scope of his employment. And

a clerk in the claim department of defendant, sent to ascertain the cause of the arrest, did not ratify his action by trying to convince the magistrate that it was right. *Lazinsky v. Metropolitan Street R. Co.*, 88 Fed. Rep. 437.

The unauthorized statements by the president of a bank as to the conduct, etc., of its cashier, who wished to procure a bond were not within the scope of his authority so as to bind the bank for such misrepresentations. *U. S. Fidelity &c. Co. v. Muir*, 115 Fed. Rep. 264.

Foreman loaned hand car to boys, one of whom was injured thereby. *Robinson v. McNeil*, 18 Wash. 163.

#### (d). WILLFUL AND MALICIOUS ACTS OF AGENTS.\*

##### 1. NEW YORK CASES.

##### 2. CASES IN OTHER STATES.

(a) Master liable.

(b) Master not liable.

A master is liable for the act of his servant done in the course of his employment, or in connection with, or furtherance of, some service committed to him by his master, and in such case it is immaterial whether the act be done willfully or recklessly (*Mott v. Consumers' Ice Co.*, 73 N. Y. 543); illegally (*Hoffman v. N. Y. Cent., etc. R. Co.*, 87 N. Y. 25; *Wright v. Compton*, 54 Ind. 337; *McClung v. Dearborne*, 134 Pa. St. 396), violently and regardlessly of safety (*Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129; *Kline v. C. P. R. Co.*, 37 Cal. 400); brutally and with excessive force; *McCann v. S. A. R. Co.*, 117 N. Y. 505; *Shea v. Sixth Ave. R. Co.*, 62 id. 180; *Levi v. Brooks*, 121 Mass. 501; *Steamboat Co. v. Brockett*, 121 U. S. 637.

But if a servant go beyond his employment, and, without regard to his service, act maliciously, or in order to effect some purpose foreign to his service, commit a trespass or injure another, the master is not liable. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Frazier v. Freeman*, 43 id. 566. The same seems to be the case where the act, in its very nature, enforces the conviction that the servant was assuming to and did the act for himself. *Mali v. Lord*, 39 N. Y. 381; *Foster v. Essex Bank*, 17 Mass. 479; *Henry v. Pittsburgh &c. R. Co.*, 139 Pa. St. 289; *Peryea v. Thompson*, 5 Hum. (Tenn.) 397.

This rule is subject to the qualification that the master is not liable for injury caused by servant, when the person injured has used words or acts calculated to arouse and bring on a personal altercation and collision with the servant. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110. *Scott v. Central Park, North & E. R. R. Co.*, 53 Hum. 414; *New Orleans &c. R. Co. v. Jopes*, 142 U. S. 18.

\* NOTE.—The cases relating to common carriers of passengers are collected under that head, post page 518.

As to care due trespassers by carriers of passengers see also same head.

## 1. NEW YORK CASES.

A principal neither authorizing nor ratifying a willful trespass committed by his agent is not liable therefor, nor is a corporation liable, although the act be authorized and sanctioned by the president and general agent thereof. In this case the plaintiff's boat was run into by the willful act of the captain of the defendant's boat. *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; 1 Hill, 480.

The master is not responsible for the willful injury committed by the servant in the transaction of his business unless he so act by the express or implied authority of his employer. The defendant's superintendent and clerks called a policeman into the store and directed the arrest and examination of a woman suspected of stealing goods. This was done without the knowledge or express or implied authority of the master, and he was not liable.

Presumptively a servant is not authorized to do that which the master if present, would not be authorized to do. *Mali v. Lord*, 39 N. Y. 381.

*Griswold v. Haven*, 25 N. Y. 526; *Wright v. Wilcox*, 19 Wend. 343; *Bank v. Baker*, 26 Atl. Rep. (Md.) 867.

The plaintiff's intestate was shot and killed by "M" while in the employment of the defendant, and while the defendant, together with "M" and another servant, were endeavoring under claim of right to enter upon the premises of the intestate, and there was no evidence that the fatal shot was fired by the express direction, or assent, of the defendant.

In an action to recover damages for causing the death it was erroneous to refuse to charge the jury that if they believed that "M" fired the shot with the premeditated design to effect death the defendant was not liable for the act. *Fraser &c. v. Freeman*, 43 N. Y. 566.

See *Davis v. Houghtellin*, 33 Neb. 582.

See, also, *Denver &c. R. Co. v. Harris*, 2 Pac. R. (N. M.) 369.

The provisions of title 13, chap. 20, part 1, of the Revised Statutes (1 R. S. 695), entitled "of the law of the road and the regulation of public stages," are not applicable to street railways, and a street railway company is not liable, under section 6 of said title, for the willful act of one of its employés.

At common law the liability of the owner of a vehicle, used for the transportation of persons for injuries resulting from the acts of his driver extends to those injuries only which result from the driver's misjudgment or negligence, while engaged for the owner in his vocation as a driver. *Wright v. Wilcox*, 19 Wend. 344, 345; *Hibbard v. The N. Y. & E. R. R. Co.*, 15 N. Y. R. 467; *Mali v. Lord*, 39 id. 383; *Fraser v. Freeman*, 43 id. 566; *Isaacs v. Third Avenue R. R. Co.*, 47

N. Y. 122. *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295, rev'g 5 Robt. 650, and judg't for pl'ff.

A brakeman, in the course of his duty of keeping the cars free from intruder, kicked a boy, who fell from the car against a pile of wood, and was thrown under the car and injured.

The defendant was liable. *Rounds v. D., L. & W. R. Co.*, 64 N. Y. 129; 3 Hun, 329.

*Johnson v. Chicago &c. R. Co.*, 58 Iowa, 348.

The plaintiff attempted to cross the platform of a car standing at the crossing and was thrown off by the driver. The complaint alleged that the driver did it willfully, but the court held, on demurrer, that the driver was acting as a "servant and agent in the employment of the defendant" when the act was done, and the demurrer was overruled on the ground that it may have been a part of the servant's duty to keep the platform clear. *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180.

In an action for injuries, alleged to have been sustained through the wrongful act of defendant's servant, plaintiff's evidence tended to show that a driver of one of defendant's ice carts, while engaged in the performance of his duties, and in the course of his employment, carelessly and *recklessly* drove his cart against plaintiff's carriage, causing the injury complained of. Upon the cross-examination of one of plaintiff's witnesses, whose direct examination tended to show gross carelessness on the part of the driver, the witness, in answer to a question as to whether the driver drove into plaintiff's carriage purposely, answered: "It seems so; it looks like it." The question being substantially repeated, the witness answered: "Well, I could not tell." Plaintiff also offered in evidence a former answer—amended pleadings having been subsequently served—which contained an admission that defendant's servant, then in its employ as driver of an ice cart, "willfully and not negligently nor carelessly, drove said ice cart against the carriage of the plaintiff." Plaintiff was nonsuited. Held, error; that the first answer of plaintiff's witness, above stated, was but the expression of an opinion upon a fact to be determined by the jury, not by the witness; but that as an opinion its effect was destroyed by the last answer; that plaintiff was not estopped from questioning the allegation of the answer, that the act was done "willfully;" also, that the answer did not exclude all presumption of liability, as the act may have been done "willfully," and yet, in the course of the employment, and so have made defendant liable. *Mott v. Consumers' Ice Company*, 73 N. Y. 543, rev'g nonsuit.

**From opinion.**—"In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer

for them. There are intimations in several cases of authority, that for the willful acts of the servant the master is not responsible. *McManus v. Crickett*, 1 East. 106; *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455; *Wright v. Wilcox*, 19 Wend. 343. But these intimations are subject to the material qualification, that the acts designated 'willful,' are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master. In such case the master would not be excused from liability by reason of the quality of the act. *Limpus v. London Gen'l Omnibus Co.*, 1 H. & C. 526; *Seymour v. Greenwood*, 6 H. & N. 359; affirmed 7 id. 355; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Jackson v. Second Ave. R. Co.*, 47 id. 274. But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to affect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible; so that the inquiry is whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act. *Croft v. Alison*, 4 B. & Ald. 590; *Wright v. Wilcox*, *supra*; *Vanderbilt v. Richmond Turnpike Co.*, 2 Const. 479; *Mali v. Lord*, 39 N. Y. 381; *Fraser v. Freeman*, 43 id. 566; *Higgins v. Watervliet T. Co.*, 46 id. 23; *Rounds v. D., L. & W. R. R. Co.*, 64 id. 129; *Isaacs v. Third Avenue R. Co.*, 47 id. 122."

The conductor of, or a brakeman upon, a railroad passenger train has authority to remove, in a lawful manner, a trespasser upon the platform of a car; whether the authority is conferred by the rules of the company or not, it is implied and is incident to his position.

The fact that the conductor or brakeman acts illegally in removing such a trespasser does not exonerate the company from liability, if his action be within the scope of his employment. In the absence of a finding or proof that the authority was exercised, as a mere cover for accomplishing an independent and wrongful purpose of his own, the company is liable, although the act was reckless and illegal and a breach of his duty to his master.

Plaintiff, a boy of eight years of age, jumped upon the steps of a car in a passenger train on defendant's road, and sat down upon the platform of the car; he was kicked from the car by a conductor or a brakeman, while the train was running at a speed of about ten miles an hour, and was injured. Recovery sustained. *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25; aff'g s. c., 14 J. & S. 526.

The plaintiff, while crossing the street, to get out of the way of a truck, crossed the platform of a car. The conductor kicked at him, and caused him to jump in front of another car coming in the opposite direction at unlawful speed, whereby he was injured. The defendant was liable. *McCann Sixth Ave. R. Co.*, 117 N. Y. 505.

Plaintiff, boy of thirteen years, caught on the forward part of caboose; brakeman threw water in his face and the tendency of this

was to make him fall, whereby he was injured. Question as to whether the act was improper and dangerous and done with the intention to remove the plaintiff from the train, and whether it caused the injury, was properly left to the jury. Verdict for plaintiff sustained. *Clark v. N. Y. L. E. & W. R. Co.*, 40 Hun. 605; s. c., aff'd, 113 N. Y. 670.

Boy stealing a ride on a train going ten miles an hour; brakeman ordered boy off and threw pieces of coal at him, one striking him on the head causing him to drop under the car and so receive injury. Defendant liable. Not necessary to show specific order to brakeman to keep boys off trains. *Lang v. N. Y. L. E. & W. R. Co.*, 51 Hun. 603; s. c., aff'd, 123 N. Y. 656.

In an action for the wrongful acts of his employé, the motive of the servant is immaterial.

Where, by the directions of a telegraph and telephone company, certain wires belonging to an electric power company have been cut from fixtures on housetops and removed therefrom without notice to the owner thereof, and without offering the electric power company a reasonable opportunity of collecting together and reclaiming such property, and in addition such wires were removed by the employés and servants of the telegraph and telephone corporation, the employer should be held liable therefor. *The Electric Power Co. v. The Metropolitan Telephone and Telegraph Co.*, 75 Hun. 68; s. c., aff'd, 148 N. Y. 746.

Upon the trial of an action brought to recover damages resulting from personal injuries, it was shown that the plaintiff, a boy of eleven years of age, while riding upon a coal train of the defendant, fell off and received the injuries complained of. The plaintiff's testimony was to the effect that one of the brakemen threw coal at him, and as he was about to get off he was hit in the back of the neck by a large lump of coal thrown by the brakeman and knocked from the car. The complaint was dismissed on the ground that the brakeman was not shown to have any express authority from the defendant to remove intruders from the train, and that none could be implied from his position or the nature of his employment.

Held, that under the circumstances, the complaint was improperly dismissed and that the case in all its aspects was one to be determined by the jury. *Lang v. The New York, Lake Erie and Western Railroad Company*, 80 Hun. 275.

A person in the service of a company was engaged in making collections of money due it for property leased by such company, with instructions to retake the property from those who were in arrears, and were supposed to intend not to pay therefor.

Held, that when such person proceeded to take such property he was



acting in the business of his employer, and in the scope of his employment;

That although the action to accomplish such purpose became willful on his part, his employers were not for that reason necessarily relieved from the consequences of his conduct, while so engaged, where it was prejudicial to others, for which such person would himself be personally liable. *O'Connell v. Samuel*, 81 Hun, 357.

It was held error to refuse to charge that "defendants are not liable for the acts of their agent or servant not done within the scope of his authority, or course of his employment," where the jury might have found that a lodging house porter's act of pushing plaintiff downstairs was not done pursuant to defendant's instructions to eject but was wholly a wanton act on his part when angered by plaintiff's conduct. *Montgomery v. Sartirano*, 16 App. Div. 95.

Defendant's trainer having authority to employ jockeys compelled plaintiff, a boy under the statutory age allowed for such employment, to ride a horse of a third person, against his will. The act imposed no liability on the defendant. *Ray v. Keene*, 19 App. Div. 147; s. c., aff'd, 160 N. Y. 706.

Defendant's agent went upon demised premises to repair the same and, in doing so, wantonly and willfully destroyed the tenant's property, maliciously delayed the work, instituted summary proceedings, &c. Defendant was liable for the acts as being done in furtherance of his interest though willfully and maliciously executed. *Lery v. Ely*, 48 App. Div. 554.

Defendant's watchman employed to protect his property was instructed to frighten away intruders by shooting the revolver with which he was furnished into the air. He, however, wantonly shot a boy who was not attempting to trespass. Defendant was not liable. *Grimes v. Young*, 51 App. Div. 239.

While it is the duty of a street car conductor to keep the car free of trespassers, and he has the right to put one off, he must do so in a proper manner, having regard to the safety of the person, and he has no right by demonstration and ejaculation, to produce fear, and thus cause such person to attempt to alight, if by so doing he unnecessarily expose him to the hazard of injury. *Ansteth v. The Buffalo Railway Co.*, 9 Misc. 419; s. c., aff'd, 149 N. Y. 210.

Citing *Clark v. N. Y., L. E. & W. R. Co.*, 40 Hun, 605; 113 N. Y. 670; *McCann v. Sixth Ave., R. Co.*, 117 N. Y. 595.

A street car driver refused repeated requests of a newsboy to stop the car so that he could alight, and ordered him to jump off, at the same time reaching for his whip. The boy then jumped from the car, fell

and was injured. Contributory negligence was not predicable of the fact that he jumped from a moving car. *Baber v. The Broadway & Seventh Avenue Railroad Co.*, 10 Misc. 109. (New York Common Pleas.)

Driver whipped up his team when he knew plaintiff, an infant, was attempting to mount it on the side. His employer was held not liable for injury to infant. *Wright v. Wilcox*, 19 Wend. 343.

If a boy, running alongside a car, not attempting to get on, should be kicked by a brakeman the railway company would be liable. *Molloy v. New York &c. R. Co.*, 10 Daly, 453.

## 2. CASES IN OTHER STATES.

(a) MASTER LIABLE.—Brakeman having authority to eject trespassers ejected a passenger while train was in motion. *Southern R. Co. v. Wildman*, 119 Ala. 565.

A master is liable for the tortious acts of his servants engaged in his employment, though done willfully, without orders or even against orders. *Duggins v. Watson*, 15 Ark. 118.

Demand by conductor that an infant wrongfully on defendant's train jump from it while in motion. *Kline v. C. P. R. Co.*, 37 Cal. 400.

Agent with authority to purchase ties for railroad company stated that his principal wanted to lend them to another company, and had them loaded on principal's cars; in fact, he bought them for another party. *Southwestern R. Co. v. Knott*, 48 Ga. 516.

Engineer frightened plaintiff's horses by unusual and unnecessary whistling. *Chicago, &c. R. Co. v. Dickson*, 63 Ill. 151.

Brakeman having authority to eject trespassers from freight trains, dragged plaintiff out from brace rods while train was in motion, and threw a stone at him. *Illinois Central R. Co. v. King*, 119 Ill. 91; aff'g s. c., 17 Ill. App. 581.

Telegraph lineman committing trespass in cutting trees that he thought endangered wires. *W. U. Tel. Co. v. Satterfield*, 34 Ill. App. 386.

Plaintiff was driving in middle of road, which was over 60 feet wide when he was run into carelessly and willfully by defendant's servant. *Dinsmore v. Wolber*, 85 Ill. App. 152.

Motorman's conduct after discovering danger of frightening horses, was willful and wanton. *Pioneer Fireproof Constr. Co. v. Sunderland*, 87 Ill. App. 213.

Maliciously blowing off steam so as to injure one on a canal boat close at hand. *Regan v. Reed*, 96 Ill. App. 460.

Master may be liable, although the act of the servant is unlawful,

as where blasting was being done. *Wright v. Compton*, 53 Ind. 337.

Plaintiff was ejected from a train with violence, pushed from the car into a cow pit and injured. Complaint charging trespass need not allege authorization or ratification of the act; it is sufficient if it is within the general scope of agent's employment. *Indiana &c. R. Co. v. Anthony*, 43 Ind. 183.

See also, *Jeffersonville &c. R. Co. v. Rogers*, 38 Ind. 116.

Blowing off steam to frighten children, made the railroad company liable for injuries from a fall due to fright. *Alsever v. Minneapolis &c. R. Co.* (Iowa) 88 N. W. Rep. 841.

Motorman bumping into carriage in attempting to clear track would render master liable. But otherwise where he does it with the declared intention to give plaintiff "a shot anyhow." See *Baltimore &c. R. Co. v. Pierce*, 89 Md. 495, 504.

See also, *Central R. Co. v. Peacock*, 69 Md. 257; *Baltimore &c. R. Co. v. Barger*, 80 id. 23.

Where servants engaged in removing stones trespassed on plaintiff's land although ordered by defendant not to do so. *Southwick v. Esles*, 7 Cush. 385.

Assault by drayman in the employ of defendant while engaged in removing furniture from plaintiff's house by defendant's direction. *Levi v. Brooks*, 121 Mass. 501.

Assault by restaurant waiters upon plaintiff for remarks he made on their rude treatment of his relative. *Byrant v. Rich*, 106 Mass. 180.

Station agent having authority to keep "bums" away, put benzine on plaintiff's clothes, in part to amuse himself. *Meade v. Chicago &c. R. Co.*, 68 Mo. App. 92.

Whether defendant's servants had used more force than was necessary in ejecting trespasser was properly submitted to the jury. *Rowell v. Boston &c. R. Co.*, 68 N. H. 358.

Person shot by employé in the active carrying out of employer's orders. *Denver &c. R. Co. v. Harris*, 3 Johns. (N. M.) 109.

Brakeman having authority to eject trespassers from freight trains, did so maliciously; put a boy off a tender with violence while it was in motion. *Pierce v. North Carolina R. Co.*, 124 N. C. 83.

A servant adulterated milk to injure his employer and gratify his malice toward him. *Stranahan &c. Co. v. Coit*, 55 Oh. St. 398.

Janitor in cleaning a room, in anger jerked the ladder on which plaintiff was working, from under him. Held, error to direct verdict for defendant. *Nelson Business College Co. v. Lloyd*, 60 Oh. St. 448; aff'g s. c., 13 Oh. C. C. 358.

Upon being sent by their master, servants entered a house, and forcibly took possession of an organ, in violation of express directions. *McClung v. Dearborne*, 134 Pa. St. 396.

Engineer wantonly and maliciously blew whistle frightening plaintiff's mule. *Skipper v. Clifton Man. Co.*, 58 S. C. 143.

Brakeman having authority to eject trespassers from freight trains, cursed and drew a pistol in ejecting plaintiff. *Texas &c. R. Co. v. Lyons*, (Tex. Civ. App.) 50 S. W. Rep. 161.

Brakeman having authority to eject trespassers from freight trains, threatened to kill plaintiff unless he jumped off while train was in motion. *Houston &c. R. Co. v. Grigsby*, 13 Tex. Civ. App. 639.

Assault by defendant's watchman upon a person who, contrary to the rules of the steamboat company, was "abaft the shaft." *Steamboat Co. v. Brockett*, 121 U. S. 637.

Plaintiff, who was arrested without cause by defendant's conductor, during his employment as such, may recover for the same. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 538.

A German translation of an English article contained a libel against the plaintiff. The fact that the agent's translation was inaccurate did not relieve the defendant from liability. *Wilson v. Noonan*, 27 Wis. 598.

(b) MASTER NOT LIABLE.—The conductor stopped his train and, pistol in hand, pursued a boy, and compelled him to go with him on the train. *Gilman v. South &c. R. Co.*, 70 Ala. 268.

Injuries occurred to a passenger of a street car from the wanton and malicious conduct of one of its engineers in approaching the street car, for the purpose of frightening the passengers. *Stephenson v. So. Pac. Co.*, 93 Cal. 558.

*Hahn v. So. Pac. &c. Co.*, 51 Cal. 605.

Person pushed off train and injured by one who claimed that he was an employé. In absence of further proof of agency, defendant was not liable. *Lindsay v. Central R. &c. Co.*, 46 Ga. 448.

Tortious arrest and imprisonment by municipal police officers. *Attaway v. Cartersville*, 68 Ga. 740.

*Cook v. Macon*, 54 Ga. 568; *Harris v. Atlanta*, 62 id. 290; *McElroy v. Albany*, 65 id. 387.

It is not the business of the agents of a manufacturing company to prosecute a forgery; and where malicious prosecution is charged against the agents and no apparent authority is shown the company is not liable. *Springfield &c. Co. v. Green*, 25 Ill. App. 106.

*Chicago &c. R. Co. v. Mogk*, 44 Ill. App. 17.

Company's flagman, incensed at words of the plaintiff, threw a stone at him, and injured him. *I. C. R. Co. v. Ross*, 31 Ill. App. 170.

Car driver, to prevent annoyance to himself, struck at boys running along by side of car for fun. *Mogk v. Chicago City R. Co.*, 80 Ill. App. 411.

Person, not a passenger on a train, assaulted by an employe. Complaint held bad on demurrer for failure to aver assailant's duties. *Smith v. Louisville &c. R. Co.*, 124 Ind. 394.

See, however, *Carter v. Louisville &c. R. Co.*, 98 Ind. 552, where servants in charge of a switching engine were held to have implied authority to eject trespassers, and company was liable for injuries caused by their recklessness.

See, also, "Carriers of Passengers," post p. 360.

Willful act of defendant's engineer in running over and killing two of plaintiff's horses. *De Camp v. M. & M. R. Co.*, 12 Iowa, 348.

See, also, *Cook v. Illinois Central R. Co.*, 30 Iowa, 202; *Porter v. Chicago &c. R. Co.*, 41 Iowa, 358.

Servant was directed to turn a horse belonging to another out of master's pasture, and thereafter, while the horse was being driven home by its owner's servant, he frightened it so that it jumped upon a fence and was killed. *Yates v. Squeers*, 19 Iowa, 26.

For assault by defendant's agent upon one demanding freight when it did not appear that such conduct was in the line of agent's duty. *Hudson v. Mo. &c. R. Co.*, 16 Kas. 470.

Claim agent of defendant railroad company procured plaintiff's arrest on charge of burglarizing a post office. Defendant held not liable for malicious prosecution. *Atchison &c. R. Co. v. Brown*, 57 Kan. 758.

See also *Mafit v. Chicago &c. R. Co.*, 57 Kan. 912.

Person, not a passenger, assaulted by car porter; no liability for Palace Car Company. *Williams v. Pullman &c. Co.*, 40 La. Ann. 87.

See *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, where railroad company was held liable. (See "Common Carrier of Passengers, Drawing Room and Sleeping Cars," post, 596.)

Person suspected of breaking open a car on a freight train shot by conductor while standing quietly on a platform. *Candiff v. Louisville &c. R. Co.*, 42 La. Ann. 477.

Foreman, authorized to discharge employes, acted in a way, and used language, which kept them from dealing with plaintiff. *Graham v. St. Charles Street R. Co.*, 47 La. Ann. 1656.

A servant of a livery stable keeper where plaintiff's mare was kept was instructed by plaintiff to take her out and exercise her, such not being a part of contract of livery, which he did, and as consequence of his immoderate driving of her she died. *Adams v. Rouzer*, 62 Md. 264.

Cashier of defendant's bank stole certain special deposits of gold. *Foster v. Essex Bank*, 17 Mass. 479.

Janitor removed elevator boy's stool, on which latter was about to sit, so that he lost his balance and started the car as a passenger was about to alight. *Gibson v. International Trust Co.*, 177 Mass. 100.

Where defendant's driver, in anger resulting from an altercation, runs into and smashes plaintiff's wagon, defendant's liability, is properly submitted to the jury. *Wood v. Detroit &c. R. Co.*, 52 Mich. 402.

Defendant's servant having charge of its coal dock accused plaintiff with dishonesty in using too large sacks of coal, and, upon denial by the latter, assaulted him. *Johanson v. Pioneer Fuel Co.*, 72 Minn. 405.

Plaintiff, a stranger, standing at a railroad crossing, was injured while uncoupling cars by order of defendant's engineer made with threats of bodily violence. *New Orleans &c. R. Co. v. Harrison*, 48 Miss. 112.

Defendant's baggage master, provoked by plaintiff's abusive language, struck him. *Southern Express Co. v. Fitzner*, 59 Miss. 581.

Watchman invited plaintiff to see defendant's ice plant and, while on the premises, for a practical joke, scared him. *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147.

Conductor knowingly and willfully detained and transported one unlawfully arrested. *Jackson v. St. Louis &c. R. Co.*, 87 Mo. 422.

Brakeman stepped on plaintiff's fingers as he was getting off moving freight train pursuant to order. *Farber v. Missouri &c. R. Co.*, 32 Mo. App. 378.

Defendant's baggage master, provoked by plaintiff's abusive language, struck him. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

A boy on a car was willfully and wantonly struck by the driver and thereby thrown off the car. *Pittsb. &c. R. Co. v. Donahue*, 70 Pa. St. 119.

Unauthorized libel of employé. *Henry v. Pittsb. &c. R. Co.*, 139 Pa. St. 289.

Motorman left his car and committed an assault on one driving a team on the tracks. *Rudgair v. Reading Traction Co.*, 180 Pa. St. 333.

Boy on a car was wantonly struck by driver. *Pittsburg &c. R. Co. v. Donahue*, 20 P. F. Smith (Pa.) 119.

Injury caused by the shouting of train hands, such outcry not being necessary to the performance of their duties. *Cobb v. R. Co.*, 37 S. C. 194.

An overseer to whom was delegated the duty of whipping a slave, killed him, in wantonness, and to gratify his malice. *Purveyer v. Thompson*, 5 Hum. (Tenn.) 397.

*Cantrell v. Colwell*, 3 Head. (Tenn.), 471; *Deihl v. Ottenville* 14 Lea (Tenn.) 191.

Boy maliciously forced from a freight train, while in motion, where there was nothing to show that such a course on the part of the employé was within the scope of his authority. *Bess v. Chesapeake &c. R. Co.*, 35 W. Va. 492.

One who attempted to rob company's till, and was arrested by order of clerk, such arrest being unauthorized. *Allen v. London &c. R. Co. L. R.*, 6 Q. B. 65.

## II. Banks and Other Agents for Collection, &c.

By receiving securities or commercial paper and assuming the collection thereof, or to do any act connected therewith, as presentation for acceptance, payment, protesting, etc., a person, whether acting simply as an agent, or a creditor, receiving the same absolutely or qualifiedly to apply on his debt, undertakes to do all that the law and general usage requires. *Smith v. Miller*, 43 N. Y. 17. When the law or usage do not specifically fix the acts to be done, or the diligence requisite to be observed, the care and skill that should be employed, would be such as a man of ordinary care, diligence, and skill would use under the circumstances.

Where a draft is delivered to an agent to be presented for acceptance, only explicit and unequivocal acceptance is permitted, and the agent is liable for damage if, in the absence of such acceptance, he fail to give notice, as in the case of non-acceptance. *Walker v. Bank of State of New York*, 9 N. Y. 582.

Citing 1 R. S. 768, § 6: *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 382.

A bank receiving and upon good consideration assuming the collection of a bill or note, is liable for any default of its agents or correspondents in collecting or paying over the proceeds, or in charging the parties thereto, unless there be an agreement to the contrary.

A bank to which a bill is indorsed and transmitted by the owner for collection, and which has a special interest in the draft and proceeds, can sustain an action against an agent employed by it to collect the same for default in paying over the proceeds or in charging the parties.

It is sufficient that the draft was indorsed to such bank, and it agreed with the owner to collect it, to enable it to sustain the action against an agent, employed by it to collect the same. *The Commercial Bank of Pennsylvania v. The Union Bank of New York*, 11 N. Y. 204.

The defendants residing in Buffalo, being indebted to the plaintiffs doing business in New York, and having funds with J. K. P. & Co., in the latter city, drew their bill on the latter firm to the order of the plaintiffs to be presented for payment, and when paid to be applied in payment of the indebtedness. The plaintiffs, instead of insisting upon the money, received therefor the check of J. K. P. & Co. upon one of the

banks in the same city, and delayed for a day to present the same, and meanwhile J. K. P. & Co. failed and check was not paid, although it would have been paid if presented forthwith. *Smith v. Miller*, 43 N. Y. 171; 52 id. 545, aff'g non-suit.

See *Syracuse &c. R. Co. v. Collins*, 57 N. Y. 641.

**From decision.**—"There was no impropriety in the receipt of the check, and as the drawees were entitled to the draft upon payment of it, there is nothing in the case upon which fault could be imputed to the plaintiffs in the surrender of the draft or receipt of the check. *Russell v. Hawkey*, 6 T. R. 12; *Howard v. Robinson*, 7 B. & C. 90; *Byles on Bills*, 16; *Story on Bills*, sec. 419; *Chitty on Bills*, 433, 434, ed. of 1833. If the check was worthless when given, or became worthless, before it could have been with reasonable diligence presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiff had omitted to notify them in due time of the non-payment of the bill. There would, in such case, be no loss resulting from negligence.

But a check is payable instantly; and *as between the drawer and drawee*, the latter has, in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of check to present it for payment, when drawn on a bank in the same place where given and received. *Smith v. James*, 20 W. R. 192; *Harker v. Anderson*, 21 id. 372; *Ward v. Evans*, 2 Ld. Ray. 928. But the duty of the *plaintiffs to the defendants* is not determined by that rule of commercial law. The rule has respect only to the contract, and liability of the parties to the instrument.

When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that, within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between *him and the persons in interest*, whom he represents. If a custom can exist in law, and does not exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence. \* \* \* \*

By receiving the securities, and assuming the collection or as here, receiving the bill, and consenting to present the same for payment, a creditor undertakes to do all that the law requires to be done, to obtain payment, and if he fails in the performance of that duty the debtor is discharged. *Canndye v. Allenby*, 6 B. & C. 373; *Story on Bills*, sec. 109. Laches, which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt, for payment of which a bill or other negotiable instrument is transferred. *Story on Bills, supra*, and note; id., sec. 419, and note. This was decided in *Kobbe v. Clark* (*Selden's Notes*, October, 1853, p. 11). If by the acts or omission of the creditor, thus receiving negotiable instruments for collection, a loss occurs, it should fall upon him, who is the cause of the loss, rather than upon the distant and innocent debtor. *Bradford v. Fox*, 38 N. Y. 289."

A notary is the agent of a bank, and the latter is liable for his negligence in protesting paper, which it undertakes to do by receiving it for collection. Banks' liability may be varied by general usage, but not by



practice adopted by the bank for its convenience. Direction to protest means to present and demand payment and if unpaid, to give notice thereof to the parties to be charged. The claim of the bank that it could not find maker was unfounded. *Ayrault v. Pacific Bank*, 41 N. Y. 510.

The plaintiff sent the defendant a check for collection, on the second of the month the defendant sent the check to the bank on which it was drawn; it should have arrived on the third. It was lost and the defendant discovered the loss on the 16th and notified the plaintiff on the 18th. Defendant was negligent in not sooner discovering loss and notifying plaintiff. *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485.

See *Mohawk Bk. v. Broderick*, 13 Wend. 133, 138.

Defendant had in its hands certain U. S. bonds belonging to plaintiff; its cashier, in the spring of 1869, for a sufficient consideration, agreed to exchange the same for registered bonds. This the bank neglected to do, and in November, 1869, the bonds were stolen. The defendant was liable. *Yerkes v. The National Bank of Port Jervis*, 69 N. Y. 383, aff'g judgment for plaintiff.

**From opinion.**—"If the plaintiff had delivered her bonds to the bank for collection, and the bank had agreed to collect them, no one would deny that the agreement would have been valid. If after such an agreement, the bank had kept the bonds for an unreasonable time, until they were stolen, or had lost them, or rendered them worthless by its culpable negligence, it would have become liable to the plaintiff for their value. *Smedes v. Utica Bank*, 20 J. R. 372; s. c., 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; *Walker v. Bank of State of N. Y.*, 9 N. Y. 582; *Montgomery Co. Bank v. Albany City Bank*, 7 id. 459."

The plaintiff sent the defendant, its correspondent in New York, a sight draft on C. P. & Co., for collection; the same was presented the same day and check given, which was the next day presented and refused as C. P. & Co. had in the meantime failed. The same day the check was returned and the draft received back and payment therefore demanded, and drawer notified of non-payment.

Held (1), That the defendant was negligent in not presenting the check on the day it was received, for, although C. P. & Co.'s account was overdrawn, the bank paid their checks until time of failure. *Allen v. Suydam*, 17 Wend. 368; *Smith v. Miller*, 43 N. Y. 172, and 52 id. 545; distinguishing *Turner v. Bank, etc.*, 4 Abb. (C. A. D.) 434; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Bank of Washington v. Tripplett*, 1 Peters 25; *West Branch Bank v. Fulmer*, 3 Penn. 402; and (2), that nominal damages could only be awarded as it appeared that the drawer was good and that the draft could be collected of him. 1 Daniel on Negotiable Inst. sec. 329; *Borup v. Nininger*, 5 Minn.

523; *Allen v. Suydam*, 17 Wend. 368; reversed for error in charge, 20 id. 321; *Dunlap v. Hamilton*, 1 Bell 320; *Chitty on Bills*, 299, 300; *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374; 3 Barn. & Cress. 439. Presumption that drawer is solvent. *Ingalls v. Lord*, 1 Cow. 240; *Allen v. Suydam*, 17 Wend. 368. Reversal was on question of damages. *First National Bank v. Fourth National Bank*, 77 N. Y. 320, rev'g 16 Hun. 332, and judgment for plaintiff.

"A" sent "B" a note payable at the latter's bank by one of its customers. Sunday, July 4th; on July 3d, "B" marked the note paid and sent its draft for same. On July 6th, "B," learning that the customer had failed, notified "A" that the draft had been sent by mistake, received it, presented and protested note and gave the endorser notice. Held, that an action against "B" for negligence in discharging the endorser by sending draft, &c., was proper, and that unless the draft was sent by mistake, of which there was not sufficient proof, the endorser was discharged and a recovery could be had. *Whitmore v. City Bank of Rochester*, 77 N. Y. 363.

The plaintiff sent a note to the defendant for collection and the defendant sent it to the Lowville Bank, where it was payable, and where the maker kept an account; the bank kept it until the next day and then sent its draft on New York in payment and failed the same day, and the draft was worthless and the plaintiff had immediate notice. The sending of the draft to the Lowville Bank was a proper demand of payment by mail (*Heywood v. Pickering*, 9 L. R. [Q. B.] 428; *Prideaux v. Criddell*, 4 id. 461; *Bailey v. Bodinham*, 16 C. B. [N. S.] 295; *Hare v. Henley*, 10 id. 65), and the draft was not such payment and the plaintiff had *suffered no damage*, as the maker was still liable and the Lowville Bank was not an agent of the defendant (*The People v. The Merchant's Bank*, 78 N. Y. 269). *Indig v. National City Bank*, 80 N. Y. 100, rev'g 16 Hun. 200, and aff'g non-suit.

**From opinion.**—"Where a note is payable at a bank, an entire failure to present it for payment, does not discharge the maker. *Walcott v. Van Santvoord*, 17 J. R. 248; *Green v. Goings*, 7 Barb. 652; *Caldwell v. Cassidy*, 8 Cow. 271. If the maker has not sufficient funds in the bank, the omission to present it is of no consequence. If he has funds, then he can plead it by way of tender, and is relieved from liability only for interest and costs. And even if the bank fails with the funds in its hands, this is no defense to the note. *Ruggles v. Patten*, 8 Mass. 180; *Fenton v. Goudry*, 13 East. 473; *Turner v. Hayden*, 4 Barn. & Cres. 1. The bank is, in such cases, regarded as simply the agent or depositary of the maker of the note, or acceptor of the bill, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only, a note or bill payable at bank differs from a check. Therefore, if there had been no presentment whatever, and the bank had failed with sufficient funds of the maker in its hands to pay the note, the maker was still liable."

On the second trial of last case there was evidence that a judgment of the court of Pennsylvania to the effect that the acceptance of the check was a payment of the draft and discharged the drawer, and such evidence was received properly and justified recovery against the defendant for the whole amount of the draft. *First National Bank v. Fourth National Bank*, 89 N. Y. 412, mod'g 24 Hun, 241.

A collecting agent is liable for the negligence of an attorney employed by him. *Weyerhouse v. Dun*, 100 N. Y. 150.

*Bradstreet v. Everson*, 72 Pa. St. 124.

On February 15th, C. & W. sent a sight draft "protest waived" to defendant for collection. The drawee accepted it February 21st, and promised to pay the following week, of which the drawers were notified. March 6th the drawer made an assignment. Defendants not liable to drawers for negligence. *Crouse v. First National Bank*, 137 N. Y. 383, rev'g judg't, for pl'ff.

A salesman for a cheese factory received a check for sales, and did not present it until after the failure of the drawer on September 11th. Individual patron had separate action against a salesman for neglect to present check. *Soule v. Mogg*, 35 Hun, 79.

Holders of bonds directed a bank to transmit the bonds to its correspondent with instruction to collect for them and their account. Upon suit by such holders, against the collecting bank for failure to collect full interest, the latter set up lack of privity of contract. It was held that the collecting bank was the holders' agent and not that of the transmitting bank, and was liable to them for such failure. *Kelley v. Phenix National Bank*, 17 App. Div. 496.

A correspondent of a bank to whom a draft had been transmitted for collection surrendered it and took another's draft, presumptively in payment, instead of either getting cash or protesting the draft and returning it to its owner. The draft in receipt not being paid, the bank was held liable for the correspondent's neglect, especially as the former notified the owner that his draft had been paid and the owner acted in reliance thereon. *Kirkhan v. Bank of America*, 26 App. Div. 110; s. c., aff'd, 165 N. Y. 132.

A bank negligently failed to collect a check, returned it to its holder protested, who thereupon without knowledge of the facts took it up. The bank in defense to a suit for recovery thereof set up that the check was deposited for cash. It was held, however, that whether it was deposited for cash or for collection, the bank was liable for its failure to present in time. *Martin v. Home Bank*, 39 App. Div. 498; s. c., aff'd, 160 N. Y. 190.

A bank receiving a note for collection failed to have it properly protested. The owner was permitted to recover the principal, interest and protest fee, but not the expense of a suit to test the liability of the indorser who had been released by the failure to protest. *Hitchcock v. Bank of Suspension Bridge*, 57 App. Div. 458.

Bank receiving from its cashier stock as security for loan to him is not chargeable with his knowledge that he was himself a pledgee and without authority to repledge it. *Brady v. Mount Morris Bank*, 65 App. Div. 212.

A bank, presented with a check for collection, forwarded it in the usual course of business, received the proceeds and notified the depositor that it was all right. Upon subsequent discovery that it had been raised, the bank was allowed to recover the amount checked against it. *Oppenheim v. West Side Bank*, 22 Misc. 122.

A rule, that it acted only as agent for a depositor for collection did not make a bank discounting a draft a mere collector as against an attaching creditor. *American Trust &c. Co. v. Austin*, 25 Misc. 454.

In absence of proof of actual damage only nominal damages are allowed. *Lienau v. Dinsmore*, 3 Daly, 365.

An agent is not liable for an omission to notify the endorser of a note deposited with him for collection, unless he is instructed to do so, or unless he omits to inform his principal of the default. *Bank &c. v. Huggins*, 3 Ala. 206.

One attorney receiving from another a note for collection is liable for remitting proceeds to payee instead of to the other attorney. *Lewis v. Peck*, 10 Ala. 142.

Payee of a note, collected without authority, accepted, with knowledge, part of proceeds and a note in settlement. Collection was ratified. *Hughes v. Neal Loan &c. Co.*, 97 Ga. 383.

Drafts deposited in a bank for collection were sent on to another bank for collection. Drafts which turned out to be worthless were received in return and credited to the depositor before learning of the collecting bank's insolvency. The collecting bank was depositor's agent and the latter had to bear the loss. *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259; aff'g s. c., 58 Ill. App. 61.

A bank, receiving a bill of lading with a time draft attached for collection, in the absence of special instructions, is justified in surrendering the former upon acceptance of the latter. The presumption is that it is a sale upon credit and that the bill of lading is security for the acceptance. *Commercial Bank v. Chicago &c. R. Co.*, 160 Ill. 401.

Defendant received checks for collection for plaintiff's accommodation and forwarded them in its usual course to its nearest correspondent, the drawee's bank, the only one in the place, which was known to plaintiff.

It was held that the collecting bank became the agent of the plaintiff and not of the defendant. *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

Bank forwarded a check received for collection to a bank which was the clearing house for the locality of the drawee. Held, not negligent. *Carlinville Nat. Bank v. Wilson*, 78 Ill. App. 339.

An attorney who received notes for collection was held liable for their conversion by a fellow attorney whom he entrusted with their collection. *Pollard v. Rowland*, 2 Blackf. (Ind.) 22.

An express company receiving a bill of exchange for collection, was held liable for the negligence of a notary, to whom the bill was sent for protest, in protesting it before maturity and discharging indorsers. *American Express Co. v. Haire*, 21 Ind. 4.

A bank, receiving from an indorsee a sight draft for collection, was held liable for failure to present it within a day after its receipt to a drawee living in the same town. Drawee's insolvency was no excuse; nor was the fact that the indorsee had recourse in any event against the drawer, who became insolvent during the delay. *Citizen's Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69.

Bank was to receive a consideration for collection, but owner knew it had to be transmitted to another bank. Former bank was not liable for latter's default. *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101; rehearing denied in 48 N. E. Rep. 601.

A bank holding inland draft for collection only, put it in its notary's hands for collection. He was not held its agent as such notary, though he was also assistant cashier. Having exercised due diligence in the selection of a notary, the bank was not liable for his failure to give notice of dishonor. *First Nat. Bank v. German Bank*, 107 Ia. 543.

A bank receiving a check for collection, sent it directly to the drawee bank, when there was another in the same place. The check was held for a day, returned unpaid and the drawee bank suspended. In a suit by holder against maker on the check, plaintiff was compelled to bear the loss. *Anderson v. Rodgers*, 53 Kan. 542; s. c., 27 L. R. A. 248.

Bank received note with instructions to collect and credit. It allowed an officer of the bank at which it was payable to do the collecting. The first bank was liable for his default. *First Nat. Bank v. Craig*, 3 Kan. App. 166.

Bank was authorized by its customers to employ another bank to do the collecting. Latter bank was customer's sub-agent. *Beach v. Moser*, 4 Kan. App. 66.

After presentment and notice of protest and nonpayment, a bank cancelled a check received for collection, taking another payable to order of its cashier, on which payment was refused. Bank was not liable, as no

damage resulted from its act and there was evidence from which authority might be inferred. *Citizen's Bank v. Houston*, 98 Ky. 139.

A bank, receiving draft from indorsee, a depositor, with instructions to "collect and credit," was negligent in crediting it to the indorser, another depositor. *Long v. Bank of Commerce*, (Ky.) 38 S. W. Rep. 886.

An express company receiving a draft for collection and neglecting to present it, although having the opportunity to do so, until after drawers' insolvency, are liable for drawers' loss on the draft. *Whitney v. Merchant &c. Ex. Co.*, 104 Mass. 152.

Instructions to a bank to deliver sealed papers pinned to a draft but only upon its payment are not disobeyed by allowing drawee to take them into his hands for examination, which results in his refusal to pay the draft. *People's Nat. Bank v. Freeman's Nat. Bank*, 169 Mass. 129.

A bank cashed and credited forged checks payable "to the order of cash" drawn on plaintiff, which were paid through the clearing house. It made no inquiry as to genuineness of signatures and did not require an indorsement thereof. Held, that it was a *bona fide* purchaser and not liable to plaintiff. *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392.

A bank received a certificate of deposit for collection with instructions to forward it to its correspondent at B, who, its customers knew, was the drawer of the certificate and who was regarded as safe. Was not liable for loss. *First Nat. Bank v. Citizen's Savings Bank*, 123 Mich. 336.

Bank sent draft received for collection direct to the drawee's bank. Was liable, though there was no other bank of standing in the community, though it gave notice of nonliability for negligence of its agents, and though such action was customary among banks. *Minneapolis Sash &c. Co. v. Metropolitan Bank*, 76 Minn. 136; rev'g s. c., 15 Bkg. L. J. 468.

A bank holding a draft for collection surrendered it to drawee in exchange for latter's check, on another bank, which was worthless. Erroneous belief that drawee of check was solvent did not relieve collecting bank of liability. *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320.

Bank sent check for collection, directly to drawee's bank. Was liable, though there was no other bank in the place; and though, had it been sent to third person, the result might have been the same. *American Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451.

Suspecting its correspondent's insolvency at S, drawee bank's residence, a bank sent a check received for collection to M, twelve miles

from S. Drawee failed on Saturday, the day the check was received at M. The check was not presented till following Monday. Remitting bank was liable. *Herider v. Phoenix Loan Ass'n*, 82 Mo. App. 427.

Purchase of a certificate of stock is within the scope of the authority of a bank cashier so to charge it with his knowledge of the condition of the stock. *Farmer's &c. Bank v. Loyd*, 89 Mo. App. 262.

Married woman sold her property and directed defendant's cashier to deliver deed upon receipt of the price, which she directed to be placed to her account. Bank was held liable for placing the proceeds to her husband's credit. *Rhinchart v. People's Bank*, 89 Mo. App. 511.

A bank having check for collection sent it to the drawee's bank when there was another bank in good standing in same town. Held, negligence. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105.

Defendant bank received from plaintiff a draft to "collect and remit," but failed to promptly enforce collection, and returned the draft after having taken a conveyance of all of drawee's property with an agreement to pay debts, not including drawer's. Defendant had failed to perform its duties in good faith and was held liable to plaintiff. *Dern v. Kellogg*, 54 Neb. 560.

A bank, receiving a note for collection, sent it to its correspondent with instructions to credit it, on payment. The latter failed, with its account to the former overdrawn. Former was liable to owner of note. *First Nat. Bank of Omaha v. First Nat. Bank*, 55 Neb. 303.

Once charged with notice through an officer, a corporation continues to be affected thereby, though the officer leave. *U. S. Nat. Bank v. Forstedt*, (Neb.) 90 N. W. Rep. 919.

A draft, indorsed for collection, was collected and credited to forwarding bank before its failure. Maker recovered of the collecting bank. The restrictive indorsement was notice of maker's title. *Boykin v. Bank of Fayetteville*, 118 N. C. 566.

See, also, *Nat. Citizens' Bank v. Citizens' Nat. Bank*, 119 N. C. 307; *People's Bank v. Citizens' Bank*, 119 N. C. 310.

A bank holding notes for collection took drafts instead of cash in payment. Owner was entitled to the draft or cash at his option. Indorsement for collection is notice that no title passed and that possession is for that purpose only. It seems that the relation of principal and agent changes to debtor and creditor after collection or where the bank was to credit the owner upon collection. *National Bank of Commerce v. Johnson*, 6 N. D. 180.

Correspondent bank, receiving notes for collection, knowing of debtor's financial difficulty, did not appraise remitting bank until after its own claims were secured and the notes had matured. Was liable for its

failure to collect. *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382.

Indorsement for collection does not guarantee the genuineness of drawer's signature nor justify drawee in relaxing any diligence in that respect. Drawee cannot recover amount of forged check presented by indorser "for collection." *First Nat. Bank of Belmont v. First Nat. Bank*, 58 Oh. St. 207.

Custom of sending indorsed check direct to drawee for collection held not unreasonable. *Kershaw v. Ladd*, 34 Or. 375.

A collecting agency, receiving and remitting a claim to its own attorney, who collects the money and fails to pay it over, is liable for his neglect. *Bradstreet v. Everson*, 12 Pa. St. 124.

Riddle v. Hoffman's Ex'r, 3 Pa. Rep. 224; *Cox v. Livingston*, 2 W. & S. (Pa.) 103; *Krause v. Dorrance*, 10 Barr. (Pa.) 462; *Rhines v. Evans*, 16 P. F. Smith, 192.

A drawee bank paid the amount of a draft indorsed to another bank "for collection" to the clearing house which applied it to a debt due from the indorsee bank to the clearing house committee. It was not a payment to the owner of the draft and no defense to an action against the drawee bank. *Crane v. Fourth Street Nat. Bank*, 173 Pa. St. 568.

A bank in collecting a check received, instead of money, a check, which became worthless. Was liable for the loss. *Farmer's &c. Nat. Bank v. Cuyler*, 9 Pa. Dist. 539.

Note payable on Sunday was received for collection with instruction to protest in case of non-payment which was done on the Thursday following. Though too late to hold indorser, the bank had used due diligence in view of the statute law in the state, relating to holidays and days of grace. *Morris v. Union Nat. Bank*, 13 S. D. 329.

Custom of bank, receiving draft for collection, to take acceptor's check on another bank to which it presents it the next forenoon, was held reasonable. *Savings Bank v. Nat. Bank*, 98 Tenn. 337.

Bank, receiving checks on a bank in another town for collection after business hours, sent them the next day in its usual course to its correspondent in a more distant town. Was held not negligent. *Givan v. Bank of Alexandria*, (Tenn.) 52 S. W. Rep. 923.

A bank with a draft for collection sent it directly to drawee. Though negligent, it was held not liable, because the result would have been the same if the draft had been sent to a third party. *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318.

Bank was not liable for holding draft received for collection without protest, where that had become the custom of the parties. *First Nat. Bank v. St. Charles Sav. Banks*, (Tex. Civ. App.) 37 S. W. Rep. 768.



A correspondent of a bank receiving a note for collection becomes, in the absence of express authority, the agent of the latter and not of the owner of the note. *State Nat. Bank v. Thomas Man. Co.*, 17 Tex. Civ. App. 214.

**From opinion.**—"The main question in this case is whether a bank receiving paper for collection is responsible for all subsequent agents employed in the collection of the paper." \* \* \* \* "In a majority of the states, including Massachusetts as leader, the liability is denied, the sub-agents being treated as sub-agents of the owner of the paper, and not the agents exclusively of the bank first receiving it for collection. Mechem on Agency, sec. 514, where the states are given and the authorities cited. But in New York and several other states the opposite rule has long prevailed, the bank receiving the paper for collection, nothing further appearing, being treated as an independent contractor, and the subsequent agents as its own and not the sub-agents of the owner. In the Supreme Court of the United States, too, the decisions appeared for a long time to be in conflict; but in the case of *Exchange National Bank v. Third National Bank*, 112 U. S. 276, the question came squarely before that learned court, and, in an able opinion by Justice Blatchford, reviewing previous decisions, the New York rule, which was also the English rule, was finally adopted. The decision of the case at bar was made in conformity to the rule so adopted and we approve it."

See, also, *Schumacher v. Trent*, 18 Tex. Civ. App. 17.

A bank, though doing business in a temporary structure, owing to a fire, undertook collection of plaintiff's notes. Was liable for failure to give notice of dishonor. *Merchant State Bank v. State Bank*, 94 Wis. 444.

### III. Executors, Testamentary Trustees.

An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge. He is only liable for his own acts and not for the negligence or waste of his co-executor or co-trustee (*Ormiston v. Olcott*, 84 N. Y. 339), unless he shall have intentionally or otherwise contributed to it, or unless it appears that he had knowledge of, or assented to, the acts done, or had notice which should excite his suspicion and put him upon inquiry. *Wilmerding v. McKesson*, 103 N. Y. 329; *McKim v. Aulbach*, 130 Mass. 481.

And only in such case where he had the means of preventing or guarding against such waste; but he is bound to exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his associates. *Earle v. Earle*, 93 N. Y. 104.

Where an executor enables by his act funds to go into the hands of his co-executor, but for which he would not have received them, and the latter wastes them, the former is liable; but this does not arise when such executor is merely passive and fails to obstruct the collection or receipts of such funds by his co-executor. *Croft v. Williams*, 88 N. Y. 384; *Darnaby v. Watts*, 13 Ky. L. R. 457.

And so, when he allows his co-executor or a third person to entirely manage the estate, he is liable for their conduct. *Earle v. Earle*, 93 N. Y. 104.

An executor or trustee is liable for loss occurring through violation of a statutory duty, as in the case of an unauthorized investment. *King v. Talbot*, 40 N. Y. 76.

Generally he must use the prudence and diligence that a man of discretion and intelligence would employ in his own affairs. *McCabe v. Fowler*, 84 N. Y. 314.

This would require active diligence in the collection of a debt to the estate. *Harrington v. Keteltas*, 92 N. Y. 40.\*

#### (a). INVESTMENT.

Where the interest upon certain legacies were, by the terms of the will, to be applied by the executors, so far as required, to the maintenance and education of the legatees during their minority, and the principal, with any accumulations thereon, to be paid to them severally on their coming of age, and the executors, upon whom the trust was imposed, invested the funds in railway and bank stocks, the legatees, upon coming of age, were not bound to accept such investments, but had the right to call upon the executors to pay over the whole amount of their legacies and interest thereon.

The law, in this state, imposes upon trustees, holding trust funds for investment for the benefit of minor children, to be supported from the income accruing therefrom, the duty of placing them in a state of security, of seeing that they are productive of interest, and of so keeping them, that they may always be subject to future recall, for the benefit of the *cestui que trust*.

The investment of such funds by a trustee in canal, bank, insurance, railroad or other stocks of private corporations, is a violation of his duty and the obligation of his trust.

As to moneys held upon trusts of this kind, it is not according to the nature of the trust, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked and in which, by the *very terms of the investment*, the principal is not to be returned at all. *King v. Talbot*, 40 N. Y. 76.

The executor in care of the securities, entrusted to him, must use the care, prudence and diligence that a man of discretion or intelligence would, in general, employ in his affairs, and when he left securities with same person, as the testator had done, the executor was not negligent. *McCabe v. Fowler*, 84 N. Y. 314.

Distinguishing *Walton v. Walton*, 1 Keyes, 18; 2 Abb. Pr. (N. S.) 428.

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\*NOTE.—As to trustees other than testamentary trustees see post p 68.

Trustee who invests funds beyond his jurisdiction does so at the peril of being held responsible for the security of the investment. *Ormiston v. Olcott*, 84 N. Y. 339.

See, also, *Matter of Denton v. Sanford*, 103 N. Y. 607.

Where executors are by will only made liable for willful default, misconduct or neglect, proof of negligence is not sufficient. Courts will in such case regard with leniency whatever is done in good faith. The complaint charged *negligence* in investing funds. An unpaid tax in real estate is not a violation of prohibition against investing on unincumbered real estate. (*Chesterman v. Eyland*, 81 N. Y. 398; s. c., 74 id. 452.) *Crabb v. Young*, 92 N. Y. 56.

See *Paulding v. Sharkey*, 88 N. Y. 432; *Glacius v. Fogel*, 88 id. 434.

An executor was held liable for the loss of interest in funds invested to accommodate his relatives, in contravention of the classes specified by statute. *Matter of Vandervort*, 8 App. Div. 341.

Executors, vested with discretionary powers, found at the time of their appointment the estate property depreciated in value, and, in the honest and reasonable exercise of their discretion, they held it for a rise. They were not chargeable with a further loss in value or with the expense attending its holdings in the meanwhile. *Matter of Hosford*, 27 App. Div. 427.

See, also, *Matter of Weston*, 91 N. Y. 502.

A life tenant consented to the unauthorized investment by the testamentary trustee. It did not affect the latter's liability to the remainderman therefor. *Matter of Talmage*, 32 App. Div. 10; s. c., aff'd, 160 N. Y. 704.

Executors with a discretionary power as to investment were not required to change the investment to trust securities, and were not liable for losses through investment, where their discretion was not abused but honestly and reasonably exercised. *Lawton v. Lawton*, 35 App. Div. 389.

See, also, *Matter of Hall*, 48 App. Div. 488; *Dunklee v. Butler*, 30 Misc. 58.

Executors having mortgages in Minnesota taken by their testator, on which there had been a default in interest, foreclosed them for interest only, instead of for principal and interest, relying on the advice of the testator's confidential agents there and that of their own local counsel. Having acted in good faith, they were not liable for losses resulting from a panic which occurred shortly after. *Matter of Ball*, 55 App. Div. 284.

Executors, finding no opportunity to invest in mortgage securities, entered into an agreement with a bank to purchase bonds for \$121,500, paying \$21,500 thereon and giving note with the bonds as security with an additional agreement for repurchase on the part of the bank. The

interest on the bonds offsetting the interest on the notes. The beneficiaries were not entitled to object to such a transaction where it resulted in shielding the estate from loss. It was also held that they were not chargeable with interest on an amount they kept on open account, no larger than necessary for the purposes of actual administration expenses. *Matter of Johnson*, 57 App. Div. 494; s. c., modified on another point, 170 N. Y. 139.

Executors, directed to convert land and invest the proceeds, were not warranted, after 16 years of increasing value, to hold it still longer for a further increase. *Matter of Fergo's Estate*, 20 Misc. 137.

A temporary administrator failed to deposit funds. Was charged with the interest they would have earned with a trust company. *Matter of Philp*, 29 Misc. 263.

So where conservator of lunatic failed to invest trust funds. *Re Thomas's Estate*, 26 Col. 110.

Trustee, who invested in stocks and bonds of a private corporation and in his own name to avoid the delay of an application to sell them, was chargeable with interest on the funds less dividends received with interest on such investments. Acquiescence by *cestui que trust* did not relieve him of his duty. *White v. Sherman*, 168 Ill. 589; aff'g s. c., 62 Ill. App. 271.

Administrator was not careless in following out testator's desire to continue an investment in bank stock where he failed to withdraw it, merely because the bank surrendered its charter as a national bank and became a private one. *Penn v. Folger*, 17 Ill. App. 365.

Executor under a will which provided that the money should be held by him, without giving directions for investment, used it for seventeen years pending time for distribution instead of investing it. Was chargeable with interest. *Re Estate of Young*, 97 Iowa. 218.

Direction to invest and pay interest. Executor not liable for the legal rate, but only such interest as he received. *Fitzgerald v. Paisley*, 110 Iowa, 98.

Executor who held funds subject to payment to legatees and who did not and could not use or make a profit out of them, was not chargeable with interest. *Briggs v. Walker*, 102 Ky. 359.

The investment of trust funds in second mortgages or in notes or shares of a business corporation with no surplus or working capital but working wholly on credit, is not in the exercise of sound discretion. *Mattocks v. Moulton*, 84 Maine, 545.

A testamentary trustee of a fund bequeathed was also the executor of the estate. As executor he sold part of the estate for an exorbitant price taking back purchase money mortgages in which the trust fund was in-

vested. The property, not bringing the face of the mortgages, he was liable as trustee for the difference, by reason of his negligence in investing in inadequate security. *Gilbert v. Kolb*, 85 Md. 627.

Trustees were not charged with indiscretion, where, with the proceeds of United States bonds, they purchased bonds of a small road guaranteed by two larger roads which it connected, where such investment was regarded as desirable by intelligent investors and eventually produced a larger income than the original. Nor were they so charged for retaining an investment their testatrix had made, merely because it declined in market value and their judgment as to its ultimate value was at error. *Green v. Crapo*, (Mass.) 62 N. E. Rep. 956.

Honesty is no excuse for irregularity in investments. *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

Funds were invested in a mode not authorized and were depleted. Executors were held liable. *Nyce's Estate*, 5 Watts & S. (Pa.) 254.

See, also, *Leslie's Appeal*, 63 Pa. St. 355; *Estate of Merkle*, 131 id. 584.

Loan was made by authority of the court and with consent of beneficiaries, on their property, which was their home. Testamentary trustee was not chargeable with the depreciation of the property, especially as its sacrifice would deprive them of a home. *Re Old's Estate*, 176 Pa. St. 158; aff'g s. c., 13 Lanc. L. Rev. 98.

Will provided that the testamentary trustee might retain testator's investments if he deemed best. Was not liable for loss resulting from the honest exercise of his discretion in retaining them. *Re Bartol's Estate*, 182 Pa. St. 407.

See, also, *Parker v. Glover*, 42 N. J. Eq. 559; *Pope v. Matthews*, 18 S. C. 444.

Trustee, in pursuance of a family arrangement, invested in land of the beneficiaries' father as a subsequent incumbrance and allowed it to remain for nineteen years. He was not liable for depreciation below first mortgage, especially as it did not appear that the loan could ever have been collected. *Re Lightner's Estate*, 187 Pa. St. 237.

Part of a legacy given to a daughter-in-law in trust for her children was spent for purchase of property on which the family lived and the balance was loaned to the trustee's husband. The executrix and trustee exchanged receipts for nineteen years, no money passing. It was held that the executrix could not be charged with interest on such loan. *Re Watson's Estate*, 189 Pa. St. 150.

Trustee purchasing mortgages made personal examination of the property, which was highly recommended. Others testified that, at the time of the purchase, the property was amply secure. He was not liable for its subsequent depreciation through unknown causes; especially where he sold on demand of *cestui que trust* soon after buy-

ing it in on foreclosure. Nor was he chargeable because the property was out of the state, though in a suburb of his own city. *In re Gouldey's Estate*, 201 Pa. St. 491.

Trustee invested in third and fourth mortgages. Was chargeable with principal and interest due and unpaid. *Makin's Estate*, 7 Pa. Dist. 126.

Trustee invested funds out of state to secure higher interest. Was chargeable for loss in principal and current domestic rate of interest on legal investments. *Robert's Estate*, 8 Pa. Dist. 303.

Trustee loaned on bond secured by mortgage on land poorly situated and marshy and which mortgage was more than its purchase price, and on note secured by pledge of oil stored out of state. Was chargeable with losses. *Simes's Estate*, 9 Pa. Dist. 31.

Trustee is liable for loss, where he either uses the fund itself, or allows his sureties to have control of it; or loans it upon notes or other personal security. *Wolgemuth's Estate*, 16 Lanc. L. Rev. 229.

Testamentary trustee in contravention of his authority, reconverted funds back into real estate. He was liable for a breach of duty though it might be regarded judicious as a private venture. *Re Horne's Estate*, 28 Pittsb. L. J. (N. S.) 443.

If there is any delay in settling the estate it is the duty of the administrator to invest the fund or seek the advice of the court. *In re McGonigle's Estate*, 31 Pittsb. L. J. (N. S.) 27.

Citing *Bruner's Appeal*, 57 Pa. St. 46.

Trustee took a confession of judgment as security instead of a bond and mortgage as directed by the court and prevented the issuance of an execution, whereby lien was cut down to ten years. Was not liable for loss by limitation as his successor could have extended the lien indefinitely. *Rush v. Steele*, 93 Va. 526.

#### (b). COLLECTION.

Where administrators sold the leasehold estate of the intestate and took a promissory note of the purchaser on credit, without security, and purchaser became insolvent before completing payment. *King v. King*, 3 Johns. Ch. 552.

*Ackerman v. Emott*, 4 Barb. 626.

An executor having notice that there is a debt due the estate, is bound to active diligence for its collection; he may not wait for a request of the distributees.

In case the debt is lost through his negligence he becomes liable as for *devastavit*. Williams on Ex'rs. vol. 2, p. 1636 (5th Am. ed.); *Shultz v. Pulver*, 3 Paige, 184; 11 Wend. 366.

It seems, that if the case is one of such doubt, that an indemnity is proper, he must at least ask for it; and at any rate he takes the risk of showing that the debt was not lost through his negligence.

The statute of limitations does not begin to run in favor of an executor, as against a claim for damages occasioned by his negligence in collecting a debt due the estate from the time of the probate of the will, but at best only from the time of the loss. *Harrington v. Keteltas*, 92 N. Y. 40.

Coon, in 1855, recovered judgment which became a lien on Conover's farm, worth about \$4,000, subject to prior liens for more than this sum. Coon died in 1860; plaintiff, administratrix, put matter in the hands of an attorney, who issued execution and collected small amounts. Liens of prior judgment expired and left Coon's judgment first lien. On accounting, the administratrix was personally held liable for negligence in not collecting judgment. *Hollister v. Burrill*, 14 Hun, 291.

Citing: *Ruggles v. Sherman*, 14 John. 446; *McRae v. McRae*, 3 Bradf. 199; *Shultz v. Pulver*, 3 Paige, 182; 11 Wend. 361; *Redfield's Law & Practice*, 250; *Williams on Ex'rs*, 15, 43. *McLellan's Probate Practice*, 213.

A trustee failed to collect a debt admitted to be due by one apparently solvent, and was so indifferent to his trust that he delivered over the management thereof to others. His executor was required to respond for the amount lost through his negligence. *Davis v. Kerr*, 3 App. Div. 322.

A testamentary trustee failed to collect rents for four years, where the tenants could have been evicted and the premises rented to those who could pay. He was held chargeable therewith; but he was not chargeable with rents uncollected for three months in a vicinity where it was exceedingly difficult to rent and where there was some hope of payment; the latter being a reasonable exercise of his discretionary power. *Matter of McIntyre*, 24 App. Div. 167.

Executors did not attempt to collect a note which it appeared they might have collected. They were required to show that efforts to collect would have been useless and the fact of having relied upon an attorney's advice did not aid them. But it was otherwise where they had exercised some diligence in collecting a portion of other notes and it appeared that the rest probably could not have been collected. *Matter of Hosford*, 27 App. Div. 421.

Executors were held accountable for rent actually received but which they could not have compelled those occupying the premises to have paid. *Bruckerhoff v. Farias*, 52 App. Div. 256; s. c. aff'd, 170 N. Y. 427.

Testator gave property *causa mortis*. Though in advanced age and suffering from disease, there were reasonable grounds for supposing she

had testamentary capacity. Executor was not liable for failure to recover it. *Matter of Hall's Estate*, 16 Misc. 174.

Executor was allowed in full, payment to general creditors by offsetting claims due, pursuant to an agreement with deceased; but only pro rata for other settlements. *Matter of Van Houten*, 18 Misc. 524.

Executrix made no attempt to collect a note of a solvent debtor which she was aware of and which was the estate's main asset. Was chargeable therewith. *Matter of Wilbur*, 27 Misc. 126.

Executor not chargeable with amount of note due the estate from his attorney of which he had no notice, actual or constructive, except so far as in legal theory he is chargeable with his attorney's knowledge. *Matter of Guldenkirch*, 35 Misc. 123.

Neglect to enforce a security given upon a note rendered executor liable. *Willis v. Willis*, 16 Ala. 652.

An administratrix was allowed interest on a mortgage, where the mortgaged lands could not be sold without sacrifice. Was not chargeable with rents which could not be collected. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710.

Reliance on attorney's advice did not excuse breach of duty. *Pryor v. Davis*, 109 Ala. 117.

Executor failed to collect claim while debtors were solvent. An order authorizing a compromise did not excuse him as his neglect caused the necessity therefor. *Fraley v. Thomas*, 98 Ga. 375.

Administrator sold property for more than its value. Was liable for the balance of the purchase price lost through negligence though he had collected its actual value. *English v. Horn*, 102 Ga. 972.

An administrator must not attempt to collect bad debts; but this does not relieve him of the duty to pursue apparently good one though he may know of a possible defense. He should leave that to the debtor. *Egan v. Clark*, 87 Ill. App. 246.

Settlement by administrator of a claim for the death of his intestate without an order of court upheld. *Brink's Exp. Co. v. O'Donnell*, 88 Ill. App. 459.

See, also, *Cogswell v. Railroad Co.*, 68 N. H. 192; *Parker v. Steamboat Co.*, 17 R. I. 376.

Administrator was not chargeable with failure to collect funds in another state, not being under a legal duty to do so. *Purdy v. Purdy* (Ky.) 42 S. W. Rep. 89.

Executor failing to sell notes or enforce a judgment not liable in absence of proof of actual damage to the estate. *Lippert v. Lippert*, 110 Iowa. 550.

Trustee permitted his attorney to collect nine or ten different sums



at intervals in four years without attempting to recover the same from him. Held, that, as such action might be susceptible of explanation, it was error to sustain a demurrer to trustee's answer. *McRoberts v. Carneal*, (Ky) 46 S. W. Rep. 442; s. c. modified, 51 id. 800.

Executors negligently failed to collect a debt owing to decedent by distributee. Was held liable therefor. *Hoffman v. Armstrong*, 90 Md. 123.

Where executors, who are presumed to have the information at hand, report that certain debts are doubtful or desperate, the court cannot hold that they were collectible in the absence of positive evidence of the fact. *Wrightson v. Tydings*, 94 Md. 358.

Where the administrator took confederate money in good faith, in payment of sales of real estate, did not use it for his own purposes and could not pay it out, he was not chargeable. *Moffatt v. Loughridge*, 51 Miss. 211.

See, however, *Webster v. Whitworth*, 49 Ala. 201.

Executrix failing to collect a claim on advice of counsel whose opinion at the time seemed well founded, was held not liable. *Scudder v. Ames*, 142 Mo. 187.

Administrator was not charged with a debt due from him where he was insolvent throughout the administration. *McCoy v. Allen*, 9 Oh. C. C. 607.

Where an executor shows that he received all that a note and mortgage sold by him was worth, he cannot be charged with its face value. *Warren v. Hendricks*, (Or.) 66 Pac. Rep. 607.

Executor is liable, if testator's estate becomes subject to payment of debt for which testator was surety, when diligence would have collected it of the principal debtor. *Chamber's Appeal*, 11 Pa. St. 436.

When debt of co-executor was not secured as directed by testator's will and he died leaving the same unpaid, executor was held responsible. *Meegand's Appeal*, 28 Pa. St. 471.

Executor is answerable when debts are not collected promptly. *Charlton's Appeal*, 34 Pa. St. 473.

*Shaffer's Estate*, 46 Pa. St. 131; *Powell v. Hurt*, 31 Mo. App. 632; *Searborough v. Watkins*, 9 B. Mon. (Ky.) 540.

An executrix received goods from a debtor to the estate, in payment of an individual debt; was chargeable therewith as her first duty was to the estate. *Re Evans' Estate*, 1 Pa. Super Ct. 37.

Trustee causing delay and expense by willfully settling bad claims and resisting good ones was chargeable with the costs of an accounting. *Moore's Estate*, 15 Lane. L. Rev. 28.

Trustee never received anything from his predecessor and it was use-

less to attempt to collect anything. He was not liable to account, especially after sixteen years. *In re Wade's Estate*, 18 Lane. L. Rev. 91.

An executor who paid special legacies out of funds charged with the payment of debts, was chargeable therewith at demand of creditors and with interest from the time the estate should have been closed. *Davis v. Jackson*, (Tenn.) 39 S. W. Rep. 1067.

Executor was not charged with interest on amount collected as executor within the statutory period of settlement, but was charged therewith, on amounts collected individually but never accounted for. *Hill v. Fly*, (Tenn.) 52 S. W. Rep. 731.

It was shown that an attorney of the intestate received a larger sum than the administrator accounted for; but it was not shown that the latter received more than that. Administrator was not chargeable. *Hanlon v. Wheeler*, (Tex. Civ. App.) 45 S. W. Rep. 821.

Administrator entrusted a note to attorney for collection; note ran out and administrator could have made the money out of the attorney but waited until after he was insolvent. He was held liable for the debt. *Mills v. Talleys*, 83 Va. 361.

*Davis v. Chapman*, 83 Va. 67.

Failure of an administrator to seek redress from persons wrongfully withholding property of the estate notwithstanding a bond of indemnity given him by them, renders him liable. *Holmes v. Bridgman*, 37 Vt. 28.

*McCloskey v. Gleason*, 56 Vt. 264.

Executor failed to collect a note and rent which were collectible. He was chargeable therefor. But he was not chargeable with assets he failed to receive and it is not shown he was negligent in respect to. Was allowed expenses of contesting suits where he acted in good faith and by advice of counsel. *Re Hall's Estate*, 70 Vt. 458.

Administrator upon request to sue a controverted doubtful claim, demanded indemnity for costs. Was not chargeable where his demand was not complied with. *Harris v. Orr*, 46 W. Va. 261.

Executor failed to include his own note, due to the estate, in his accounting. Was held chargeable therewith. *Robinson v. Hodgkin*, 99 Wis. 327.

### (c). DISTRIBUTION.

An executor overpaid testator's widow, but as the latter had supported minors who were otherwise unprovided for, at her own expense, which in justice should have been charged against the latter's shares, the matter was adjusted upon an accounting by presuming that such over-payment was properly advanced out of the estate to the widow in payment for such support. *Matter of Braunsdorf*, 2 App. Div. 73.

Executor, who paid claim barred by statute of limitations, and paid discount on loans to pay debts, which was made necessary by payment of legacies, was allowed for neither, and was held personally liable to creditors for the devastavit caused thereby. *Matter of Oosterhoudt*, 15 Misc. 566.

Administrator was allowed for mourning attire for widow and minor daughter as part of funeral expenses. *Matter of Wachter*, 16 Misc. 137.

Beneficiary of a trust paid it to executor under a mistake of law. Latter was not liable after having distributed it to the legatees under the will. *Haynes v. McKee*, 19 Misc. 511.

A creditor was paid more than his share of the available assets. Administrator was liable for the amount above the amount he should have paid with trust company interest added. *Matter of Philp*, 29 Misc. 263.

Executors were not responsible for the honest and reasonable exercise of their discretion in the selection of securities sold to pay debts. *Matter of Fidelity Loan &c. Co.*, 23 Misc. 211.

The court refused to review the acts of a testamentary trustee who had discretionary powers as to apportionment of the income, in the absence of the abuse thereof. *Clark v. Clark*, 23 Misc. 272.

Administrator of an insolvent estate paid execution in full which was in the sheriff's hands and was a lien upon the property before the intestate's death, though estate was afterwards declared insolvent. Was allowed therefor. *Hullett v. Hood*, 109 Ala. 345.

Lands were ordered sold, part for cash and part on time. Accounts were filed a few months after receipt of the deferred payments. Was not such a delay in accounting as to charge administrator with interest. *Siniard v. Green*, 123 Ala. 527.

Evidence considered insufficient to sustain a charge of negligence in an administrator for not bringing to trial a suit on which final settlement of the estate had depended from the time of the first account, a period of over seven years. *Estate of Marre*, 127 Cal. 128.

An ancillary administrator held funds for less than a year, making no profit on them except that incidental to depositing them subject to check in the bank of which he was president. He was not chargeable with interest especially where he was not requested to distribute. *Dorris v. Miller*, 105 Iowa. 564.

Administrator was not liable for payment of claim out of the prescribed statutory order where there was enough to pay all in full and no one is injured thereby. *Masterson v. Canble*, 15 Ind. App. 515.

Payment in good faith and on sufficient consideration of small sums though without proper demand was not negligence for which an administrator was chargeable. *Beale v. Barnett*, (Ky.) 64 S. W. Rep. 838.

Executor, who made payments without order of court to legatees, under a will subsequently set aside, was not allowed therefor. *Succession of Heffner*, 49 La. Ann. 407.

Executor is answerable for corrupt negligence in failing to oppose illegal claims against the estate. *Parson's v. Mills*, 2 Mass. 80.

And for negligence in failing to pay funeral expenses of intestate. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

Executors, who, within the year made a distribution without taking the required refunding bond, were held liable, notwithstanding confirmation of their accounts, on a judgment obtained ten years thereafter. *Robin's Estate*, 180 Pa. St. 630.

Release by a legatee of a third prevented charges against the executor as to that third being made for the benefit of the other two-thirds. *Hertzler's Estate*, 192 Pa. St. 531.

An executor who had improvidently paid a creditor was allowed *pro rata* out of a dividend. *Taylor's Estate*, 4 Pa. Dist. 691; s. c., 17 Pa. Co. Ct. 166.

Administrator sold property to pay debts subject only to the principal of a mortgage thereon, as the rate of interest was in dispute. He was allowed for the payment of accrued interest when the dispute was settled. *Darrah's Estate*, 6 Pa. Dist. 178.

Executor was allowed for preferred debts paid before notice of adverse claim. *Re Corcoran's Estate*, 27 Pittsb. L. J. (N. S.) 112.

One hundred dollars was a reasonable allowance for a tombstone where the personal property did not exceed \$2,000. Executors, who delivered property to the life tenant without security, were liable to remaindermen for life tenant's waste. *Re Griffiths Estate*, 1 Lack L. News, 311.

Administrator appointed in different states, was not liable to answer to a creditor in one state for a devastavit committed in another state. *Bank of Wayne v. Fulton*, (Tenn.) 19 S. W. Rep. 297.

Executor paid specific legacies without taking a refunding bond, while there were outstanding debts. Were chargeable though he had no notice of them. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226.

#### (d). DISBURSEMENTS.

A guardian is not entitled to compensation for his services to the estate as an attorney, even though done at the request of his co-executor and the legatees and next of kin. *Cottier v. Munn*, 41 N. Y. 113.

See, also, *Morgan v. Hannas*, 49 N. Y. 667; *Binsse v. Paige*, 1 Keyes, 87.

The trial court found that an executor employed his partner as an individual to defend claims against the estate. It was held that while the partnership could make no charge for such service, the partner,

if employed as an individual, might do so. *Parker v. Day*, 155 N. Y. 383; rev'g s. c., 12 Misc. 510.

An administrator took a second appeal after the first had reasonably settled the merits of the claim against him. It was held to be an imprudent administration of the estate as it was not reasonably certain that he would thereby relieve the estate of a claim greater than the cost of appeal, and he was refused allowance for attorney's fees. *Gross v. Moore*, 14 App. Div. 353.

Administrator was allowed to charge the estate with costs received by his attorney for collecting a claim, and credit himself therewith, but was not allowed for uncollectible claim paid by him, nor for attorney's services in investigating a relationship irrelevant to the suit. *Matter of Van Buren*, 19 Misc. 373.

Administrator was allowed for reasonable counsel fees on his settlement in court. Was not allowed counsel fees in improperly contested suits. *Prior v. Davis*, 109 Ala. 117.

An executor appearing and successfully contesting a will for the estate, and those interested under it, was allowed fees as an attorney. *Alexander v. Bates*, 127 Ala. 328.

Where attorney's services were rendered in an effort to improperly charge the estate in executor's favor their fees were not allowed. *Noble v. Jackson*, (Ala.) 31 South Rep. 450.

Administrator was charged with interest, where administration was unreasonably protracted for more than twenty-five years. *Jacoway v. Hall*, 67 Ark. 340.

Administrator of an insolvent estate was allowed for the cost of preserving a vineyard, though the estate was mortgaged. *Estate of Smith*, 118 Cal. 462.

Administrator was allowed for the care of stock till it could be advantageously sold. *Estate of Fernandez*, 119 Cal. 579.

For delay in settlement of estate administrator was not held for damages beyond interest on the balance in his hands. *Estate of Armstrong*, 125 Cal. 603.

Administratrix of an estate consisting of an insurance policy, contested by the company, employed counsel without order of the court on a contingent basis, where the fee was higher than it would have been in an unconditional employment. The fee was reasonable, and she was allowed therefor. *Filbeck v. Davies*, 8 Col. App. 320.

Executor believing himself entitled thereto retained fees for his services as attorney. Was chargeable with interest. *Davidson v. Story*, 106 Ga. 799.

Special administrator to defend a claim was not allowed costs and

counsel fees on appeal, where it appeared that he had not acted in good faith or with prudence. *Switzer v. Kee*, 69 Ill. App. 499.

Trustee was not entitled to credit for expenses concerning litigation not necessary for the protection of the principal fund, and was charged with the amount of its depletion. *Neritt v. Woodburn*, 82 Ill. App. 649.

Where the estate had no interest in the litigation administrator was not allowed expenses therein. *Cullen v. State*, (Ind. App.) 62 N. E. Rep. 759.

See, also, *Harris v. Coates*, (Id.) 69 Pac. Rep. 475.

An attorney employed by an administrator refused to pay over money collected, claiming it for his services. Administrator, having exercised due care in selection of the attorney, was not chargeable. *In re Beam*, 8 Kan. App. 835.

Testamentary trustee, in anticipation of actual income, paid for the support and maintenance of the *cestui que trust* and was allowed reimbursement therefor, but was not allowed attorney's fees for an unsuccessful defense to an action by a creditor until after the debt was paid. *Young v. Bullen*, (Ky.) 43 S. W. Rep. 687.

Where an action should not have been brought in a fiduciary capacity, it was error to allow administrator a counsel fee. *Thompson v. Thompson*, (Ky.) 65 S. W. Rep. 457.

Fees for services of attorneys in suit to contest will were allowed, though will was set aside because made in violation of a prohibitory law. *Fenner v. Succession of McCan*, 49 La. Ann. 600.

Tutor of minor paid expenses in excess of revenue. The payments were not recommended at a family meeting and were repudiated by the minor at majority. The tutor was not allowed for them. *Re Watson*, 51 La. Ann. 1641.

Executor was not allowed counsel fees for contesting the will as it was not a part of his duty to contest it. *Re Johnson's Estate*, 4 Oh. N. P. 156.

Allowance of \$550 in an estate of over \$23,000 for four years' counsel services embracing among other things an abstract of title, two suits and the accounting; was not excessive. *Re Wolfe*, 4 Oh. N. P. 336.

Executrix purchased tombstone without consulting parties interested. Was allowed therefor. *Titlow's Estate*, 5 Pa. Dist. 40.

Executors made payments under mistake of law; were chargeable therewith. *Monroe's Estate*, 9 Kulp. 334.

#### (c). CARE OF ESTATE.

Negligence for administrator of an estate, twelve miles from a bank

to keep money of estate in living rooms back of store, for twelve months. *Cornwell v. Deck*, 8 Hun, 122.

See, also, *Chambersburg Savings Bank v. McLellan*, 76 Pa. St. 203; *Furman v. Coe*, 1 Caines Cases in Error, 96.

The defendant, an administrator, negotiated the sale of the intestate's farm. A deed signed by the heirs was given and the administrator received price and placed it in a bank, which, two months thereafter, failed. The defendant was not acting as administrator and should have paid the money over directly (*Mills v. Mills*, 115 N. Y. 80), and he was not protected by the rule governing trustees and public officers depositing trust funds, without negligence, in a bank of good standing, in which case liability does not attach. (*People v. Faulkner*, 107 N. Y. 477.) *Harlow v. Mills*, 58 Hun, 391; s. c. aff'd, 128 N. Y. 650.

Receipts for payments executed by legatees, though not under seal, reciting that, in consideration thereof, the executors were discharged from liability for claims against the estate, were deemed releases and bound those executing them, especially after the lapse of fifteen years. *Matter of Hodgman*, 11 App. Div. 344; s. c. aff'd, 161 N. Y. 627.

Executors having no power of sale as to lands, their account thereto was as agents of its owners and not executors of the estate. *Matter of Hodgman*, *supra*.

Testamentary trustee, directed to invest, deposited the funds in a trust company, and used a large amount for his private purposes. He was charged with legal interest on all; but was allowed advances for support of *cestui que trust*, made in anticipation of income that was not forthcoming, by reason of the lack of investments. *Matter of Muller*, 31 App. Div. 80.

Trustee compromised a suit for the recovery of a piece of property, which was claimed by another and his title to which he was advised by his counsel was doubtful, and which was of no practical utility, as it had been set aside for a street and would have to be kept open for light and air. His rents from certain properties were small; but the premises were out of condition, in poor locality and it was not probable that any diligence would have increased them. Was not negligent. Nor was he liable for a failure to rent certain premises to other tenants at an advanced price, where he could not do so without purchasing improvements made by the present tenants, when there was no funds of the estate available and the law did not permit him to mortgage; but he was chargeable with a failure to enforce a tenant's covenant to pay taxes. *Gomez v. Gomez*, 33 App. Div. 379.

Testamentary trustee, who was expressly relieved from liability for loss except through gross negligence, granted an extension of a mortgage

without requiring a responsible party to assume the payment of the bonds. He also allowed the party in possession of the mortgaged premises to take the insurance money received, after the premises had been burned, upon the latter's verbal promise to repair. The former was held to be merely an error of judgment, but the latter, gross negligence. *Matter of Olmstead*, 52 App. Div. 515; s. c. aff'd, 164 N. Y. 571.

Executor continued testator's business by his direction. He was liable individually for his servant's negligence. *McCue v. Finck*, 20 Misc. 506.

Administrator deposited estate funds in a bank of which he was cashier, knowing of its coming insolvency. Was chargeable with the loss upon its failure. *Matter of Scudder*, 21 Misc. 179.

Administrators paid estate funds, distributable to next of kin, to the surrogate before judicial settlement of their accounts. There was no warrant or power therefor under the Code of Civil Procedure, section 2537, and the administrators were liable for a loss thereof. *Matter of Te Culver*, 22 Misc. 217.

Sale of stock was deferred on account of the inability to settle the estate. Administrator was not chargeable with its decrease in value. *Matter of Thorp*, 31 Misc. 581.

Administrator allowed funds to remain in a bank, of which he was a stockholder, director and the cashier, on two per cent interest for two years instead of distributing them. No objection having been made till final accounting, and no demand for legacies having been made, he was charged only with the interest the funds had actually earned. *Matter of Sudds*, 32 Misc. 182.

Administratrix was charged with the value and interests of a saloon together with profits, minus the expense of conducting it, where she allowed it to pass under the control of her husband who operated it for her. *Matter of Suess*, 37 Misc. 459.

Executor is liable when through failure to pay the taxes, real property belonging to the estate is lost. *In re Hertemen*, 73 Cal. 545.

Trustee mingled trust funds with his own, using them as his own, without investing them for the estate. Was chargeable with compound interest. *Bemmerly v. Woodward*, 124 Cal. 568.

An administrator was not held liable for the failure of his counsel to take advantage of a technical defect of mortgagee's complaint on foreclosure, nor for paying off a lien on property in the prudent exercise of his duties, though, on a subsequent sale, it brought less than the amount of the lien. *Re Armstrong Estate*, 125 Cal. 603.

Administrator was charged with interest on an investment directed by the court, in absence of proof that interest could not be collected.



Was charged with interest on a portion thereof retained, in absence of proof that it was for the use of estate. *McIntire v. McIntire*, 14 App. D. C. 337.

Negligence, by reason of which money of the estate was stolen from the administrator's person. *Tarver v. Torrance*, 81 Ga. 261.

Administrator who continued decedent's business beyond the time permitted by Ga. Code, sec. 2545, acted at his peril and was chargeable. *King v. Johnson*, 96 Ga. 497.

Heirs set apart a fund for the payment of an annuity provided for by the will. The trustees were not chargeable with failure to properly invest, where the will did not direct them as trustees to do so. *Leslie v. Moser*, 163 Ill. 502; rev'g s. c., 62 Ill. App. 555.

An administrator without authority to invest money, but bound to have it ready for payment upon the demand of the one entitled to it, was not chargeable with interest if he had received none. *Haines v. Hay*, 67 Ill. App. 445; s. c., rev'd on other grounds, 169 Ill. 93.

Executors, in charge of funds, held by their testator in trust to be turned over on the perfecting of a title, refused to turn them over on the perfecting of the title by limitation, but insisted on the execution of deeds or the institution of proceedings to complete the title. They were chargeable with simple but not compound interest. *Mathewson v. Davis*, 191 Ill. 391; rev'g s. c., 91 Ill. App. 153.

An executor *de son tort* is chargeable with the diligence of an ordinarily prudent man. *Rohn v. Rohn*, 98 Ill. App. 509.

Administrator may deposit funds in a bank for a reasonable time while awaiting order of distribution. But, where he receives from the bank a certificate of deposit, payable at a specified time after date with interest, it is a loan and he is liable for a devastavit. *Caruthers v. Caruthers*, 99 Ill. App. 402.

Executor failed to withdraw his entire deposit from his bank based on the apparently well founded assumption that such action would precipitate an immediate suspension. Was exonerated from liability. *Cook v. Barnes*, (Ky.) 43 S. W. Rep. 682.

Insurance company gave "a vacancy permit" for 30 days agreeing to extend it for another 30 days upon application. Executor was negligent in not making the application, and liable for the destruction of the property. *Henderson Trust Co. v. Stuart*, (Ky.) 55 S. W. Rep. 1082.

Trustee is not chargeable with interest where the money was paid out as fast as it was collected. *Doom v. Howard*, (Ky.) 64 S. W. Rep. 469.

Stocks were properly sold by executors at private sale in small lots, as large sales at public auction would tend to depreciate the market value. *Succession of Kaiser*, 48 La. Ann. 973.

It was negligence in defendant, as an administrator, to deposit funds of the estate in a bank, which defendant's president knew was insolvent and of whose financial condition its other officers having the matter in charge had enough information to put them upon inquiry. *Germania Safety Vault &c. Co. v. Driskell*, (Ky.) 66 S. W. Rep. 610.

Administrator was charged with interest at bank rates, where the estate funds were in deposit in his own firm subject to check. *In re Brewster's Estate*, 113 Mich. 561.

Executor was not liable for selling assets at an unpropitious time to obtain necessary funds, nor for bartering assets in payment of debts, where he had the approval of the court. *Owen v. Potter*, 115 Mich. 556.

Trustee held money without using it pending judicial determination of the title to it. Was not chargeable with interest thereon. Also discharged mortgage for less than its face value. Was not liable where he realized the full value of the mortgaged property. *Calkins v. Bump*, 120 Mich. 335.

In charging an executor of several estates with interest for using estate funds for itself, the amount was arrived at by deducting the proportion of cash on hand belonging to the several estates from the cash balance due them. *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Executor failed to withdraw trust funds from his bank after its resumption of payment, upon the failure of an association in which it was largely interested, but where it was agreed that the bank's creditors should not withdraw. He was not negligent. *Harding v. Canfield*, 73 Minn. 244.

Administrator was not charged for the difference between par value and market value of bonds where it was not shown that sale was for less than the latter. *Ladd v. Stephens*, 147 Mo. 319.

Executor deposited estate funds to his own credit, though he appraised the bank of his relationship. Was liable, upon the bank's becoming insolvent. *Re Estate of Horner*, 66 Mo. App. 531.

Executor failed to keep accounts. On the question of the propriety of a claim, the doubt was resolved against him. *Hetfield v. Debaud*, 54 N. J. Eq. 371.

An executrix failing to keep account of amount realized from sale of property, was charged with inventoried value. *Hunt v. Smith*, 58 N. J. Eq. 25.

Due diligence in selection of an attorney was held to excuse an administrator for the attorney's mistakes. *Sharpe's Case*, 61 N. J. Eq. 601.

Trustees may be sued as individuals for negligence in the management of the estate. *O'Malley v. Gerth*, (N. J. L.) 52 Atl. Rep. 563.

Administrators were not chargeable with property, which came into

their hands, and which was of little or no value, and on which they were unable to realize a profit. *Janes v. Brunswick*, 8 N. M. 105.

Administrator's failure to plead the statute of limitation was in bad faith. Held, liable, though by statute it was left to his discretion. *Person v. Montgomery*, 120 N. C. 111.

Trustees, acting within the scope of their authority and exercising such diligence as men of ordinary prudence manifest in like affairs of their own, were not liable for loss of the trust estate. *Miller v. Proctor*, 20 Oh. St. 442.

Administrator transferred funds from a bank giving interest, to his own, where none was given. Was chargeable with loss of interest. *Dick's Estate*, 183 Pa. St. 647.

Executor appropriated a lease of liquor saloon, the good will of the business and the right to transfer of the license without attempting to find a purchaser. Was chargeable with amount it was proved they could have been sold for. *Buck's Estate*, 185 Pa. St. 57.

Executor was not charged with the difference between the inventoried value and the price received on a sale, forced to secure funds. *Semple's Estate*, 189 Pa. St. 385.

Executrix was chargeable with interest, where she mingled estate funds with her own and had the use thereof. *Meyer's Estate*, 13 Pa. Super. Ct. 476.

Executor converted interest-bearing securities, convertible at any time, for the purpose of putting the proceeds in his own bank. Was chargeable with interest thereon. *Dolan's Estate*, 15 Pa. Super. Ct. 20.

Where testator released his sons from liability for loss arising from deciding what was for the best interest of the estate, the court could not scrutinize transactions as long as there was no fraud. *Markle's Estate*, 5 Pa. Dist. 47; s. c., 17 Pa. Co. Ct. 337.

An executor may, in the exercise of his discretion, sell at private sale below inventoried value to prevent greater loss by delay attendant on a public one. Though he did not, immediately upon his appointment sell at public sale, for good reasons. *Orne's Estate*, 7 Pa. Dist. 337.

Executors were not charged for failure to apply rents to pay principal and interest, where they were insufficient to pay the principal and it did not appear that the mortgagee would have accepted less than both principal and interest. *Hall's Estate*, 8 Pa. Dist. 8.

Executor, in honest exercise of his discretion, held investments coming into his hands in hope of a rise. Was not chargeable with loss. *Donnelly's Estate*, 8 Pa. Dist. 182. Executor, under advice of counsel, continued the business with an irresponsible partner. Was chargeable with value shown by the appraisement of testator's interest. *Re Kalbfell's Estate*, 27 Pitts. L. J. (N. S.) 280.

Depository bank showed no signs of insolvency, though there were rumors to that effect. Executor was not liable for failure to withdraw funds. *Re Seaman's Estate*, 2 Lack. L. News 271.

Administratrix purchased all assets and assumed all debts of deceased partners for the purpose of protecting the estate. Was not liable, having acted with the best judgment at the time. *Atherton's Estate*, 8 Kulp 150.

Order of court gave discretion in sale of cotton. Not liable for depreciation from holding it too long, in the absence of bad faith. *Nicholson v. Whitlock*, 57 S. C. 36.

Stock being low it seemed the best interest of the estate to hold it for a rise. Administrator not liable though it subsequently became worthless, especially as such action was taken at the request of the beneficiaries. Administrator was not responsible for advice of counsel in regard to defending a suit. *Pearson v. Gillenwaters*, 99 Tenn. 446; s. c. aff'd, id. 462.

Executor made deposit in a bank, solvent at the time, but which subsequently, without warning, became insolvent. Was not liable. *Re Kohler's Estate*, 15 Wash. 613.

#### (f). LIABILITY FOR NEGLIGENCE OF CO-EXECUTOR.

If one executor allows his co-executor to receive and waste the estate he is liable; but it is not negligence to entrust co-executor with securities to sell on his promise to pay proceeds into general funds. *Adair v. Brimmer*, 74 N. Y. 541.

See *Sherman v. Page*, 85 N. Y. 128; *Burt v. Burt*, 41 N. Y. 46; *Remington v. Walker*, 99 N. Y. 626.

Where the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond, secured by mortgage on real estate in Ohio, which was guaranteed by the widow, who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, held, that it was the right and duty of the survivor to accept the securities, and that he could not be made personally liable for so doing.

The rule applicable to executors, as such, is that each is liable only for his own acts, and one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein. *Sutherland v. Brush*, 7 Johns. Ch. 22; *Monell v. Monell*, 5 id. 283;

*Manahan v. Gibbons*, 19 Johns. 427. *Ormiston v. Olcott*, 84 N. Y. 339, rev'g 22 Hun, 270, and aff'g decree of surrogate.

**From opinion.**—"Nor is the rule more stringent, where executors are also trustees, as claimed in *Bates v. Underhill*, 3 Redf. 365. The decision in that case is rested wholly on the English rule, which is not so rigorously enforced in this country. *Hill on Trustees*, 309, note 1; *Story's Eq. Jur.* § 1280. The authorities in this state do not justify the distinction sought to be made. *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Kip v. Deniston*, 4 Johns. 23; *Kirby v. Turner*, Hopk. Ch. 330; *DeForest v. Fulton F. Ins. Co.*, 1 Hall 130. There would be neither wisdom nor justice in a rule which would practically end in making a trustee a grantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent."

Where an executor receives funds of the estate and delivers them to a co-executor, or does any act by which the funds come to the hands of the latter, and but for which he would not have received them, and he diverts or wastes them, said executor is liable for the loss. *Langford v. Gascoyne*, 11 Ves. 335; *Ames v. Armstrong*, 106 Mass. 18; *Candler v. Tillett*, 22 Beav. 257; *Clark v. Clark*, 8 Paige, 152; *Monell v. Monell*, 5 Johns. Ch. 296; *Williams on Ex'rs*, 1927.

But where an executor is merely passive, not obstructing the collection or receipts of assets by his associate, he is not liable for the latter's waste, unless he assented to it, or having knowledge of a misapplication intended, or in progress, and having the means to prevent it by proper care, neglected to do so. *Sutherland v. Brush*, 7 Johns. Ch. 17; *Adair v. Brimmer*, 74 N. Y. 566; *Williams v. Nixon*, 2 Beav. 472.

Where an executor loaned to his co-executor money, taking his individual note therefor, upon the faith of representations of the co-executor, that he desired to use the money to pay debts of the estate, and where it appeared that it was not so used, held, that the money loaned was not a proper charge against the estate.

So also, where an executor received funds of the estate, which he delivered to his co-executor, who misappropriated them, held, that said executor was liable therefor.

Where, however, two executors, under a power of sale in the will, entered into joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated: held, that in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the co-executor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable. *Williams on Ex'rs*, 1937, note *u*; *Perry on Trusts*, secs. 420, 423. That, at least is the law in this state. *Kip v. Deniston*, 4 Johns. 25; *Monell v. Monell*, 5 Johns. Ch. 296.

Also held, that he was not made liable by acts of negligence on his part, which in no way were connected with or contributed to the loss. *Croft v. Williams*, 88 N. Y. 384, modifying 23 Hun, 102.

Where executors or trustees permit a third party to manage and control the estate, they adopt him as their agent, are responsible for his conduct, and liable for losses occasioned by his improper or negligent management.

*It seems*, that while an executor or trustee is not liable for acts of a co-executor or co-trustee, which he has not the means of preventing or guarding against, or from which he has no reason to apprehend danger to the estate, he is bound to exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his associate; and if he delivers over to him the whole management of the estate, he is responsible for losses which might have been prevented by reasonable diligence upon his part.

The widow of the testator, who was the co-trustee, and held liable jointly with W., was by the will entitled to the income of one-third of the estate during life. The principal had never been in the hands of W. It was treated, however, as a fund in his hands, and he was directed to pay into the U. S. Trust Co. the portion thereof to which the legatees who recovered were entitled to have paid to them on the death of the widow, the interest meanwhile to be paid to her. Held, error; that, as the fund was lost by negligence with which the widow was equally chargeable, she was not entitled to recover of her co-trustee, but should be compelled to contribute the income toward her proportion of the loss; also, that it would be oppressive to require W. to deposit the principal. *Earle v. Earle*, 93 N. Y. 104.

As to liability of executor for debt due from himself to the estate, see *Baucus v. Stover*, 89 N. Y. 11.

The will of W. created among other trusts one for the benefit of the plaintiff, a portion of the fund of which was directed to be separately invested and the income applied to her use during life. The testator was at his death a member of the firm of W. & M. The surviving members of the firm, one of them the defendant G., an executor and trustee under the will, continued the business. G. retained in his possession the books of account, papers, securities, etc., belonging to the estate. Assets realized from the estate were, under the authority of G., paid to the new firm and were, with the knowledge of the defendant, McKesson, a co-executor and trustee, used in its business, the firm paying interest, which was credited in account books of estate to the estate. No portion of the estate was set apart, as the plaintiff's share. The firm failed and the funds of the estate in its hands were lost. McKesson was

liable for allowing the funds to accumulate in the hands of the firm without requiring the same to be invested, as directed by the will; also if he had not actual knowledge of the fact, that the firm was using the funds, he could have ascertained that fact by making inquiries, and was negligent in failing to do so. He should at least have sought to have the funds properly invested. G., without the knowledge of McK., hypothecated securities belonging to the estate to secure loans for his own benefit or for that of the firm. Held, that McK. was not liable for the loss; that the failure to make a separation of the securities, as contemplated by the will, did not render him liable, as this did not induce or cause the spoliation, nor would such a separation have prevented it.

McK. was charged with interest on the losses, computed with annual rests. As there was no wrongful intent on his part, this was error; and the simple interest, at five per cent., was a proper charge. *Wilmerding v. McKesson*, 103 N. Y. 329, aff'g judg't gen. term mod'g and aff'g judg't for pl'ff.

**From opinion.**—"An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge. \* \* The general rule \* \* \* is laid down in *Williams on Executors*, 6 Am. Ed. 1820, as follows: 'A devastavit by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it, for the testator having misplaced his confidence in one shall not operate to the prejudice of another.' For the devastavit of a co-executor or trustee an executor or trustee is not liable, unless it appears that he had knowledge, or assented to the acts done, or had notice which should excite his suspicion and put him upon inquiry. *Sutherland v. Brush*, 7 Johns. Ch. 17; *Sherman v. Parish*, 53 N. Y. 483; *Peter v. Beverly*, 10 Peters, 532; *McKim v. Aulbach*, 130 Mass. 481."

Several persons, including the defendants, were executors of a will; two of them, "C" and "B," took charge and possession of the estate and assumed to administer it, and the defendant had no actual connection with it. "C" and "B" were regarded as prudent, reliable business men, but they misappropriated a portion of the estate and failed. The defendant was not liable.

The mere fact that one of two or more executors is passive, and does not participate in the administration or interfere with the acts of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts. *Cocks v. Hariland*, 124 N. Y. 426.

**Distinguishing** *Earle v. Earle*, 93 N. Y. 104; *Remington v. Walker*, 99 id. 626. See, also, *Nanz v. Oakley*, 120 N. Y. 84.

An executor received funds of the estate and voluntarily delivered them over to his co-executor. He was not allowed to relieve himself of responsibility by showing that they were under the latter's sole control and management. *Thompson v. Hicks*, 1 App. Div. 275.

One executor had the active management of the estate, but frequently consulted with the other executor in regard thereto; and no action was taken that the latter either did not or could not have known and given advice upon, and which, therefore, had at least her implied consent. She was held equally chargeable with the other's misconduct as to investments. *Matter of Peck*, 31 App. Div. 407.

It was deemed advisable by all concerned to exclude one of the trustees from the management of the estate except in a few minor ministerial particulars. He was not liable for defaults of his co-trustee where he had no knowledge thereof and the condition of the estate was such as not to excite suspicion. But, where he learned of an act of devastavit by his co-trustee and negligently failed to notify his *cestuis que trust* he was liable for whatever loss they might have averted by proceedings, had they been notified. *Matter of Westerfield*, 48 App. Div. 542.

See, also, *Matter of Westerfield*, 32 App. Div. 324; *id.*, 40 *id.* 610.

An administratrix had no knowledge of the misapplication of the funds of the estate by her co-administrator, and was guilty of no negligence in not discovering it. She was not liable for the latter's defaults. *Matter of Adams*, 51 App. Div. 619.

Testamentary trustee was not liable for loss by his co-trustee who was the sole acting trustee and in charge of all the funds. *Meldon v. Devlin*, 20 Misc. 56.

Negligence of an executor in allowing his co-executors to waste the estate. *Clark v. Clark*, 8 Paige, 152.

Two executors signed a receipt and the money passed into the possession of one of them. Both were liable for it. *Monell v. Monell*, 5 Johns. Ch. 283.

*Mesick v. Mesick*, 7 Barb. 120.

The fact that deceased, while alive, had given to those, who, after his death became his trustees, each different portions of his estate to manage, did not justify them, as trustees, in so dividing the responsibility as to relieve either of the duty of general supervision necessary to the safety of the estate. *Birmingham v. Wilcox*, 120 Cal. 467.

Trustee moved to another city: whereupon his co-trustee managed the estate himself without the other's assistance. Held, it was not an abandonment of his discretionary power or negligence in the supervision of



the trust and he was not liable for his co-trustee's default. *Colburn v. Grant*, 16 App. D. C. 107; s. c. aff'd, 181 U. S. 601.

Administrator was held liable for his co-administrator's waste, where his negligent conduct enabled the latter to commit it. *Whiddon v. Williams*, 98 Ga. 310.

An executor, permitting a co-executor to retain funds for private use instead of turning them over to trustee as directed by the will, was held liable for the latter's mismanagement and for payments to one not properly qualified as trustee though *cestuis que trust* consented. *Grundy v. Dyre*, (Ky.) 48 S. W. Rep. 155; s. c. aff'd, 49 S. W. Rep. 469.

Trustee to sell property authorized his co-trustee to receive the purchase price and consented to the ratification of the auditor's report of distribution. He was liable for his co-trustee's default. *Barroll v. Forman*, 88 Md. 188.

Where two executors united in a joint bond, and one of them embezzled part of the funds, each is liable for the other's acts as to property coming into their joint possession. *Ames v. Armstrong*, 106 Mass. 15.

*Brazen v. Clark*, 5 Pick. 96.

A trustee joined with his co-trustee in the conveyance of trust property, so as to permit mismanagement by the latter; held that, if it could not be collected from the co-trustee, the other would be liable. *Bechtold v. Read*, (N. J. Eq.) 32 Atl. Rep. 694; s. c. modified, 54 N. J. Eq. 407.

Joint executors were to each receive one-half of the estate as trustees from themselves as executors. One held a fund, by mistake included in the account of the executors, but never paid into the estate. His co-executor was not liable to latter's *cestui que trust* for the loss of the fund. *Cassel's Estate*, 180 Pa. St. 252.

Executrix, who renewed liquor license in her own name and continued the testator's business, was chargeable with the good will of the business. Co-executor was not chargeable, as no part of the estate ever came within his control. *Mueller's Estate*, 190 Pa. St. 601; aff'g s. c., 8 Pa. Dist. 70.

Testamentary trustee was held for what he received and not for what he jointly receipted for. *Birely's Estate*, 7 Pa. Dist. 395.

Executor's estate was not charged with his co-executor's default, having received no part of the estate. *Graham's Estate*, 8 Pa. Dist. 479.

Executors, not under bond, are not usually liable for the default of their co-executors. *Swift's Estate*, 6 Northampton Co. Rep. 105.

Co-executor was not chargeable with funds, which it was not shown, were received or lost by him through his negligence. *Ripple's Estate*, 9 Kulp, 66.

## IV. Trustees, Directors, Financial Agents, Assignees, &amp;c.

Trustees, directors and financial agents are bound to exercise the same degree of care, diligence and capacity, that men of common prudence ordinarily exercise under the same circumstances. *Hun v. Cary*, 82 N. Y. 65; *Jones' Appeal*, 8 W. & S. (Pa.) 143; *Waterman v. Alden*, 42 Ill. App. 294; *Wharton on Negligence*, sec. 517.

The diligence is that of a good and conscientious business man, when possessed of the qualifications of the mandatory in question. *Wharton on Negligence*, sec. 519.

Therefore the mandatory is not required to put forth extraordinary effort, unless that be specially engaged, but should be uniform in the exercise of the requisite care and capacity. *Wharton on Negligence*, sec. 519.

Such agents are not liable for mistakes of judgment within the scope of their powers. *Sperings' Appeal*, 71 Pa. St. 11. And when they are invested with the management of funds, according to their judgment and discretion, they are chargeable only for gross negligence and willful mismanagement. *Harvard College v. Amery*, 9 Pick. 446.

Nor are they liable for the acts of those necessarily, or according to usage, selected to assist in the execution of the business committed to them, provided they use due care in the selection of competent and suitable sub-agents, and in the continued employment of them. *Wharton on Negligence*, sec. 523.

The trustees of a bank are bound to exercise the same degree of care that men of common prudence ordinarily exercise in their own affairs. *Scott v. DePeyster*, 1 Edw. Ch. 513, 543; *Sperings' Appeal*, 71 Pa. St. 11; *Hodges v. N. E. S. Co.*, 1 R. I. 312; *S. C. 3 R. I. 9*; *The Liquidators, etc. v. Douglas*, 11 Session Cases (3rd Series), 12 (Scotch); *The Charitable Corporation v. Sutton*, 2 Atkyns, 405; *Litchfield v. White*, 3 Sandf. 545; *Story on Bailments*, sec. 182.

A savings bank, while insolvent, built a banking building at an improper cost, and thereafter failed. In an action brought by the receiver of the bank against the trustees for damages caused by alleged improper investments of its funds, the trustees were held liable for reckless extravagance. It was not necessary to join all the trustees. *Hun v. Carey and others*, 82 N. Y. 65, aff'g judgment on cross appeals.

Where the interest, received from the investments of the funds of depositors in a savings bank, exceeded the interest paid, the trustees of the bank were held not to be liable under chapter 371 Laws of 1875, although the expenses of the bank exceeded its earnings and income. In this case no fraud, or other misconduct, or want of ordinary care and skill, was imputed to the trustees. *Van Dyck v. McQuade*, 86 N. Y. 38.

Distinguishing *Hun v. Cary*, 82 N. Y. 65: *Austin v. Daniels*, 4 Den. 300; *F. Ins. Co. v. Jenkins*, 3 Wend. 130; *Butts v. Wood*, 37 N. Y. 317; *Gillet v. Moody*,

3 N. Y. 479; *Robinson v. Smith*, 3 Paige, 222; *Cunningham v. Pell*, 5 id. 607; *Com. Bank v. Union Bank*, 11 N. Y. 203; *Osgood v. Laytin*, 3 Keyes, 521; *People v. Sup'rs*, 4 Barb. 64; *Vanderkar v. R. & S. R. R. Co.*, 13 id. 390.

An assignee for the benefit of creditors is liable for ordinary negligence, or the want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business. He has no right to carry on the business, but must convert the assets. *Duffy v. Duncan*, 32 Barb. 587. *In the matter of accounting of Dean*, 86 N. Y. 398.

See *Litchfield v. White*, 7 N. Y. 438.

The assignee for the benefit of creditors is bound to use the diligence that a person of ordinary prudence would employ in the collection, recovery and application of assets. Devastavit may be charged from neglect, intentional omission, actual misappropriation and positive fraud. Negligent omission to attack a fraudulent transfer was held to be sufficient to hold the defendant liable. *In re Cornell*, 110 N. Y. 351.

*In re Cohn*, 78 N. Y. 248.

If directors, through gross neglect or inattention, suffer corporate funds to be lost or wasted, they are liable therefor. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; rev'g 23 Hun, 237, and ordering judgment for plaintiff.

Same case, 99 N. Y. 185; reversing 34 Hun, 352, s. c., 43 Hun, 458; citing *Robinson v. Smith*, 3 Paige, 222; *Cumb. Coal Co., v. Hoffman Coal Co.*, 30 Bard. 159; *Cunningham v. Pell*, 5 Paige, 607, 613.

An agent loaned principal's money on second mortgages and worthless bonds. The principal, without knowledge of prior liens, received interest; on foreclosure, property sold for less than prior liens. The agent was liable for negligence. *Whitney v. Martin*, 88 N. Y. 535.

See *Heinemann v. Heard*, 50 N. Y. 35; Story on Agency, 183; Story's Eq. Juris., sec. 310.

Although a cashier, by the rules, be required to consult other officers or committees in the matter of discounts, it is not negligence not to do so, if they have no meetings and systematically absent themselves. No bad faith was proved. *Second National Bank of Oswego v. Burt*, 93 N. Y. 233.

A broker gratuitously loaned money belonging to another, and received as collateral security certain genuine certificates of stock, which had, however, by forgery been raised so as to represent a larger number of shares than they were issued for, and a loss resulted. The broker advertised himself as a dealer in choice stocks and promised his customers careful attention. Upon proof of the delivery of the money to

the broker to be loaned, and the failure to return the same on demand, the burden was on the broker of proving that he did his duty without negligence or misconduct. It was a question of fact properly submitted to the jury whether it was negligent to take the certificates without examination, but that it was not necessary to make inquiries or present certificates for verification.

Evidence that the broker had loaned a large amount of his own money on similar certificates, and that such certificates had been bought and sold in the street, was proper. *Marvin v. Brooks*, 94 N. Y. 75; *Onderkirk v. C. N. Bank*, 119 id. 267. *Isham v. Post*, 141 N. Y. 100, rev'g 71 Hun, 184, and judgment for plaintiff.

A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature towards his principal, and is subject to the obligations and disabilities incidental to that relation. *Robinson v. Smith*, 3 Paige, 222.

See *Scott v. De Peyster*, 1 Edw. Ch. 513; *Cumberland Coal, &c. Co. v. Sherman*, 80 Barb. 553.

Trustee appointed under a trust deed is liable for failure to collect moneys owing to the estate. *Meacham v. Starnes*, 9 Paige, 398.

Brokers who have peremptory orders to sell under certain conditions, must follow their directions; and are liable for loss incurred for neglect to do so. *Hope v. Lawrence*, 50 Barb. 258.

See, also, *Hanks v. Drake*, 49 Barb. 186.

Directors made an unauthorized dividend; but, to remove any doubt as to the bank's solvency, gave their individual notes. These were held to have been properly applied to the damage caused by their improper declaration of the dividend and impairment of capital. *Dykman v. Keeney*, 10 App. Div. 610; s. c., 16 id. 131; s. c. aff'd, 160 N. Y. 677.

A director, upon personal investigation ascertained that his bank was hopelessly insolvent, but kept it open for deposit, thereby holding it out to the public as solvent. He was held liable to persons who made deposits on the faith of the bank's solvency. *Cassidy v. Uhlmann*, 27 App. Div. 80; s. c., rev'd for exclusion of relevant testimony, 163 N. Y. 380; s. c., on retrial, 54 App. Div. 205; s. c., aff'd, 170 N. Y. 505, where the relations of stockholders, directors and depositors are fully discussed.

Bank director is not liable for error of judgment, not indicating fraud or lack of knowledge necessary for the position. *Godbold v. Branch Bank &c.*, 11 Ala. 191.

Error by trustee in construing the provisions of a trust deed, whereby he failed to equalize the burden imposed on *cestuis que trust*, rendered him liable. He was not allowed for claims paid, which were debts of

honor but not legal charges. Otherwise as to claims compromised which threatened to impair the fund. *Marks v. Semple*, 111 Ala. 637.

Corporation executed a note for a loan intended for it. Its president and secretary were, however, officers of another corporation and the money was applied to the payment of stock in the latter. The former company was liable on its note though the latter received the money. *Allen v. West Point Min. &c. Co.*, (Ala.) 31 South Rep. 462.

Knowledge by officers of street railway, that its rights have been encroached upon by a railroad and that the latter has promised to pay damages is imputable to the corporation which is thereby barred of its ejectionment and limited to an action for compensation. *Fresno Street R. Co. v. Southern P. R. Co.*, 135 Cal. 202.

Directors were not liable for compensation of receiver where the suit for his appointment was instituted in good faith. *Ephraim v. Pacific Bank*, (Cal.) 69 Pac. Rep. 436.

Trustee held the proceeds of the sale of goods, which were subject of a suit, to await the order of the court. Though they were mingled with trustee's own funds and used for its own purposes, the trustee always had money on hand to meet the demand for said funds. The trustee was required to account for the profits made in the use of said money. *Boston &c. Smelting Co. v. Reed*, 23 Colo. 523.

President of a corporation was not permitted to defend an action by its receiver for his negligence in allowing an agent to get behind in his accounts, on the ground that the directors were fully informed of the facts. As fiduciaries, they had no power to ratify such acts. *New Haven Trust Co. v. Doherty*, 74 Conn. 353.

Directors of bank, in taking notes in payment of stock subscriptions, must at least use ordinary care in ascertaining their value and have reasonable cause for believing them to be worth the amounts for which they were taken. *Coddington v. Canady*, 157 Ind. 243.

Cashier made investment in notes of residents of good standing of another city. Some inquiries were made, but more thorough inquiry would have disclosed the worthless character of the paper. It was held that the cashier had acted in good faith and with reasonable care. *Exchange Bank v. Gardner*, 104 Iowa, 176.

A bank indorsed and guaranteed notes of a third person, when the directors knew that the maker of the notes and the bank were both insolvent. It was held, that the directors' contingent liability, the notes not having matured, was not covered by Gen. Stat. 1889 Par. 406, making directors liable upon receiving deposits, or contracting debts when the bank is insolvent. *Wichita Nat. Bank v. Weeks*, 5 Kan. App. 694.

It is negligence for a trustee having received money, to hand it over

without seeing to its due application; to permit co-trustee to deal with it, without inquiry; or, knowing of a breach of trust, to fail to obtain restitution. *Darnaby v. Watts*, 13 Ky. L. Rep. 457.

A bank president who signed a false publication as to its condition was liable to one to whom he sold shares, who relied thereon. Though her purchasing agent was a director and also signed such statement, he, unlike the president, was not presumed to and, in fact, did not, know of its falsity. *Ward v. Trimble*, 103 Ky. 153.

See, also, *Trimble v. Reid*, (Ky.) 41 S. W. Rep. 319.

Directors, acting in good faith, passed cashier's accounts as all right, when, by slight diligence, they might have discovered large overdrafts. It was not such a representation as to his conduct, as to relieve those who subsequently became his sureties from liabilities for cashier's subsequent permission to overdraw. *Grant County Deposit Bank v. Littell*, (Ky.) 56 S. W. Rep. 669.

Where the president of a corporation received corporate stock in exchange for a stock of goods, his knowledge that he held part of the latter as factor only was not imputable to the corporation. *Wyeth v. Renz-Bowles Co.*, (Ky.) 66 S. W. Rep. 825.

Where property was untenable by reason of lack of repair suffered by trustee while in funds, he was charged with rent. *Whittingham v. Schofield*, (Ky.) 67 S. W. Rep. 846.

Trustees, invested with management of trust according to their judgment and discretion, are to be chargeable only for gross neglect and willful mismanagement. *Harvard College v. Amory*, 9 Pick. 446.

Loan by a guardian without security renders him liable. *Clark v. Garfield*, 8 Allen, 427.

*Lovell v. Minot*, 20 Pick. 116.

Bank loaned to an irresponsible person on inadequate security through lack of prudent investigation on the part of a director and officer, though he acted in good faith. The director was liable to the bank. *Commercial Bank v. Chatfield*, 121 Mich. 641.

Directors of a bank, knowing of its insolvency and holding it out as solvent, were held liable to owner of a draft and bill of lading delivered to vendee without payment. *Wolfe v. Simmons*, 75 Miss. 539.

Plaintiff's brother as her trustee, instead of investing her funds, transferred to her a worthless note for the amount. The transaction was held voidable. *Stokes v. Terrell*, (Miss.) 23 South. Rep. 371.

Directors left the entire management of the bank to the cashier, who loaned to irresponsible parties in excess of the statutory limit. They were responsible for resulting loss, as the statute imposed the manage-

ment of the bank's affairs upon the directors. *Union Nat. Bank v. Hill*, 148 Mo. 380.

Bank directors, who, honestly ignorant of its insolvency, permit a deposit, are not liable under a statute imposing personal liability on directors receiving deposits with knowledge of insolvency. *Utley v. Hill*, 155 Mo. 232.

If a trustee neglects to deposit funds in a mode indicating his representative character, and the funds are lost, he is liable. *Coleman v. Lipscomb*, 18 Mo. App. 443.

*State v. Powell*, 67 Mo. 395; *State v. Moore*, 74 id. 413; *State v. Rubey*, 77 id. 610; *Knecht v. U. S. Sav. Inst.*, 2 Mo. App. 563.

Where it was the duty of the officers to know the bank's condition they were presumed to know it. *Euds v. Orcutt*, 79 Mo. App. 511.

Directors of a corporation were held personally liable for the death of one killed by explosion of an unlawful amount of gunpowder stored in the company's warehouse, when, by the exercise of ordinary care, they could have known that the amount was unlawful. *Cameron v. Kenyon &c. Co.*, 22 Mont. 312.

The report of an insolvent bank to the comptroller of the currency represented it to be solvent. Directors who attested it, though done without knowledge of its falsity and without intention to defraud, were liable to one purchasing stock in reliance thereon. Otherwise as to one who did not attest it. *Germer v. Mosher*, 58 Neb. 135.

Funds being once properly invested, it is not negligence *per se* for a trustee to permit his co-trustee to assume actual care of them; nor will he become liable until he has some notice of co-trustee's default. *Dyer v. Riley*, 51 N. J. Eq. 124.

Trustee to deliver bonds in installments upon payment of certain portions of the purchase price was not relieved from liability for delivery without payment by a suggestion from *cestui que trust*, upon learning of purchaser's inability to pay the portion due, to make the best bargain he could. *Danforth v. Moore*, 55 N. J. Eq. 127.

Directors of bank could not set up as a defense to an action for loss from their neglect in failing to examine the cashier's accounts, that they were ignorant of a by-law requiring it, or that such by-law had not been customarily observed, or that they relied on the statements of officers and the examinations of the bank examiners; especially where their attention has been called to an objectionable practice. *Campbell v. Watson*, (N. J. Eq.) 50 Atl. Rep. 120.

President and vice-president were held to the same liability for false statements to the bank's depositors and creditors, as its directors. *Solomon v. Bates*, 118 N. C. 311; *Caldwell v. Bates*, 118 N. C. 323.

Directors permitted declaration of a dividend, when bank was insolvent. Proper attention to their duties would have disclosed its condition. Were liable to a purchaser of stock mislead thereby. *Houston v. Thornton*, 122 N. C. 365.

Cashier failed to see that vault doors were locked; though he believed others under him, having that particular duty in charge, had attended to it. He was liable for loss resulting from such failure. *Kalb v. American Nat. Bank*, 21 Oh. C. C. 1; s. c., 11 O. C. D. 437.

Owner of lands, holding half his interest therein in trust for another, made disbursements on his own responsibility for subsidies for waterworks. He could not charge his *cestui* with any portion thereof, nor for compensation as trustee, where he received income without rendering an account. *Royal v. Royal*, 30 Or. 448.

Directors, although liable for embezzlement or gross inattention, are not liable for mistakes of judgment, if within the scope of their powers, even if such mistakes are absurd and ridiculous. *Spering's Appeal*, 71 Pa. St. 11.

Negligence, as a ground of liability, must be such as enters into the cause of loss; so where bonds of a depositor were stolen by bank teller the bank is not liable for the larceny unless there is proof of its negligence in keeping the teller. *Scott v. National Bank, etc.* 72 Pa. St. 471.

A trustee is not a surety for his co-trustee, nor liable for co-trustee's bad faith or crimes. *Fesmire's Estate*, 134 Pa. St. 67.

*Stell's Appeal*, 10 Pa. St. 149.

Diligence required of a trustee is diligence of a prudent man in his own affairs. *Jones' Appeal*, 8 W. & S. (Pa.) 143.

Trustee permitted his son's access to his security box and the latter forged his father's name to powers of attorney for their transfer. Trustee was held not negligent. *Pennsylvania Ins. &c. Co. v. Franklin Fire Ins. Co.*, 5 Pa. Dist. 323.

Trustee permitted tenant to remain for three years, while paying only a small portion of the rent with prospects of still less, and while the value of the premises was depreciating for lack of repair. He was surcharged with rent. *Manfield's Estate*, 19 Pa. Super. Ct. 26.

Directors held not personally responsible for violation of company's charter due to mistake as to their powers and not to want of ordinary care and prudence. *Hodges v. N. E. Screw Co.*, 1 R. I. 312.

Directors of a bank, relying on the honest management of its officers, failed to ascertain its insolvency. Were not liable in equity at suit of depositors, where bank or its assignee failed or refused to sue. *Deaderick v. Bank of Commerce*, 100 Tenn. 451.

A loan was made of one-third of the bank's capital, but to one who



was the chief merchant in the place and in good standing. It was prudent at the time, in view of the surrounding circumstances. The bank's officers and directors were not liable to the stockholders because it happened to turn out disastrously. *Wheeler v. Aiken &c. Bank*, 75 Fed. Rep. 781.

Directors of a bank failed to discover a default, which examination would have revealed. They failed to examine the books, gave little or no attention to the affairs of the bank and held meetings only at long intervals and then merely to elect officers and declare dividends. They were held liable. *Gibbons v. Anderson*, 80 Fed. Rep. 345.

A trustee, whose only duty was to hold stock and deliver it over upon payment of a sum decreed, could not recover assessments paid thereon, during an appeal from the decree. *Irvine v. Angus*, 84 Fed. Rep. 127.

Lack of knowledge of the facts by a bank president who wrongfully certified checks, was no defense where he willfully refrained from investigating. *Spurr v. United States*, 87 Fed. Rep. 701.

Directors who were merely members of the board were not held liable where, knowing little of banking, they failed to discover defalcations of one whom they had no reason to suspect. Otherwise as to the member of the discount and examining committee, who, with the exception of what was called to their attention by the cashier, made no examination, so as to discover reckless loans and overdrafts made or permitted by the latter. *Warner v. Penoyer*, 91 Fed. Rep. 587; aff'g s. c., 82 id. 181.

Directors were not charged with knowledge of facts contained in the bank's books where they were kept so as purposely to conceal such facts. *Lamson v. Beard*, 94 Fed. Rep. 30.

Directors and officers of a national bank are responsible for using its funds in prospecting for minerals, but not for repairs, which they *bona fide* thought was necessary in fitting a mine, acquired in payment, of a debt for a market. *Cooper v. Hill*, 94 Fed. Rep. 582.

The fact that a statute exists, imposing liability on directors, does not exclude their common law liabilities for negligence. *Great Western Min. &c. Co. v. Harris*, 111 Fed. Rep. 38.

Stockholder was entitled to equitable relief against directors who voted large salaries to insolvent officers who had rendered no services, so as to have the same applied upon their indebtedness to the corporation. *Harrison v. Thomas*, 112 Fed. Rep. 22.

Directors of a bank failed, through lack of proper investigation, to ascertain the mismanagement of its executive officers, to whom they had delegated their authority. Were liable to parties injured thereby. *Warren v. Robinson*, 19 Utah, 289.

Complainant was guilty of laches in seeking to charge a purchaser

as a trustee on the ground that certain sales were a violation of trust, when he fails to seek relief for 17 years after their rights accrued, and the purchase was made 50 years before. *Redford v. Clarke*, (Va.) 40 S. E. Rep. 630.

That directors had ceased to be such at time of suit, is no defense to an action for misfeasance while in office. *Boyd v. Mutual Fire Asso.*, (Wis.) 90 N. W. Rep. 1086.

## V. Public Officers.\*

**A public officer, not judicial, is bound to exercise only reasonable skill and care in performance of ministerial duties;** *Olmstead v. Dennis*, 77 N. Y. 378; *Slava v. Jones*, 83 Ala. 139; *Fairbanks v. Kitteridge*, 24 Vt. 12; **and also administrative duties.** *Bassett v. Fish*, 75 N. Y. 303.

**He is liable to one sustaining special damage for the commission of a negligent act, or the negligent omission of a duty,** (*Robinson v. Chamberlain*, 34 N. Y. 389; *Bennett v. Whitney*, 94 id. 302; *Hover v. Burkhoof*, 34 id. 113), **or for a failure to perform an absolute duty, in the performance of which an individual has a special interest.** *Clark v. Miller*, 54 N. Y. 548; *Bray v. Bardard*, 109 N. C. 44.

**He is not personally liable for the negligence of a board of public officers, of which he is a member, unless he acts for the board, and is negligent.** *Bassett v. Fish*, 75 N. Y. 303.

**Nor is he liable for the negligence of servants employed by him.** *Walsh v. Trustees etc.*, 96 N. Y. 427. See, 62 id. 160; *Almango v. Supervisors*, 25 Hun, 551; *Cardot v. Barney*, 62 N. Y. 81.

**Unless the relation of the subordinate to him be something of a personal nature.** *Ely v. Parsons*, 55 Conn. 83.

**As when they are employed by or under him, voluntarily or privately, and paid by or responsible to him.** *Shepherd v. Lincoln*, 17 Wend. 250; *Bassett v. Fish*, 75 N. Y. 311.

**But public officers are not liable for non-feasance unless means be at their disposal, enabling them to fulfill the duty imposed upon them, as in the case of highway commissioners and the trustees of an ordinary school district.** *Bartlett v. Crozier*, 17 Johns. 439; *Bassett v. Fish*, 75 N. Y. 310.

The relation between the keeper of the county poorhouse and the superintendent, who employs him, is of a public nature and the former cannot be deemed the agent of the latter, within statute of embezzlement. 2 R. S. 678, section 59. *Coats v. The People*, 22 N. Y. 245; reversing 4 Park. 662.

A public officer or contractor engaged to perform the duties of a public officer is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof.

In this case a contractor was liable for defective lock gates of which he had notice, and in consequence of which a canal boat was injured.

\*NOTE.—As to the liability of a municipality for negligence of its officers, see "Municipality," post.

A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage. *Lansing v. Smith*, 8 Cow. 151; *Smith v. Wright*, 24 Barb. 306; *Pierce v. Dart*, 7 Cow. 609; *Shepard v. Lincoln*, 17 Wend. 250; 3 Chit. Cr. Law, 568 (Perk. Ed. of 1841); *Adsit v. Brady*, 4 Hill 630; *Mayor of Lime Regis v. Henly*, 1 Bing. N. C. 222. *Robinson v. Chamberlain*, 34 N. Y. 389, aff'g judg't for pl'ff, and overruling, *Fiske v. Dodge*, 38 Barb. 163.

The fact that the trustee of a charitable or educational corporation does not appear upon call of case, is not *per se* negligence so as to charge him personally with costs. *Slocum v. Barry*, 38 N. Y. 46.

Public officers, not judicial (*Mills v. City of Brooklyn*, 32 N. Y. 489), are amenable to one specially injured by their negligence either by acts of omission or commission.

A commissioner of highways with funds in his hands should use reasonable and ordinary diligence to repair a highway of a defect of which he has notice by circumstances or directly. Actual notice is not necessary, where the circumstances are such that ignorance is in itself negligence. *Hover v. Burkhoff*, 44 N. Y. 113, aff'g judg't for pl'ff.

Distinguishing *Garlinghouse v. Jacobs*, 29 N. Y. 297, where defendant had no funds. (See *Robinson v. Chamberlain*, 34 N. Y. 389, putting *Garlinghouse v. Jacob*, on true grounds, and following *Adsit v. Brady*, 4 Hill 630, although this last case had been doubted in *West v. The Village of Brockport*, 16 N. Y. 168.) Also, distinguishing *Seymour v. Wilson*, 14 N. Y. 567; *Bartlett v. Crosier*, 17 Johns. 440, and following *Adsit v. Brady*, 4 Hill 630; *Hutson v. Mayor*, 9 N. Y. 169; *Robinson v. Chamberlain*, 34 id. 389; *Henly v. The Mayor*, 5 Bing. 91; *Bartlett v. Crosier*, 15 Johns. 250. *Lane v. Cotton*, 1 Salk. 17; *Fulton & Co. v. Baldwin*, 37 N. Y. 648; *Sherman & Red. on Neg.* 195.

See *McCarthy v. City of Syracuse*, 46 N. Y. 196; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Barton v. City of Syracuse*, 36 id. 54; *Mills v. City of Brooklyn*, 32 id. 489.

The plaintiff employed the defendant to search for taxes and assessments against land to be purchased. The defendant delivered to the plaintiff a return against taxes, signed by him, and another return against assessments, signed by a third person not employed by the plaintiff, but the defendant took pay for both. The plaintiff afterwards paid assessments not discovered by the search. The defendant was liable. The burden was on the defendant to show that the plaintiff was saved harmless by the warranty against assessments in the deed. *Morange v. Mir*, 44 N. Y. 315, aff'g judg't for pl'ff.

On burden of proof see *Allen v. Suydam*, 20 Wend. 321; *Blot. v. Boiceau*, 3 Comst. 78; *Walrod v. Ball*, 9 Barb. 271.

A municipal officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action, if he refuses to perform it, even though he believe the statute to be unconstitutional.

A supervisor refused to present an assessment of damages in laying out highway to supervisors, as required by law, and was held liable for amount of same, with interest. *Clark v. Miller*, 54 N. Y. 528, affirming 42 Barb. 255; distinguishing *The People v. Supervisors*, 28 N. Y. 112; citing *Commercial Bank v. Kortright*, 22 Wend. 348.

If a person invested with administrative duties of a public nature negligently perform them, he is liable to person injured thereby. *McCarthy v. Syracuse*, 46 N. Y. 194; *Hover v. Burkhoof*, 44 id. 113; *Mersey Dock Trustees v. Gibbs*, 3 Hurl. & Colt. 1043.

Also liable for neglect of those voluntarily or privately acting for him and paid by or responsible to him. *Shepherd v. Lincoln*, 17 Wend. 250.

A trustee of a Union Free School district is not liable personally for the negligence of the board, but the negligence, if any, is that of the corporation, but when a trustee acts for the board and is negligent, then he is liable.

This action was brought against all the members of such a board jointly as trustees, charging them as public officers, not as individuals, with neglect in not keeping the school house in repair, in consequence whereof the plaintiff was injured. It appeared upon the trial, that the board had an arrangement with "F." one of the defendants, that when any small repairs were needed he was to make them, whether upon order or notice first given, or upon his own motion, did not distinctly appear, and it did not appear that the question of his individual liability, distinct from that of the other defendants, was presented to the trial court. The judgment was against all of the defendants jointly. Held, error; and that it could not be sustained against "F." individually in this action.

Also, held, that the complaint could not be amended by striking out the names of the defendants and inserting that of the corporation, as the corporation had not been brought into court, and the court had no jurisdiction of it, nor could the complaint be amended here by striking out the names of all the defendants save "F." and the designation of him as trustee; as it would be a complete change of the theory of the action.

The break in the floor had been there for three months; and it was inferable that it was due to natural wear and tear; two unsuccessful attempts had been made to repair it. The floor of the room was badly out of repair; this was known to the members of the board, and repairs

had been promised by that body. Held, that the evidence authorized a finding that the passage way was negligently out of repair. The action was brought by a school teacher injured by the floor.

Distinction between board of education of Union Free Schools (title 9, chap. 555, L. 1864), and trustees of ordinary school districts pointed out.

In determining the liability of the trustee of an ordinary school district, it must appear that he had command of funds to make repairs. *Bartlett v. Crozier*, 17 J. R. 439. *Bassett v. Fisk*, 75 N. Y. 303, rev'g 12 Hun. 209, and judg't for def't.

A public officer, as a drainage commissioner, is liable for lack of reasonable skill and care in the performance of ministerial duty to one specially interested in the discharge of such duty. *Adsit v. Brady*, 4 Hill, 630; *Clark v. Miller*, 54 N. Y. 528. An officer cannot be compelled to act and will not incur liability by mere omission to do so. *Bentley v. Phelps*, 27 Barb. 524.

This action was to recover of the defendants, personally, damages, which the plaintiff claimed to have sustained from his misconduct and negligence in not discharging public duties under the drainage act. The defendants, as drainage commissioners, borrowed money, under statute, of plaintiff, and by failure of commissioners to properly pursue the requisite proceedings the plaintiff had been unable to obtain payment. The defendants were not liable, as they were not shown to have omitted any duty. *Olmstead v. Dennis*, 77 N. Y. 378.

One, acting gratuitously as a public officer, is not personally liable for negligence of a person necessarily employed in the execution of an order, properly given by him. The superintendent of school buildings, or ward trustees are not liable for an excavation negligently left open by workmen in the absence of personal negligence or of knowledge that the excavation had been left. *Hall v. Smith*, 2 Bing. 156; *Bailey v. The Mayor*, 3 Hill, 538, and cases cited; Story on Agency, sec. 321. *Donovan v. McAlpin*, 85 N. Y. 185.

While chapter 368, Laws of 1851; chap. 301, Laws 1853; chap. 101, Laws 1854; chap. 574, Laws 1871; chap. 112, Laws 1873, vested the board of education in the city of New York, with the general control and care of the school buildings and property, "for the purposes of public education," it committed the especial care and safe keeping of such buildings in the respective wards to the ward trustees, who are also authorized to make repairs, and are not the agents of the board, but independent public officers, and for their negligence the board is not liable.

The defendant was not liable for injuries sustained by plaintiff in

falling into an excavation in the yard of a building occupied as a ward school, the grating to which excavation had been negligently left open, either by the janitor or by masons employed by the ward trustees, in making repairs to the building. *Donovan v. Board of Education*, 85 N. Y. 117.

A public officer is not responsible in a civil action for a judicial determination, however erroneous, or howsoever malicious the motive which produced it, to persons who have not suffered special damage thereby. *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557.

See, *People ex. rel. Francis v. Common Council &c.* 78 N. Y. 33; 34 Am. Rep. 500.

Where an officer has negligently repaired a public street he is liable not for nonfeasance or omission, but for misfeasance (*Robinson v. Chamberlain*, 34 N. Y. 389), and it is not necessary to show funds in his hands.

Statute (sec. 6, title 14, chap. 291, Laws 1867), giving action for willful neglect does not take away common law remedy. Addition of official title was *descriptio personæ*.

One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage because of a neglect properly to perform these duties.

While the omission of the word "as" is not conclusive, when the body of the complaint plainly discloses an official or representative capacity as the ground of the action, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually. *Bennett v. Whitney*, 94 N. Y. 302.

See *Slocum v. Barny*, 38 N. Y. 46.

Failure on the part of a county treasury to collect a bond and mortgage in his hands; neglect to foreclose same, although interest was, when he came into office, three years in arrears, and delay for sixteen months after is not alone sufficient to create liability against him; facts establishing negligence must be shown, as, that he failed to ascertain insufficiency of property, the insolvency of the mortgagor, etc., and there was no averment that defendant had any knowledge of these conditions. *Woolley v. Baldwin*, 101 N. Y. 688, sustaining demurrer to complaint.

Trustees of the New York and Brooklyn bridge were liable neither officially nor personally for negligence of laborer on the bridge. They represented and acted as agents of the two cities. *Appleton v. Water Commissioners*, 2 Hill, 432; *Bailey v. Mayor*, 3 id. 531; 2 Denio, 433; *Barnes v. District of C.*, 91 U. S. 540; *Ehrgott v. Mayor*, 96 N. Y. 264; *Matter of the Application of the Rochester Water Commissioners*, 66 id. 413.

But the commissioners of public charities and correction, although appointed by municipal authority, are not agents of the city. *Maximilian v. The Mayor*, 62 N. Y. 160. *Walsh v. Trustees &c. N. Y. & B. Bridge*, 96 N. Y. 427.

But, under acts chap. 399, L. 1867; chap. 601, L. 1874; chap. 300, L. 1875, the trustees are agents and the employers are servants of the cities of New York and Brooklyn, so as to charge such cities with their negligence. *Walsh v. Mayor &c.* 107 N. Y. 220; 41 Hun, 299.

Citing *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, 489.

A sheriff replevied coal on a vessel and, pending justification of securities, put a keeper in charge of the coal, and the vessel sank; held (1) that the sheriff was not an insurer; (2) that the sheriff was bound to use more than ordinary care in protecting property in his possession, which was the subject of litigation. *Moore v. Westervelt*, 21 N. Y. 103.

The case came again to the Court of Appeals, and it was held, that the sheriff was bound only to take such steps for the preservation of the coal as a careful and prudent man acquainted with the circumstances would take, if the goods were his own. Ordinary diligence alone is usually required, when sheriff is in possession. Verdict for defendant was sustained. *Moore v. Westervelt*, 27 N. Y. 234; s. c., 1 Bosw. 357; 2 Duer, 59.

Where a sheriff is sued for negligence in allowing the defendant, in his custody under execution, to escape, the judgment on which the prisoner was held is conclusive of the plaintiff's rights. *Richtmeyer v. Remsen*, 38 N. Y. 206.

Defendant, a supervisor of a town, deposited public money, in his hands, with private bankers who subsequently failed and the money was totally lost. The trial judge found that the defendant acted in good faith and without negligence; but it was held that he was liable for the loss nevertheless; public officers having the custody of public funds being insurers thereof, *ex virtute officii*. *Tillinghast v. Merrill*, 151 N. Y. 135; aff'g, s. c., 77 Hun, 481.

Police officer made an arrest for a felony without warrant and without reasonable cause. The fact that it was subsequently discovered that he had carried concealed weapons and was on this charge convicted and punished did not prevent liability for the false imprisonment on the false charge prior to such conviction. *Sneed v. Bonnoil*, 166 N. Y. 325; aff'g, s. c., 49 App. Div. 330.

A sheriff who discharged a debtor on an order which failed to state all the jurisdictional facts, was required to show the existence of the omitted facts in order to justify the discharge. *Seward v. Wales*, 167 N. Y. 538; aff'g, s. c., 40 App. Div. 539.

Sheriff sold goods on execution recovered by defendant, an indemnity bond having been given. Sheriff having been sued for such sale and defeated, sued the bond. Defendant not allowed to allege negligence of sheriff and his attorney in a suit by the owner of the goods, as after notice of such suit to defendant, it was his business to defend it, and the sheriff's defense was gratuitous, and in absence of fraud the defendant was bound by the result of the action. *Howell v. Christy*, 3 Lansing, 238.

If sheriff be guilty of negligence in allowing the escape through entire failure to execute writ of *ne exeat*, action lies without application to court. *Beckwith v. Smith*, 4 Lansing, 182.

Allegation that the head of the building department in the city of New York, whose duty it was to see that all unsafe buildings were made secure, and that he was furnished with means therefor, and that he was notified of such condition of a building and that it fell on another, doing damage, states facts sufficient to constitute cause of action. *Connors v. Adams*, 13 Hun, 427.

Distinguishing *Murphy v. Commissioners*, 28 N. Y. 134.

County clerk is only liable for negligence in making a search to the person for whom made.

"O." applied by his agent "W." to clerk for a search, whereon the plaintiff was to loan him money, and did so, relying on search. Clerk omitted a deed and the plaintiff was damaged. No recovery. *Day v. Reynolds*, 23 Hun, 131, aff'g nonsuit.

Citing *Savings Bank v. Ward*, 100 U. S. 195; distinguishing *Hover v. Barkhoof*, 44 N. Y. 113, where the plaintiff was said to have been *especially injured*.

Public officers managing a penitentiary, are not liable to convict for injuries arising from negligence of servants. Allegation was that the defendants illegally and negligently made the convict approach a saw, whereby he was injured. Demurrer was sustained. *Alamango v. Supervisors of Albany Co.*, 25 Hun, 551.

Where an assignment of the interest of the owner of a leasehold estate in fee is presented to and left with the clerk of the proper county to be recorded, the failure of the clerk to properly index it, or errors made by him in transcribing it, will not prejudice the rights of the assignee or deprive him of the privilege conferred upon him by the recording acts. *Mims v. Mims*, 35 Ala. 23; *Chatham v. Bradford*, 50 Ga. 321; s. c., 15 Am. R. 692; *Polk v. Cosgrove*, 4 Biss. 437; *Riggs v. Boylan*, id. 445; *Merriek v. Wallace*, 19 Ill. 486; *Bank of Kentucky v. Haggan*, 1 A. K. Marsh. 306; *Payne v. Pavey*, 29 La. Ann. 116; *Swan v. Vogel*, 31 id. 38; *Sinclair v. Slawson*, 44 Mich. 123; *Green v. Garrington*, 16 Oh. St. 548; *Tousley v. Tousley*, 5 id. 78;



Schell v. Stein, 76 Penn. St. 398; Wood v. Brown's App. 82 id. 116; Curtis v. Lyman, 24 Vt. 338; Hunter v. Windsor, id. 327. *Bedford v. Tupper*, 30 Hun, 174.

Following *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *Simonson v. Falihee*, 25 Hun, 570; *Jones on Mortgages*, sec. 552.

A sheriff received from his judgment creditor, or his attorney, notice of an attachment of real estate in the form required by law, and signed by the sheriff and by such attorneys, together with copies of the affidavit and undertaking on which an order of attachment had been made, and the sheriff undertook to file the notice with the clerk the next morning, but neglected to do so for ten days, which enabled the debtor to convey the real estate before judgment could be recovered against him. It was the duty of the sheriff to file the notice with the clerk, and even otherwise, having undertaken to do so, he was liable for the omission. *Lewis v. Douglass*, 58 Hun, 587.

See *Ransom v. Halcott*, 18 Barb. 36; *Hoffman v. Conner*, 13 Hun, 541; *Code of Civil Pro. sec. 102*.

Sheriff takes the risk in levying on goods not specified in the order directing seizure. *Einstein v. Dunn*, 61 App. Div. 195.

A chamberlain was liable for the loss of school taxes in his custody though he acted without negligence. No other city official had power to direct its deposit and relieve him of responsibility. *Johnstown v. Rodgers*, 20 Misc. 262.

Commissioners of charities, etc. in determining whether plaintiff was a veteran and so not liable to discharge, acted in a quasi-judicial capacity, and were not liable for a mere error of judgment. *Nuttall v. Simis*, 22 Misc. 19; s. c., aff'd, 31 App. Div. 503.

That process is regular on its face does not protect city marshal in serving it, where he in fact knows of a fatal defect therein. *Harris v. Gunn*, 37 Misc. 796.

Chief of fire department was held not liable for neglect to have the department out at a fire, where it appeared that there was no means by which the fire might have been extinguished, no mains or hydrants suited to the fire apparatus and no buckets to carry water in from an adjacent well or creek. *Walter v. Meader*, 77 N. Y. Supp. 407.

Negligence of public officer, in respect to ministerial duties, renders him liable. *Eslava v. Jones*, 83 Ala. 139.

County school examiner revoked the license of a teacher without giving him the required statutory notice and re-examination. He was held personally liable. *Lee v. Huff*, 61 Ark. 494.

Sheriff was liable for releasing property on a bond not executed as required by statute. *Fitzhugh v. Hackley*, 70 Ark. 54.

Police officer was liable for false imprisonment, where the party defrauded refused to positively identify the prisoner and the prisoner denied that he was the man and referred the officer to one well-known to the latter, but the officer failed to make the inquiry as to his identity. *Miller v. Fano*, 134 Cal. 103.

County treasurer was held not an insurer of funds, deposited with him, pursuant to statute authorizing such deposit, in trust for heirs of unknown intestate, and, where he used reasonable care in selecting a bank of deposit for such funds, he was not liable because of its unforeseen failure. *Gartley v. People*, 28 Colo. 227.

City treasurer paid warrants in reliance upon an erroneous denial by a court of a writ of mandamus to compel such payment. It was held no excuse for violating a statute as to the order of payment of warrants. *First Nat. Bank v. Arthur*, 12 Colo. App. 90.

Public officer liable for negligence of subordinate, if his appointment be private and discretionary with said officer. *Ely v. Parsons*, 55 Conn. 83.

The approving of an appeal bond by a justice of the peace is rather a ministerial than a judicial act, and, if he has acted corruptly or maliciously, an action will lie. *Legates v. Lingo*, 8 Houst. (Del.) 154.

That township funds were put in a bank considered safe, was held no defense, the township treasurer being an insurer of such funds. *Swift v. Trustees of Schools*, 189 Ill. 584.

Where an officer replevins, he must ascertain the value of the property; he is liable, if he fails to take a bond in sufficient penalty to protect defendant in case a return is awarded. *Mayer v. People*, 92 Ill. App. 123; s. c. aff'd, 190 Ill. 109.

Warden of penitentiary and sureties are insurers of public funds coming to his hands. *Ramsay v. People*, 97 Ill. App. 283.

Board of county commissioners employed contractor, who was negligent in the performance of his work. There was held to be no individual liability on part of the commissioners. *Schnurr v. Huntington County*, 22 Ind. App. 188.

Sheriff may refuse to levy though tendered indemnification for the consequences, where he shows existence of liens on the property to an amount exceeding its value. *Phelps &c. Co. v. Skinner*, 63 Kan. 364.

Superintendent of police, through an erroneous but honest misinterpretation of the law, compelled plaintiff to close his saloon. He was acting within the scope of his authority and had not abused his discretion. *Lecourt v. Gaster*, 50 La. Ann. 521.

Where it is sought to hold a public officer personally liable, plaintiff must show lack of authority. He cannot be so held for acts done under color of official authority. *Bright v. Murphy*, 105 La. 795.

Officers who honestly seek the enforcement of law and the administration of justice and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages. *Lyons v. Carroll*, 107 La. 471.

Sheriff is liable where he failed to levy while defendant had property and to make return until after return day. *Commonwealth v. Begley*, (Ky.) 66 S. W. 754.

Tender of a drawbridge, appointed by the governor and on a salary, liable for injuries caused by his negligence. *Nowell v. Wright*, 3 Allen 166.

Prisoner in house of correction has no action against the master for neglect to provide sufficient food. *Williams v. Adams*, 3 Allen, 171.

See, also, *Spear v. Cummings*, 23 Pick. 224.

Postmaster not accountable for negligence of a subordinate. *Keenan v. Southworth*, 110 Mass. 474.

An officer arrested a captain of foreign vessel on process from a state court which had no jurisdiction, after being informed of the nationality of the vessel. He was held liable, as, after knowing the facts, he was bound to know the law. *Tellefsen v. Fee*, 168 Mass. 188.

A chief of police was held liable for an arrest made by one of his officers, where plaintiff was detained for fifty hours with the chief's knowledge without being brought before a court and without having a complaint entered against her, the power of discharge resting with the chief. *Martin v. Golden*, (Mass.) 62 N. E. Rep. 977.

The rule, that a ministerial officer is liable for the negligent performance of his prescribed duties, applied to a clerk of a court who had misinformed plaintiff. *Selover v. Sheardown*, 73 Minn. 393.

A police officer, while out with his wife on a wheel, unnecessarily injured plaintiff in attempting to direct movement of latter's rig. It was a question for the jury, whether the officer was acting in his official capacity, and hence, error to dismiss the case as to sureties. *Seitner v. Ransom*, 82 Minn. 404.

The statutory duty of an officer to pay over official funds is, in the absence of any provision to the contrary, an absolute one. *Northern P. R. Co. v. Owens*, (Minn.) 90 N. W. Rep. 371.

Justices of County Court, as trustees of a fund for educational purposes, deposited same with county treasurer for safe keeping. They were not liable for misappropriation by latter. *Anderson v. Roberts*, 147 Mo. 486.

A notary, taking an acknowledgement to a forged deed by one un-

known to him, was held liable for resulting damage. *State v. Ryland*, 163 Mo. 280.

Superintendent of workhouse acting under an ordinance which attempted to confer power in excess of that allowed by the city charter, was liable for false imprisonment in detaining a prisoner, under the guise of discipline, longer than the charter allowed. *St. Louis v. Karr*, 85 Mo. App. 608.

A city treasurer was obliged by law to keep his official funds on deposit. Having used reasonable care in the selection of the bank, and not having been negligent in failing to withdraw it, he was held not liable for loss through bank's failure. *Livingston v. Woods*, 20 Mont. 91; overruling *Commissioners v. Lineberger*, 3 Mont. 231.

County judge ordered administrator to pay money into Court instead of distributing it. Was liable therefor. *Wheeler v. Barker*, 51 Neb. 846.

Sheriff held liable for failure to procure a bond in replevin proceedings whose sureties were sufficient. *Barton v. Shull*, 62 Neb. 570.

Money paid to village treasurer for a liquor license is public money, which he is absolutely liable to account for. *Hrabak v. Dodge*, 62 Neb. 591.

It is no defense that the officer acted honestly and in good faith, when he took insufficient security on a replevin bond as he guarantees absolutely that the surety is sufficient, and it is unnecessary to allege negligence in so doing. *Adams v. Weisberger*, (Neb.) 87 N. W. Rep. 16.

Road overseer was held responsible for disbursements, paid for services in excess of their reasonable worth. *Denver v. Myers*, (Neb.) 88 N. W. Rep. 191.

County treasurer is insurer of the funds coming into his hands officially, and liable therefor though without negligence in depositing them in a private bank. *Thomssen v. Hall County*, (Neb.) 89 N. W. Rep. 389.

Notary was liable for failure to give notice of dishonor of protested paper, in the absence of contrary instructions. *Williams v. Parks*, (Neb.) 89 N. W. Rep. 395.

Negligence of public officer in exercise of public duty, does not give rise to a cause of action in a private individual. *School Dist. &c. v. Burress*, (Neb.) 89 N. W. Rep. 699.

Where the writ is regular and from a court of competent jurisdiction, remedy for the arrest is not trespass for false imprisonment, but case for the malicious motive and want of probable cause. *Calderone v. Kiernan*, (R. I.) 51 Atl. Rep. 215.

See *Lisabelle v. Hubert*, (R. I.) 50 Atl. Rep. 837.

Negligence of public officer in respect to ministerial duty renders him

liable. *Ford v. McGregor*, 20 Nev. 446; *Henry v. Sargent*, 12 N. H. 333.

Supervisors of an election check list, willfully and maliciously neglected or refused to place thereon the name of the plaintiff, who was a qualified voter. They were held liable in an action on the case. *Hanlon v. Partridge*, 69 N. H. 88.

For negligent failure to exercise authority prescribed by statute, members of board of county commissioners are liable. *Bray v. Barnard*, 109 N. C. 44.

Erroneous order of commitment for contempt by mayor, sitting as a Mayor's Court, was made through malice though within his jurisdiction. No civil liability. *Scott v. Fishblate*, 117 N. C. 265.

A county commissioner, on constructing a bridge, refused to construct a draw span on the ground that the river was not navigable above that point. Not liable for statutory penalty for intentional and willful neglect of duty to boat owner, in the absence of gross negligence or willfulness. *Staton v. Wimberley*, 122 N. C. 107.

A sheriff, in determining the necessity of calling in military aid, acts in a judicial capacity, but, in the use of that force in performing the duties of his office, he acts ministerially and is liable for the use of excessive and unnecessary force. *State v. Coit*, 8 Oh. S. & C. P. Dec. 62.

Prothonotary failed to indorse upon an execution process a waiver of exemption shown by the record. Held civilly liable, where defendant claimed exemption and nothing was realized. *Wilson v. Arnold*, 172 Pa. St. 264.

Treasurer of school district deposited funds with a bank which was in good repute. Was not liable though the bank failed. *School Dist. v. Stoner*, 16 Montg. Co. L. Rep. 107.

To charge a justice of the county court with liability for negligence in taking an insufficient guardian bond, willfulness and maliciousness must be proven. *McTeer v. Lebow*, 85 Tenn. 121.

See, also, *Boyd v. Ferris*, 10 Hum. (Tenn.) 406; *Spears v. Smith*, 9 Lea, (Tenn.) 483.

State comptroller's and treasurer's accounts were passed without objection. In absence of fraud, the state was bound and they could not be reopened on the ground of ignorance of the law. *State v. Buchanan*, (Tenn.) 52 S. W. Rep. 480.

A county trustee is not liable, where he deposited funds intrusted to him in a bank of good repute, which subsequently failed. *State v. Cope-land*, 96 Tenn. 296.

Where the tax proceedings are regular on their face, the tax rolls in due form and issued from the proper authority, the tax collector is not

liable as for an illegal valuation. *Texas Land &c. Co. v. Hemphill County*, (Tex. Civ. App.) 61 S. W. Rep. 333.

Postmaster-general enclosed circular, with warrants for claims due to postmasters, calling attention to statutory provisions and warning them against employment of attorneys for collection of the claims. He was acting within the scope of his employment and was not liable to attorney for sending proceeds direct to claimants. *Spaulding v. Vilas*, 161 U. S. 483.

A person, by law authorized to inspect and survey a boiler, was liable for negligent inspection and false certificate. *Bradley v. Hartford &c. R. Co.*, 19 Fed. Rep. 246.

An assessor acts judicially in listing the property for assessment, and, while not liable for honest errors of judgment, he is liable, if an excessive assessment is made through malice and corruption. *Bailey v. Berkey*, 81 Fed. Rep. 137.

Collector of internal revenues is an insurer of public funds coming into his hands; embezzlement by a deputy is no defense. *Pond v. United States*, 111 Fed. Rep. 989.

Disbursing officer was not liable for money stolen from his tent. *Scott v. U. S.*, 18 Court of Claims, 1.

An ordinance by a city counsel having power to regulate the use of streets, prohibiting the moving of buildings thereon without permit, is a reasonable and not an arbitrary exercise of their discretionary powers. *Eureka v. Wilson*, 15 Utah, 53.

An officer, serving a replevin writ, was released from liability for accepting an insufficient bond, where plaintiff discharged a surety against whom the officer had recourse. *Follett v. Shumway*, 68 Vt. 68.

See, also, *Fairbanks v. Kittridge*, 24 Vt. 12.

Collector was not liable to the penalty prescribed for knowingly making an overcharge of mileage, where he guessed at the distance from the best of his judgment and was only a mile out of the way. *Weightman v. Jones*, 73 Vt. 353.

Police commissioners caused an arrest and imprisonment for wearing the official uniform of the police force. They were held liable, as they had no power to act in a quasi-judicial capacity, and the only punishment for the offense was a fine. *Bolton v. Vellines*, 94 Va. 393.

Exercise of ordinary care in selection of bank for deposit of county funds, did not relieve county treasurer from liability for funds lost through the bank's insolvency. *Fairchild v. Hedges*, 14 Wash. 117.

Officers of a town, proceeding carefully within their jurisdiction, are not personally liable for errors of judgment. *Smith v. Gould*, 61 Wis. 31.

*Hamilton v. City of Fond du Lac*, 40 Wis. 47; *Hurley v. Town of Texas*, 20 id. 634; *Alford v. Barrett*, 16 id. 175; *Squiers v. Village of Neenah*, 24 id. 588.

Board of street commissioners, individually liable, when they act in disregard of the charter. *Robinson v. Rohr*, 73 Wis. 436.

*Wallace v. City of Menasha*, 48 Wis. 79; *Uren v. Walsh*, 57 id. 98.

## VI. Receivers and Assignees.

Property placed in the hands of a receiver as such is protected from an action at law founded on negligence in the management thereof, and the receiver is not liable in such an action. But in the absence of evidence that the receiver, in the management of the property, acted otherwise than as an officer of the court, as if he was or held himself out to be a carrier of passengers in his personal capacity, he would be liable for any injury arising from his negligence or that of his servants. *Kane v. Smith*, 84 N. Y. 458.

Trustees of a railroad mortgage, given to secure the bonds of the company, who foreclose the mortgage for bondholders, and who, being directed in the decree of foreclosure to bid off the road at a certain sum, if no equal bid is made by others, do accordingly make the bid, receive a deed from the referee, and operate such railroad for the benefit of their *cestius que trust*, must, as to the public, be regarded as operating the road as owners, and render themselves liable as common carriers of all goods transported over the road under their management.

They are in no sense receivers, or officers of the court, entitled to the immunities from the ordinary liabilities of persons conducting such business, if any, belonging to such officers. *Rogers v. Wheeler and others as Trustees*, 43 N. Y. 589; affirming 2 Lans. 486.

A special receiver or assignee, in bankruptcy, of property of a railway company is not its agent, nor is it liable for his negligence.

Upon a sale by an assignee in bankruptcy of the tracks, fixtures, rolling stock and franchises of a railroad corporation, the corporation, as a legal entity, does not vest in the purchasers, and they do not become stockholders or corporators therein (following *Wellsborough Plank Road v. Griffin*, 57 Penn. 417, and distinguishing *The Commonwealth v. The C. P. R. Co.* 52 Penn. 506, which was decided under a special statute). Nor are the purchasers liable for damages resulting from negligence of those operating the road, intermediate the time of sale and the confirmation thereof by the court. *Metz v. B. C. & P. R. Co.*, 58 N. Y. 61.

See *Ahern v. Steele*, 115 N. Y. 203, 247; *Mayor v. Bailey*, 2 Denio, 433.

The assignee in bankruptcy of a railroad, acting merely as an officer of the court, to whom no personal negligence is imputed, is not liable for negligence of a necessary and proper employe. *Cardot v. Barney*, 63 N. Y. 281, aff'g order granting new trial after verdict for plaintiff.

**From decision.**—"Public officers performing their duties through the agency and with the assistance of subordinate agents employed by them, whether acting gratuitously or for a compensation, are not answerable for the neglects or wrongful acts of their subordinates. When acting for a compensation, they are regarded as being paid for the services rendered, and not for taking the hazard of the acts of those necessarily employed by them. *Lane v. Cotton*, 1 Lord Mansf. 646; s. c., 1 Salk. 17; *Whitfield v. Lord Ledespencer*, Cowp. 754; *Hall v. Smith*, 2 Bing. 156; *Duncan v. Finlater*, 6 Cl. and Fin. 894. Sheriffs are an exception to the rule, for the reason that the poundage and other fees to which they are entitled for acts done by their deputies is deemed a just equivalent for their responsibilities. *Hall v. Smith*, *supra*.

Best, Ch. J., in *Hall v. Smith*, *supra*, says: "The maxim of *respondet superior* is bottomed on this principle, that he who expects to derive advantage from an act, which is done by another for him, must answer for any injury a third person may sustain from it," thus making the benefit and liability reciprocal. The principle was recognized in *Bush v. Steinman* (1 B. & P. 404) and the defendant held liable for the reason that the work was carried on for his benefit. Lord Brougham, in *Duncan v. Finlater*, *supra*, places the liability upon the ground that what is done by the agent being done for the benefit of the principal, and under his direction, he should be responsible for the consequences of doing it. *Scott v. Mayor of Manchester*, 2 H. & N. 204, was distinguished from *Hall v. Smith* by the fact that the corporation derived a profit from the carrying on the works. *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vermont, 421; *Barter v. Wheeler*, 49 N. H. 9, proceed upon the same ground, that the defendants were the owners of the roads, and were bound personally by their contracts; and that the fact was unimportant that they were trustees and acted in a representative capacity. The actions were upon contracts made by the defendants, and, as in the case of executors and administrators, they were held to answer for them. *Ferrin v. Myrick*, 41 N. Y. 315. The legal title to the roads was in the defendants, and they operated them as proprietors, and their liability legitimately resulted from their proprietorship, although the title was in trust for others. Judge Peckham said, in *Rogers v. Wheeler*, *supra*, they were in no sense receivers or officers of the court. They had assumed to operate the roads, and had made contracts with the public in the course of that business, and there was no principle or policy, that would shield them from liability, if they failed to perform their engagements. *Barter v. Wheeler*, *supra*, was decided upon the same views of the position of the defendant. *Ballou v. Farnum*, 9 Allen, 47, and *Lamphear v. Buckingham*, 33 Conn. 237, were actions against trustees and mortgagees in trust for the bondholders in possession of and operating the roads as such trustees and mortgagees, to recover for injuries sustained by reason of the negligence of persons employed by them. The defendants were held liable.

\* \* \* *Blumenthall v. Brainerd*, 38 Vt. 402, was an action upon a contract for the carriage of goods, the defendants being receivers of the road by appointment of the Court of Chancery. \* \* \* The court regarded the assumption by the defendants of the extraordinary responsibilities of common carriers as not incompatible with their duties and responsibilities as receivers, and held them to their contracts. \* \* \* *Paige v. Smith*, 99 Mass. 395, without affirming the soundness of the decision of the case last cited, followed it, in an action against a receiver appointed by the Court of Chancery of the same state, on the ground that it was impossible to accord to the defendants an exemption from the ordinary common-law liabilities of common carriers more extensive than they are allowed in the state in which they were appointed."



Property placed in the hands of a receiver as such, is protected from an action at law, founded on negligence, in the management thereof, and the receiver is not liable in such action.

The officer is individually liable for the management of the property voluntarily assumed by him and over which the court has no control. *Kain v. Smith*, 80 N. Y. 458; reversing 11 Hun, 552, and judgment of nonsuit.

*Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; *Blumenthal v. Brainard*, 38 Vt. 409; *Paige v. Smith*, 99 Mass. 395; 20 Ohio St. 137; *Ballou v. Farnum*, 9 Allen, 47; *O. &c. Co. v. Davis*, 23 Ind. 553; *Newell v. Smith*, 49 Vt. 260; *Niehols v. Smith*, 115 Mass. 332; *Lamphear v. Buckingham*, 33 Conn. 237; *Klein v. Jewett, Recr. &c.*, 26 N. J. Eq. 474.

**From opinion.**—"Such an officer displaces the directors, and under the direction of the court by which he is appointed, has the sole control of its property and effects, and when authorized so to do, the executive power to use its franchises, (*City of Rochester v. Bronson*, 41 How. Pr. 78), and is responsible for his conduct in all these things to the court appointing him. In such a case also the remedy for injuries resulting from his negligence, or the negligence of those operating a railroad under him, would be by application to the same tribunal, *Noe v. Gibson*, 7 Paige, 513; *Parker v. Browning*, 8 id. 388; *Metz v. Buff.*, Corry and P. R. R. Co., 58 N. Y. 61; *Morse v. Brainard &c.*, 41 Vt. 541; *Klein v. Jewett*, 26 N. J. Eq. 474, which might itself dispose of the matter by administering justice between the parties, or allow the party aggrieved to bring his suit at law for the alleged injury. Cases above cited.

But this is so when the person charged is acting under color of its authority merely. \* \* There must be 'an absence of evidence that the operator assumed to act otherwise than as an assignee, or that he held himself out as a carrier of passengers other than as an officer of the court.' *Murphy v. Holbrook et al*, Recrs. of the C. P. and L. R. R. Co., 20 Ohio St. 137; *Potter*, Recr. of the A. and G. W. R. Co. v. *Bunnell*, id. 150; *Henderson v. Walker*, Recr., etc., 55 Ga. 481, stand upon the same principle.

So limited, there is no danger that any injury will go without compensation. Damages for injury to the person, whether passenger or employé, for loss of goods in course of transportation, or otherwise, would be chargeable upon, and payable out of the fund in court, the same as other expenses of administration. *Klein v. Jewett*, 26 N. J. Eq. 474; *Morse v. Brainard &c.* 41 Vt. 551; *Cowdrey v. G. H. and H. R. R. Co.*, 3 Otto, 93 U. S. Sup. Ct. 352."

**Liability of receiver for negligence;** appointed in suit to remove executors; his duty to use active diligence to obtain personal property from executors, etc. *Clapp v. Clapp*, 49 Hun, 195.

Citing *Litchfield v. White*, 3 Seld. 438, 443; *Matter of Dean*, 86 N. Y. 398; *Stehman's Appeal*, 5 Barr. 413; *Pingree v. Comstock*, 18 Pick. 46; and distinguishing *Lawson v. Copeland*, 2 Brown's Ch. C. 156; *Schultz v. Pulver*, 11 Wend. 362.

An assignee was guilty of such negligence, in failing to collect assets, as would have rendered him liable to removal. But all the assets having

been actually collected before an application for such removal was made, nothing remaining to be done but to account, the court ordered that the fund be paid into court for distribution. *Tompkins v. Sheehan*, 6 App. Div. 76.

Receiver, after being presented with a claim properly stated and a demand of notice of proceedings, made a motion to be allowed to pay a dividend from a fund, without notice, on certain uncontested claims. An order made on such motion was vacated and the receiver required to restore so much of the fund distributed thereunder as would pay such claimant who was entitled to preference. *People v. Family Fund Soc.*, 31 App. Div. 166.

Distinguishing *Willis v. Sharp*, 124 N. Y. 406; *People v. Randall*, 73 N. Y. 416; *Swart v. Central Trust Co.*, 27 N. Y. S. R. 113.

Where property was sold below inventory value, the assignee was charged with inventory value, when that was below market value, in the absence of satisfactory explanation. *Matter of McFarlane*, 65 App. Div. 93; s. c. aff'd, 169 N. Y. 608.

Assignee sold certificates of an insolvent bank, belonging to the estate, to his children at public auction, lending them the purchase money. He was charged with subsequent advance in price of the certificates. *Matter of Sheldon*, 72 App. Div. 625.

In the absence of authority from the court, a temporary receiver has no power to continue business and bind the estate therein. *Appleton v. Welch*, 20 Misc. 343.

Negligence of employes, causing fatal injuries, renders trustee of a railroad, for benefit of bondholders, liable. *Lamphear v. Buckingham*, 33 Conn. 237.

In Illinois, a receiver is liable for injuries caused by the negligence of servants of a preceding receiver. *McNulta v. Lockridge*, 137 Ill. 270.

A railroad company in the hands of a receiver is not liable for injuries resulting from the operation of the road by him. *Ohio &c. R. Co. v. Anderson*, 10 Bradw. 313.

Assignee delayed twenty-seven days after assignment before taking possession, the property being in an adjoining state, whereby an attaching creditor gained priority. Delay was unreasonable. *Forster v. Second Nat. Bank*, 61 Ill. App. 272.

Interest on a fund in the hands of an assignee pending litigation when he was unable to use it was held not chargeable against him. *Emig v. Barnes*, 77 Ill. App. 616.

Assignee, without waiting for an adjudication as to priority, paid in full claim of assignor's *cestui*, where identity of trust fund was in question. Was liable to other creditors. *Seiter v. Mowc*, 81 Ill. App. 346.

Possession of the receiver is not possession of the railroad company; hence, the railroad company is not liable for negligence of receiver's servant. *Ohio &c. R. C. v. Davis*, 23 Ind. 553.

Assignee was not implicated with his fraudulent assignors, by reason of his failure to investigate their condition, where there were no facts at the time of accepting the trust to arouse his suspicion, or put him upon inquiry. *Martin-Brown Co. v. Morris*, (Ind. Terr.) 42 S. W. Rep. 423.

Leave to prosecute receiver for negligence of servants not necessary to jurisdiction of a court of law. *Allen v. Central R. Co.*, 42 Iowa, 683.

*Kinney v. Croker*, 18 Wis. 74. See, however, *Barton v. Barbour*, 104 U. S. 126.

Trustee failed in suit to establish the propriety of an investment, made in violation of statute; application for attorney's fees was denied, he was charged with costs and his commissions were withheld until he made good the loss. *Aydelot v. Breeding*, (Ky.) 64 S. W. Rep. 916.

Gross negligence and failure to keep accounts, cut down commissions. *Ward v. Shire*, (Ky.) 65 S. W. Rep. 8.

Receivers of railways may be sued as common carriers; so, where a carload of hay was destroyed by reason of negligence of railroad's employés, the receivers were liable. *Paige v. Smith*, 99 Mass. 395.

*Ballou v. Farnum*, 9 Allen, 47; *Nichols v. Smith*, 115 Mass. 332.

Where the creditors allow the assignee to continue the business in the name and under the direction of the assignee, they cannot receive and use profits in time of success and yet complain of losses in time of depression. *Quimby v. Uhl*, (Mich.) 89 N. W. Rep. 722.

Assignee, who allowed and paid a claim against the estate to one already indebted to it and in a greater sum, was chargeable for the loss. *In re Excelsior Man. Co.*, 164 Mo. 316.

Admission by receiver that he was operating the railroad at the time of an accident, though another company ran its trains on the same tracks, is binding, in the absence of proof that injury was caused by latter's negligence. *Moling v. Barnard*, 65 Mo. App. 600.

Property, not included in the trust, a receiver takes at his own risk, though acting under order of court. He is personally liable for such a mistake and may be sued without consent of court. *Kirk v. Kane*, 87 Mo. App. 274.

Though an excavation has been filled in by the company of which a receiver has been appointed, he is chargeable with notice of a defect occasioned by negligence in doing the work. *Robinson v. Mills*, 25 Mont. 391.

Liability of receiver for injuries while operating a railroad is tested

by the same rules as in case the corporation were defendant. *Klein v. Jewett*, 26 N. J. Eq. 474.

Receiver paid a dividend to one not authorized to receive it, when, by due diligence, the mistake could have been prevented. Was chargeable with the loss. *Todd v. Meding*, 56 N. J. Eq. 83.

Trustees under a railroad mortgage, having foreclosed and purchased the road, which they hold and operate for the bondholders, are liable as common carriers for goods received. *Barter v. Wheeler*, 49 N. H. 9.

A receiver of an infant's estate will be held accountable, if he makes a loan without taking any security, and loss results therefrom. *State, &c. v. Gooch*, 97 N. C. 186.

Assignee to settle estate sold notes for less than their value on account of his ignorance as to the debtor's responsibility, where, by exercise of ordinary care, he could have known the facts. Was held liable therefor. *Weisel v. Cobb*, 118 N. C. 11.

Receiver, operating railroad, is liable for negligence of himself and his agents, where the company would have been. *Meara v. Holbrook*, 20 Oh. St. 137.

Receiver donated use of opera house for a charitable, benevolent, and social purpose. It was customary so to do to gain the good will of the public, when it could not be otherwise used. Was not chargeable with rent. *McKennon v. Pentecost*, 8 Okla. 117.

Assignee paid claims to persons not entitled under deed of assignment, without direction or authority of court. He was held thereby to have assumed the burden of showing that the payments were legal. *Wright's Estate*, 182 Pa. St. 90.

Assignee was not negligent in rejecting as valueless an endowment policy, without convertible value, having only eight years to run and, in the event of death payable to others than creditors. *Provident Life &c. Co. v. Fidelity Ins. &c. Co.*, (Pa.) 52 Atl. Rep. 34.

Assignee delayed sale until season was over, owing to a mistake of judgment. Was not chargeable. *Wilson's Assigned Estate*, 14 Lane. L. Rev. 370.

Where there is apparently no reason for not declaring a dividend, the assignee is chargeable with interest. *Morris v. Ellis*, (Tenn.) 62 S. W. Rep. 250.

For negligence, in failing to provide an embankment with sluices sufficient to drain off the water, receivers of a railroad company were liable. *Clark v. Dyer*, 81 Tex. 339.

In Texas, receiver is not liable in damages for death caused by negligence of company's servants. *Texas &c. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88.

*Turner v. Cross*, (Tex.) 18 S. W. Rep. 578; *Yoakum v. Selph*, 19 id. 145; *Brown v. Warner*, 78 Tex. 543; *R. Co. v. Geiger*, 79 id. 13; *Texas &c. R. Co. v. Thedens*, (Tex.) 21 S. W. Rep. 132; *Campbell v. Davis*, 22 id. 244; *Texas &c. R. Co. v. Collins*, 19 id. 365; *Missouri Pac. R. Co. v. Texas &c. R. Co.*, 30 Fed. Rep. 167.

Receiver allowed animals to remain on a ranch and failed to insure buildings thereon. Was not chargeable with loss in absence of proof of negligence. *Hasum v. Stone &c. Co.*, 13 Tex. Civ. App. 414.

Receiver not liable for injuries sustained before his appointment. *Finance Co. &c. v. Charleston &c. R. Co.*, 46 Fed. Rep. 508.

*Missouri Pac. R. Co. v. Texas &c. R. Co.*, 30 Fed. Rep. 167.

A federal receiver is bound by the laws of the state in which the property is situated, and liable by such laws for negligence of employé having authority over other employés. *Peirce v. Van Dusen*, 78 Fed. Rep. 693.

Assignee failed to make full inventory, but creditors had free access to books and took no objection to a second inventory gotten up at their instance. He failed to bring suit to collect stock subscriptions. The court refused to remove him, as his course was due, not to dishonesty, but to an honest misconception of his duties; especially as the property was not endangered. *Putnam v. Timothy Dry Goods &c. Co.* 79 Fed. Rep. 454.

Receiver was not allowed counsel fees for services in obtaining his appointment and in sustaining his charges on an accounting. *Sowles v. National Union Bank*, 82 Fed. Rep. 139.

Receivers were not liable for tort committed by the company before their appointment. *Northern P. R. Co. v. Heflin*, 83 Fed. Rep. 93.

A fund in the hands of a receiver was not chargeable with interest, on a recovery made necessary by a receiver's *bona fide* disallowance of the claim. *Merchant's Nat. Bank v. School District*, 94 Fed. Rep. 705.

Two thousand nine hundred and fifty-two dollars for hotel bills in New York for two years on receivership business, was held an unnecessary outlay and disallowed. *Braman v. Farmers' &c. T. Co.*, 114 Fed. Rep. 18.

Trustees of a railroad for the benefit of bondholders are liable for negligence of employés; but not for negligence of employés of another company, on whose tracks the trains of the first company run. *Sprague v. Smith*, 29 Vt. 421.

Receivers of railroads, in chancery, sustain the character of common carriers; and, if they expressly contract to deliver goods, are liable for negligence of any connecting road in transporting them. *Newell v. Smith*, 49 Vt. 255.

Blumenthal v. Brainard, 38 Vt. 402; Morse v. Brainard, 41 id. 550; Cutts v. Brainard, 42 id. 566; Lyman v. Cent. Vermont R. Co. 59 id. 167; Roxbury v. Central &c. R. Co., 60 Vt. 121.

Receiver allowed a claim to become barred by limitation, thinking that the trustee had extended the lien, where by due diligence he could have discovered his mistake. Was held chargeable. *Rush v. Steele*, 93 Va. 526.

Receiver failed to carry out contract entered into by corporation before his appointment. Was not liable. *Casey v. Northern P. R. Co.*, 15 Wash. 450.

Commissions and counsel fees were denied a receiver, who refused to report, filed an imperfect account when personally cited by the court, used estate funds for his own convenience and employed interested counsel at large salaries in unimportant litigation and the statement of his comparatively simple account. *Speiser v. Merchant's Exch. Bank*, 110 Wis. 506.

## **BAILMENTS.**

### **I. IN GENERAL.**

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- (b) When bailment exists.
- (c) Rules of negligence applicable to bailments.

### **II. EVIDENCE.**

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- (a) Duty and risk of bailor.
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- (a) Who is entitled to be a guest.
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- (c) When the relationship exists.
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- (g) Rules and regulations and disobedience thereof.
- (h) Contributory negligence of guest.
- (i) When innkeeper liable as ordinary bailee.
- (j) When liability ends.

### **XI. BANKS—SAVINGS.**

## I. In General.

A bailee should employ the care and skill that an ordinarily good and prudent business man would use under the same circumstances, unless the parties impliedly or expressly contract for a lesser or higher degree of diligence and capacity. This involves all gradations of caution and faculty, from such minor efficiency, as, unobserved, charges the gratuitous bailee for gross negligence, to that highest obligation of prudence imposed upon common carriers of passengers, which, when, not exercised, charges the carrier for slight negligence.\* Common carriers of goods, and innkeepers are primarily insurers.

## (a). KINDS OF BAILMENTS.

A BAILMENT is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story on Bailments, sec. 1. p. 4.

A DEPOSIT is a naked bailment of goods to be kept for the bailor without recompense, and to be returned, when the bailor shall require it, and is entirely for the benefit of the bailor, or a third person.

A MANDATE is a bailment of goods without reward to be carried from place to place, or to have some act performed about them, and is entirely for the benefit of the bailor, or a third person.

†Dr. Wharton states that this term also applies to a bailment, where a compensation is payable according to the value of the service, but not fixed at the time of the bailment. Wharton on Negligence, secs. 484-490; *Waterman v. Gibson*, 5 La. Ann. 672.

COMMODATUM, a loan for use, is a bailment of goods to be used by the bailee temporarily, or for a certain time without reward, and is entirely for the use of the bailee. It differs from what is termed *mutuum* in this, that in *commodatum* the goods are lent to be specifically returned; in *mutuum* the goods are to be consumed and are to be repaid in property of the same kind.

A PLEDGE, or PAWN, is a bailment of goods to a creditor, as security for some debt or engagement, and is for the benefit of the parties, or both or one of them and third person.

A HIRING, *locatio-conductio*, is a bailment always for reward or compensation, certain or uncertain, and includes: 1. The hiring of a thing for use (*locatio rei*.) 2. The hiring of work and labor (*locatio operis faciendi*). 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiae*). 4. The hiring and car-

\*NOTE. However unsatisfactory in principle the terms "gross negligence" or "slight negligence," they probably, from common use, convey the thought of extremes of care.

†NOTE. In case of compensation the bailment would be for mutual benefit, and increased vigilance would be required of the bailee.



riage of goods from one place to another (*locatio operis mercium vehendarum*).

Bailments of this kind are for the benefit of the parties, or both or one of them and a third person. Story on Bailments, secs. 4-8, pp. 9, 10.

### (b). WHEN BAILMENT EXISTS.

An agreement by producers to deliver goods to a factory, once owned by them, at a certain price and to receive the proportion of the profits, corresponding to the proportion of the goods delivered, was held a bailment and not a sale. *Sattler v. Hallock*, 160 N. Y. 291; aff'g s. c., 15 App. Div. 500, where the authorities are carefully considered.

Mere fact that property came into a person's possession, without proof of some trust respecting it, does not make him a bailee. *Samuels v. McDonald*, 3 J. & S. 211.

The overcoat of one attending a theater was taken from a hook in a private box. Proprietor was not liable. *Pattison v. Hammerstein*, 17 Misc. 375.

See, also, *Bird v. Everard*, 4 Misc. 104; *Schueps v. Sturm*, 25 id. 168.

A bailment for no definite period, though for hire, is only a license and is revocable at any time. *Gleason v. Morrison*, 20 Misc. 4; s. c. aff'd, id. 320.

Restaurant keeper was liable for failing to provide a reasonably safe place for a coat taken by a waiter for safe keeping, as was the custom, in the absence of notice that he would not be responsible therefor. *Appleton v. Welch*, 20 Misc. 343.

Bailee for indefinite period sold out his own business, notifying bailor to remove the goods or arrange with the purchaser as to them. He was not liable for latter's refusal to deliver to bailor. *Emerald &c. Brew. Co. v. Leonard*, 22 Misc. 120.

See, also, *De Lemos v. Cohen*, 28 Misc. 579.

Customer of a tailoring concern left her purse in one room while she was being fitted in another. The concern was held to be bailee of the purse, but the customer was not allowed to recover, on account of her contributory negligence. *McAllister v. Simon*, 27 Misc. 214.

A customer in a restaurant hung his coat on a hook provided near his table, without directing the care of any of the attendants to it. Neither actual or implied bailment nor negligence in general supervision having been shown, there was no liability. *Montgomery v. Ladjing*, 30 Misc. Rep. 92.

Where owner of cotton sent it to be ginned, expecting to pay cus-

tomary storage charges, and it was received to be ginned for hire but nothing was charged for storing and handling, the bailment, as a whole, was one for hire, and the bailee was liable for the lack of ordinary care in not storing it, whereby it was damaged by rain. *Union Compress Co. v. Nunnolly*, 67 Ark. 284.

Debtor gave a bill of sale of crops to creditor as security, agreeing to protect and prepare them for market. Debtor was bailee of the creditor. *Boston v. Rabun*, (Ga.) 41 S. E. Rep. 568.

Customer's hat was taken from rack in a barber shop while he was being shaved. Proprietor was liable as a bailee for hire. *Dilberto v. Harris*, 95 Ga. 571.

Money deposited with a firm and a receipt taken, is a debt and not a bailment, where the intention is that the firm shall deposit it in their bank to their own account, and they are liable when the money is stolen before it is so deposited by them. *Geist v. Pollack*, 58 Ill. App. 429.

A restaurant keeper was liable for loss of guest's coat, where waiter took it, saying he would take care of it; though there were notices that the proprietor was "not responsible for hats and coats." *La Salle Restaurant &c. v. McMasters*, 85 Ill. App. 677.

Delivery of cotton to be ginned for a price, is a bailment for hire. *Concord Variety Works v. Beckham*, 112 Ga. 242.

Deposit of grain with warehouseman to be mingled with other grain, sales being made for the mass, is a bailment and not a sale. *Baker v. Born*, 17 Ind. App. 422.

Retail dealer requested wholesale dealer to send samples to be examined by a customer with a view to purchasing. The custody of the retailer was in the nature of a bailment, and he is not liable for loss without his negligence. *Knights v. Piella*, 111 Mich. 9.

Delivery of grain to elevator company for storage, held a bailment, notwithstanding a custom to treat such transactions as sales, unless the custom was known and contract made in reference to it. *Weiland v. Krejnick*, 63 Minn. 314.

See, also, *Weiland v. Sunwall*, 63 Minn. 320.

Transfer of a note for collection only, under circumstance charging transferee with notice of such fact, is a bailment and not a sale of the paper. *United States Nat. Bank v. Geer*, 55 Neb. 462; rev'g s. c., 53 Neb. 67; s. c., 41 L. R. A. 444.

Upon the deposit of a check, the bank becomes a bailee, unless depositor have the right to immediately check against it or apply it on an indebtedness. *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84.

Wheat received for storage at the owner's risk was held a bailment and

not a sale, where the owner expected to sell to the warehouseman or obtain from him the same quality and quantity of grain on demand on payment of storage charges and return of load checks issued for the original grain. *Tobin v. Portland &c. Mills Co.*, (Or.) 68 Pac. Rep. 743.

An agreement to lease at a given sum with the option to purchase, applying the rental as the purchase price, was held a bailment and not a conditional sale. *Cobb v. Deiches*, 7 Pa. Super. Ct. 252.

Storekeeper was liable for articles which might ordinarily be left by a customer in a dressing booth while trying on other clothes, in absence of a printed disclaimer of liability. But not such articles as a diamond ring. *Hunter v. Reed*, 12 Pa. Super. Ct. 112.

Defendant ordered a scale, agreeing to pay a sum monthly for a certain period, at the end of which he was to return it or purchase it by adding an extra sum. It was held to be a bailment and not a sale. *Stimpson Computing Scale Co. v. Schetromf*, 13 Pa. Super. Ct. 377.

Furniture was left with bailee to be kept by him without charge. He was a gratuitous bailee, and, upon his death, the bailment was terminated, and no trust followed the goods into the hands of his widow. *Morris v. Lowe*, 97 Tenn. 243.

Proof of lack of due care with proof of possession merely, does not make a *prima facie* case, the duty of due care must be shown. *World's Columbian &c. Co. v. Republic of France*, 91 Fed. Rep. 64; rev'g s. c., 83 Fed. Rep. 109.

#### (c). RULES OF NEGLIGENCE APPLICABLE TO BAILMENTS.\*

(1) In the absence of negligence on his part contributing to the result, either at the time it happened or theretofore, a bailee is not responsible for loss resulting from inevitable accident, as by lightning or storms, by the perils of sea, by inundations or earthquakes, or by sudden death or illness, the inroads of a hostile army, or pirates. Story on Bailments, sec. 25.

Nor for robbery by force, either in the highway or from the breaking open of a house, and the assaulting of the inmates thereof (Story, sec. 27), nor for losses by private or secret theft. Story on Bailments, sec. 27. *Sturm v. Poker*, 150 U. S. 312.

(2) DEPOSITUM.—Where the bailment is entirely for the benefit of the bailor, or of a third person, and is without compensation, the bailee will only be liable for such lack of care, as is termed gross negligence, which Chancellor Kent describes as that want of care, which every man of common sense, under the circumstances, takes of his own affairs.

\* NOTE.—These rules are not given as applicable to common carriers or innkeepers; as regards such occupations examine those topics.

Kent's Commentaries, vol. 2, sec. 560; Wharton on Negligence, sec. 476; *Illinois Central R. Co. v. Tronstein*, 64 Miss. 834.

It is also expressed that the bailee must exercise that ordinary diligence and care which a usually prudent man takes of his own property of a like description. *Mark v. Hudson R. Bridge Co.*, 103 N. Y. 28.

A gratuitous bailee is only responsible for gross negligence. *Edson v. Weston*, 7 Cow. 278; *Beardslee v. Richardson*, 11 Wend. 25; *Spooner v. Mattoon*, 40 Vt. 300; *Smith v. N. & L. R. Co.*, 7 Foster (N. H.), 86; *Knowles v. R. R. Co.*, 38 Me. 55; *Briggs v. Dearborn*, 99 Mass. 50; *Sodowsky v. McFarland*, 3 Dana, 204; *White v. Bank*, 4 Brewster (Pa.), 234; *Grill v. G. & C. Co.*, L. R., 1 C. P. 600.

A trunk left in the possession of an employé after employment has ceased, is a "deposit," wherein bailee is liable as for gross negligence. Loss, by reason of employé's failure to tag it before taken away by expressman, did not render employer liable. *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. 396.

Notes were deposited with a gratuitous bailee to be held until payment of a sum to him, and the surrender of a receipt by him, when they were to be returned to the owner. Bailee was liable for improper surrender to third person, through forgetfulness. *Serry v. Knepper*, 101 Iowa 372.

Beans were left in storage; but bailee's premises were not a warehouse and he made no charge therefor and did not expect to make any. He was a gratuitous bailee and loss was sufficient to excuse their return unless gross negligence was shown. *Dinsmore v. Abbott*, 89 Me. 373.

Consignee refused to receive goods. Bailor requested the company to hold them, till further notice. They were destroyed through the explosion of a lamp. It was a gratuitous bailment and bailee not liable without proof of gross negligence. *Hapgood Plow Co. v. Wabash R. Co.*, 61 Mo. App. 372.

Gross negligence of a delivery to one personating depositor was for the jury. *Lancaster Bank v. Smith*, 62 Pa. St. 47.

Railroad company permitted storage of wool as accommodation in its car. It was not liable in absence of gross negligence. *Texas C. R. Co. v. Flanary*, (Tex. Civ. App.) 50 S. W. Rep. 726.

Dr. Wharton classifies deposits as follows:

(a) "Those in which deposits are made with persons *not in the habit of receiving* such deposits," where "the depository is only liable for gross negligence, that is, for the lack of the diligence *non specialists* show in such matters."

(b) "Where the deposit is made with persons *accustomed to receive such deposits* in which case the diligence shown must be determined by

the usage of good business men of the particular class, in respect to such duties—diligence and care which such men, under such circumstances, are accustomed to exhibit.” Wharton on Negligence, sec. 457, etc.

(3) MANDATUM.—“A mandatary, whether with or without pay, who accepts and undertakes to perform a trust or mandate, must exhibit *diligence appropriate to what he undertakes*. If he claims to be a business man, *experienced in a specialty*, he must employ the diligence a good business man in such specialty is accustomed to show. If he disclaims having such special business capacity, he is liable only for the lack of the diligence which a good non-expert in such cases is accustomed to show.” Wharton on Negligence, sec. 510. See, also, secs. 498 and 500.

But this rule is further modified to this extent, that while such bailees are only obliged to exercise the care and skill of good and conscientious business men, when possessed of the qualifications of the mandatary in question (Wharton on Negligence, sec. 518), yet, if the bailee possess certain peculiar aptitudes and capacities, *which he offers to another*, he must, in the service of the other, diligently employ such faculties. Wharton on Negligence, sec. 517.

Dale v. See, 51 N. J. L. 378; Melbourne v. Louisville &c. R. Co., 88 Ala. 443; Isham v. Post, 141 N. Y. 100; rev'g 71 Hun, 184; Sprangler v. Eicholtz, 25 Ill. 297; Rutgers v. Lucet, 2 Johns. Cas. 92; Saunders v. Hartsook, 85 Ill. App. 55; Maury v. Coyle, 34 Md. 235.

(4) COMMODATUM.—Where the bailment is for the use of and benefit of the bailee, such bailee is bound to bestow “on the thing loaned to him the care which a good business man, versed in the use of such particular thing, would, under the particular circumstances, exhibit, and this would involve special diligence on his part and make him responsible for slight neglect.” Wharton on Negligence, sec. 668. Union Compress Co. v. Nunnally, 67 Ark. 284; Mehle v. Vensel, 39 La. Ann. 680; Knights v. Piella, 111 Mich. 9.

(5) A PLEDGE OR PAWN.—The bailee must exercise the diligence of a good business man under the same particular circumstances. Wharton on Negligence, sec. 670; Cornell Man. Co. v. Louisville &c. Power Co., (Ky.) 44 S. W. Rep. 637; McMahon v. Philadelphia, (Pa.) 41 W. N. C. 527.

(6) HIRING.—The bailee is liable for the lack of the special skill and diligence, which a person ought to have and exercise, in undertaking to do any work requiring *special qualifications*. Wharton on Negligence, sec. 713.

This liability may arise not merely *in doing the work carelessly*, but *in entering on the work without due skill*; unless his judgment be super-

sceded by the judgment or direction of his employer, or unless the employer, at the time of the employment, knew that the bailee did not possess such skill. Wharton on Negligence, secs. 721, 722.

(7) The foregoing rules of liability may be modified by special contract diminishing or enlarging the skill or care, or liability, of the bailee for lack thereof, in all cases where, *by the policy of the law, such contract is regarded as binding*. Wharton on Negligence, secs. 466, 467; *Sturm v. Boker*, 150 U. S. 312; *Allen v. Williamsburg Savings Bank*, 2 Abb. N. C. 342; *Butler v. Greene*, 59 Neb. 280; *Standard Brewery v. Malting Co.*, 171 Ill. 602; aff'g s. c., 70 Ill. App. 363; *Tindall v. McCarthy*, 44 S. C. 487.

(8) It is no defense that a depositary bestowed the same care on the subject of the bailment that he did upon his own property, although evidence thereof is proper on the question of his negligence. Wharton on Negligence, secs. 461, 462; Story on Bailments, secs. 63, etc.

(9) The assent of the bailor to any act or omission or conduct, of the bailee, is binding upon the former. *McKay v. Hamblin*, 40 Miss. 472.

(10) A bailor cannot recover for injury by third person to property being used within scope of the bailment where the bailee's negligence contributed to the injury. *Illinois C. R. Co. v. Sims*, 77 Miss. 325; s. c., 49 L. R. A. 322.

(11) Where a bailee, under a special or implied contract for a specific use of property, or for the length of time that it should be used or kept, or for any other conduct respecting the same, violates such agreement, or any instructions concerning it, he is liable for any loss which may happen, usually irrespective of his negligence contributing thereto. *Collins v. Bennett*, 46 N. Y. 490; *McCullough's Lead Co. v. Strong*, 3 J. & Sp. 21; *Ross v. Southern Cotton Oil Co.*, 41 Fed. R. 152; *Keller v. Grath*, 45 Mo. App. 332; *Fidelity Investment Co. v. Carico*, 1 Col. App. 292; *Russell v. Roberts*, 3 E. D. Smith 318; *Anderson v. Foreman*, 1 Wright (Ohio) 598; *Fareas v. Powell*, 86 Ga. 800; *Welch v. Mohr*, 93 Cal. 371; *Murphy v. Kaufman*, 20 La. Ann. 559; *Wilcox v. Hagan*, 5 Ind. 546; *Fox v. Pruden*, 3 Daly, 187; *Lockwood v. Bull*, 1 Cowen, 322.

(12) Bailee for hire is liable for the negligence of his servants, or those under his control. *Sinclair v. Pearson*, 7 N. H. 219. *Hall v. Warner*, 60 Barb. 98; *Smith v. Read*, 6 Daly, 33.

As, if a horse be ridden immoderately by a servant, or the servant negligently leaves open the stable door and theft results; or if the bailment be furniture and the same be injured by bailee's servants, children, guests or boarders, or if injury be done to the property by the negligent acts of the sub-agents of the bailee, the latter is liable. (Story on

Bailments, 89). *Salem Bank v. Gloucester Bank*, 17 Mass. 1. *Dansey v. Richardson*, 25 Eng. L. & Eq. 90; 3 El. & Bl. 722; *Coggs v. Bernard*, 2 Lord Raymond, 909, 910.

Gratuitous bailee was liable for gross negligence of his servants. *Rivara v. Ghio*, 2 E. D. Smith (N. Y.), 264.

SUMMARY.—It will be seen from the above that the rule is practically uniform, *that the bailee must discharge the trust or contract with the prudence and skill which good business men, under the circumstances, exercise*; and whatever refinements may be superadded to this, courts and juries will usually hold the bailee to such care. Hence, the question of a bailee's negligence will be measured by his relation to the bailment, the skill or care that he claimed to have, or held himself out as ready to bestow; or that the law required of him as a public agent, the nature and value of the bailment, the benefit given or received, the usages of business, the custom of the bailee to receive such bailment, the particular conduct of the bailee in the care of the property, the peril attending the execution of the trust; and any special agreement increasing or diminishing his liability. Wharton on Negligence, secs. 468, 473, 476, 501.

In Story on Bailments (8th ed.) sec. 62, after stating that *reasonable care must be taken of the bailment*, it is said that "what is reasonable care must materially depend upon the nature, value, quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties."

## II. Evidence.

### (a). IN GENERAL.

It is a general rule that the burden is upon the owner to prove that an injury to the subject of the bailment was caused by the failure of the bailee to exercise due care and diligence. *Claflin v. Meyer*, 75 N. Y. 260, and the cases there fully considered. *Harrington v. Snyder*, 3 Barb. (N. Y.) 380. *Buchanan v. Smith*, 10 Hun, 476; Story on Bailments, secs. 397, 399; *Wood v. Rennie*, 143 Mass. 453.

See, however, *Logan v. Matthews*, 6 Pa. St. 417; *Fox v. Pruden*, 3 Daly, 187; *Newton v. Pope*, 1 Conn. 109.

### (b). PRIMA FACIE CASE.

#### 1. BY PROOF OF DEMAND AND REFUSAL TO DELIVER.

Proof of failure to deliver on demand makes a *prima facie* case of negligence against bailee. *Fairfax v. New York &c. R. Co.*, 67 N. Y. 11; *Onderkirk v. Central &c. Bank*, 119 N. Y. 263.

A demand is not necessary, unless it be to put the burden of explanation on the bailee. *Clafin v. Myers*, 15 N. Y. 260, 262; rev'g s. c., 11 J. & S. 1.

Proof of deposit for hire with a warehouse company and failure to return, makes out a *prima facie* case against the bailee. *Lockwood v. Manhattan Storage &c. Co.*, 28 App. Div. 68.

Proof of demand and refusal before action brought is necessary in case of naked bailee. *Brown v. Cook*, 9 Johns. 361; *Phelps v. Bostwick*, 22 Barb. 314.

Formal demand of baggage of innkeeper is not necessary. *Cheeseborough v. Taylor*, 12 Abb. Pr. (N. Y.) 227.

Proof that a guest delivered a baggage check to a hotel porter, but could get neither the baggage or the check on demand from the hotel proprietor, makes out a *prima facie* case. *Carhart v. Wainman*, 114 Ga. 632.

Proof of failure to deliver upon rightful demand, constitutes *prima facie* evidence of negligence. *Clark v. Shrimski*, 77 Mo. App. 166.

See, also, *Ross v. Clark*, 27 Mo. 549; *Donlan v. Clark*, 23 Nev. 203.

## 2 BY PROOF OF RETURN IN DAMAGED CONDITION.

Bailee for hire of a wagon, horse and harness returned them in a damaged condition. Plaintiff, having proved the fact, a presumption of negligence arose, which the burden was upon the defendant to rebut. *Rutherford v. Krause*, 55 App. Div. 210.

See, also, *Lyons v. Thomas*, 34 Misc. 175.

In action for conversion for misuse of bailment, the bailor was held not to have made out a *prima facie* case by proof of delivery in good condition and return damaged. In such cases liability for loss is not dependent on want of ordinary care, but is absolute. *Cartlidge v. Sloan*, 124 Ala. 596.

Burden of proof is on bailee to show absence of negligence, where the property is injured while in exclusive custody of himself or agents. *Pusey v. Webb*, 2 Pennewill (Del.), 490.

A *prima facie* case is made by proof of delivery to a warehouseman in good condition and re-delivery damaged, or of the refusal or neglect to re-deliver at all. *Parry v. Squair*, 79 Ill. App. 324.

See, also, *Saunders v. Hartsook*, 85 Ill. App. 55; *Hindson v. Bradford*, 91 id. 218.

A bailor makes a *prima facie* case by proof of delivery in good condition and a return damaged. *Holt Ice &c. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314.

See, also, *Rayl v. Kreilich*, 74 Mo. App. 246; *Crawford v. Cashman*, 82 id. 554.



Proof of return in a damaged condition throws on bailee burden of showing absence of negligence. *Logan v. Mathews*, 6 Pa. St. 417.

(c). REBUTTAL BY PROOF OF LOSS OR INJURY CONSISTENT WITH DUE CARE.

Warehouseman must show loss of goods, consistent with due care, then plaintiff must show that this happened through want of requisite care. *Claffin v. Meyer*, 75 N. Y. 260.

(See opinion in this case, Evidence, post, 130.)

Failure to deliver raises a presumption of negligence; but, being *prima facie*, it is rebutted by proof of loss by that which is apparently an accident, and the burden which continues throughout the trial is on the bailor to show negligence. Building partially destroyed, collapsed while being repaired. It was held error to charge that, on proof of defendant's failure to return the goods, the burden was upon him to show that he acted as a prudent man. *Kaiser v. Latimer*, 9 App. Div. 36.

On a retrial of this case, however, it was held that, while, when loss is accounted for by proof of accident or crime, it is necessary for the bailor still to prove negligence; that proof may be furnished by the character of the accident itself, and the rule *res ipsa loquitur* applied in this case. *Kaiser v. Latimer*, 40 App. Div. 149.

Fire is not such an event as is ordinarily attended with negligence and consequently does not raise a presumption thereof. *Liberty Ins. Co. v. Central &c. R. Co.*, 19 App. Div. 509.

But evidence that a stove was in such a bad condition that live coals had dropped out of it on the floor; that the fire originated about the stove and the freight agent had been notified of such condition, was sufficient proof of negligence to require a submission to the jury. *Grieve v. New York &c. R. Co.*, 25 App. Div. 518.

And evidence that locks of doors of a warehouse were missing or broken, without other proof of robbery or forcible entry, was not proof of a loss under circumstances not ordinarily attended with negligence so as to rebut the usual presumption arising upon proof of failure to deliver. *Lichtenstein v. Jarvis*, 31 App. Div. 33; s. c. aff'd, 164 N. Y. 601.

See, also, *Hoffman v. Coughlin*, 26 Misc. 24.

When delivery of goods by express relieves bailee, see *Rhind v. Stake*, 28 Misc. 177; *Stearns v. Farrand*, 29 id. 292.

Possession as a depositary for hire creates the obligations for care. *Titworth v. Winnegar*, 51 Barb. 148.

Loss of cotton in defendant's possession by theft and fire was ad-

mitted. No presumption arose that the loss was due to his negligence. The burden was upon the plaintiff to establish negligence. *James v. Orrell*, 68 Ark. 284.

Grain was delivered to bailee to be threshed. Upon bailor's proof of loss, burden was upon the bailee to show due diligence. *Massillon Engine &c. Co. v. Akerman*, 110 Ga. 570.

Cotton was sent to be ginned, for hire. It being lost, the burden was on the bailee to show due diligence. *Concord Variety Works v. Beckham*, 112 Ga. 242.

Proof of loss of bonds deposited for safety without hire, is insufficient. *Lery v. Pike*, 25 La. Ann. 630.

Fact of loss of bonds deposited with a bank for safe keeping *without hire*, is insufficient to establish negligence where inference of due care might be drawn. *Smith v. First National Bank*, 99 Mass. 605.

See, also, *Foster v. Bank*, 17 Mass. 478.

Samples were sent to bailee for inspection with a view to purchase. No presumption of negligence arose from proof of loss by theft and the burden was upon the bailor to show negligence. *Knights v. Piella*, 111 Mich. 9.

On proof of failure or refusal to deliver on demand bailee must show not only loss but such diligence in their keep as the nature of the bailment required. *Davis v. Tribune &c. Co.*, 70 Minn. 95.

Where grain in a warehouse was lost through collapse of the building, due to a "phenomenal" rise in the Mississippi River, the burden of showing negligence was upon the bailor. *American Brewing Asso. v. Talbot*, 141 Mo. 674.

Bailee of cotton was not *prima facie* liable for the loss of same by fire. *Bryan v. Fowler*, 70 N. C. 596; *Henderson v. Bessent*, 68 id. 223.

Evidence merely of abstraction by an officer of the bank is insufficient. *Foster v. Bank*, 17 Mass. 478; *Giblin v. McMullen*, L. R. 2 P. C. App. 317; unless bank knew the true character of the employé and neglected to remove him. *Scott v. Bank &c.*, 72 Pa. St. 471.

And so fact that bonds were stolen without bank's fault. *DeHoven v. Kensington Bank*, 81 Pa. St. 95.

Upon admission of possession by a bailee, the burden is upon him to show a re-delivery and acceptance. *Emmerling v. First National Bank*, 97 Fed. Rep. 739.

Property in exclusive possession of bailee was returned damaged in such a way as would not ordinarily occur without negligence. Burden was on bailee to show absence of negligence. *Hildebrand v. Carroll*, 106 Wis. 324.

## (d). BURDEN OF PROVING NEGLIGENCE ON PLAINTIFF.

Although a failure to deliver goods on demand to a bailor raises a *prima facie* case of liability against the bailee, (*Fairfax v. N. Y. C. R. Co.*, 67 N. Y. 11; *Wisner v. Chelsey*, 53 Mo. 547), yet the latter may rebut the presumption by showing that the loss was occasioned by some accident not within the control of the bailee (*Claffin v. Meyer*, 75 N. Y. 260; *Mills v. Gilbreth*, 47 Maine 320; 74 Am. Dec. 487), and then the burden is upon the bailor to prove that this was chargeable to the bailee's negligence. *Russell M'fg Co. v. N. H. S. Co.*, 50 N. Y. 121; *Heinemann v. Heard*, 62 id. 448; *Blunt v. Barrett*, 124 id. 117; *Stewart v. Stone*, 127 id. 500.

See, also, *Schwerin v. McKie*, 51 N. Y. 180; *Burnell v. New York Cent. &c. R. Co.*, 45 N. Y. 184, 189; *Schmidt v. Blood*, 9 Wend. 268; *Steers v. N. Y. C. &c. R. Co.*, 45 N. Y. 184; *Claffin v. Meyer*, 75 id. 262; *Arent v. Squire*, 1 Daly, 347; *Fox v. Pruden*, 3 id. 187.

Burden of proof is on owner to show that the negligence of *hirer* of a horse was the cause of the injury to the same. *Harrington v. Snyder*, 3 Barb. 380; *Newton v. Pope*, 1 Cow. 109.

Bailor makes a *prima facie* case by proof of delivery to a warehouseman and injury. Bailee rebuts the presumption of negligence by proof of injury by acts not usually attended with negligence. The burden is then upon the bailor to show negligence notwithstanding. *Mautner v. Terminal Warehouse Co.*, 25 Misc. 729.

See, also, *Higman v. Camody*, 112 Ala. 267; *Pusey v. Webb*, 2 Penn. (Del.) 490.

The burden, first is upon bailor to show refusal to deliver upon demand, then the bailee must show excuse therefor, as of a loss, whereupon the bailor must show loss was by lack of due care. *Dinsmore v. Abbott*, 89 Me. 373.

The burden is on the bailee to show loss by theft to excuse failure to deliver; but on proof thereof, the burden is upon the bailor to show lack of due care. *Knights v. Piella*, 111 Mich. 9.

## III. Hiring.

Any damage befalling a chattel while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was bailed, must be sustained by the bailor. So, if a horse be hired to go a journey, and, during the due prosecution of the journey, without any ill treatment by the hirer, become lame, the hirer is not answerable for damages. *Millon v. Salisbury*, 13 Johns. 211.

Not error to charge that the jury are to decide whether defendant,

hirer of a horse, had used due care; *what is due care is for the court.* *Rowland v. Jones*, 73 N. C. 52.

(For Rule of Negligence, see *ante*, p.103, Rule 6.)

(a). DUTY AND RISK OF BAILOR.

While the burden of proof rests upon a bailor charging negligence against the bailee where goods in his hands have been injured by accident, proof of the nature of the accident may afford *prima facie* proof of negligence, so as to require proof from him to counteract its effect.

Where, in an action for services and materials furnished to defendant's yacht, the latter alleged damage to have resulted from plaintiff's negligence in the performance of a contract to take care of the yacht while out of commission, held, that proof of the condition of the yacht when delivered to plaintiff, the nature of injuries, subsequently sustained, and that they were not the result of ordinary wear and tear, made out a *prima facie* case of negligence against the bailee.

Testimony of an expert as to whether injuries shown to have been sustained by the yacht were the result of ordinary wear and tear was competent evidence. *Wintringham v. Hayes*, 144 N. Y. 1.

The plaintiff hired a horse of this defendant, and in reply to his inquiry if the animal was all right, was told, that he was "just a little 'skeery.'" After proceeding about one and a-half miles the horse shied, started up, turned around, and ran down a hill, until the plaintiff checked him, thereupon he turned around again and upset the wagon. The defendant admitted that he knew the horse would shy and turn around. He was legally liable for damages to the plaintiff, and for failure to impart his knowledge of the vivacious propensities of the horse. *Kissam v. Jones*, 56 Hun. 432.

A foundry company was not liable for the destruction of patterns by fire having exercised due care in the absence of a special agreement to insure. *Coldwell-Wilcox Co. v. Sullivan*, 3 App. Div. 359.

Plaintiff sought to recover of defendant from whom he hired a saddle, for injuries sustained, by reason of the saddle's being improperly adjusted and in dangerous condition to ride. But, it appearing that he had notice of the fact and attempted to readjust it, his proceeding on his ride after failing to remedy the defect was contributory negligence, by reason of which he could not recover. *Wilson v. Dickel*, 7 App. Div. 175.

One who takes a horse on trial, with a view to its purchase, and returns it in a damaged condition, is liable for the injury, unless he can account for the injury which caused it and show that it was without fault on his part, or that he used such ordinary care that the proper inference would be that the injury was unavoidable.

Defendant, who wanted a horse, took a horse from plaintiff on trial, and returned it with a fractured leg. In an action for his value, defendant testified that the horse was excited and would rear when he met bicycles, that, notwithstanding this, he rode him for about sixteen miles, and jumped him over a fence, that he became lame when near home and that defendant then dismounted and led him; that it was not his way to take a horse off on a side road when he became frightened at bicycles, but he would conquer the horse or be conquered by him, and that he did not recollect of the horse injuring himself. There was also evidence to show that a horse might sustain wounds or fractures in the hands of a careful driver who might not know or perceive it at the time. Whether the defendant used ordinary prudence in riding and managing the horse was for the referee. *Nichols v. Balch*, 8 Misc. 452. (New York Superior Court.)

Bailor hired a coach to a club when it was in an unsafe condition. Was liable to a guest of one of its members. *Glenn v. Winters*, 17 Misc. 597.

Lessor of a bicycle in a dangerous condition, was liable for injuries caused thereby within the period of bailment. *Moriarty v. Porter*, 22 Misc. 536.

An owner of a horse known to be breachy should contract for greater diligence, if he desires to have more than ordinary care bestowed on him. *Mansfield v. Cole*, 61 Ill. 191.

Owner of horse cannot recover for its death, when hirer overtasked it to accomplish only what owner contracted for it to perform. *Ruggles v. Fay*, 31 Mich. 141.

#### (b). DUTY AND RISK OF BAILEE.

A bailee is liable for any neglect of such care as is usual with good and careful hostlers, or owners of horses. Wharton on Negligence, sec. 715, note 3.

It is negligent to use a horse which refuses its food from fatigue. Wharton on Negligence, sec. 715, citing *Bray v. Mayne*, 1 Cowen, 1; *Eastman v. Sanborne*, 3 Allen, 595; *Edwards v. Carr*, 13 Gray, 234.

A hirer of a horse is liable to its owner for damage caused by improper harnessing by a hostler, to whose care hirer committed him. *Hall v. Warner*, 60 Barb. 198.

A tailor was not allowed to recover for labor performed on defendant's garments, destroyed by fire, while in his possession, after date agreed for delivery, though the fire occurred without his negligence. *Cohen v. Moshkowitz*, 17 Misc. 389.

See, also, *Kafka v. Levensohn*, 18 Misc. 202.

An agreement by bailor to send for the goods bailed does not change the bailee's common law duty to return, save to impose the condition of notice. *Gleason v. Morrison*, 20 Misc. 320; aff'g s. c., 20 Misc. 4.

Request to forward did not relieve bailee from failure to deliver, where it was not properly complied with. Statement by bailor that a certain express company went her way, was no authority to accept its receipt limiting its liability. *Rhind v. Stake*, 28 Misc. 177.

Forwarding by the only express available, was a compliance with bailor's directions to send the goods by express, and relieved bailee of responsibility. *Stearns v. Farrand*, 29 Misc. Rep. 292; aff'g s. c., 59 N. Y. Supp. 384.

Delivery of goods bailed for custody to, or suffering a third person to take the same, is a conversion. *Lockwood v. Bull*, 1 Cowen, 322.

But after tender to owner, gratuitous bailee lawfully removed goods into a public highway. *Roulston v. McClelland*, 2 E. D. Smith, 60.

Gratuitous bailee cannot sell property without notice to bailor for non-removal of same, but should, within a reasonable time after notice to remove, store it at bailor's risk. *Dale v. Bruckerhoff*, 7 Daly, 45.

Nor may he charge the bailor an extravagant price for keeping same. *Hazeltine v. Weld*, 13 N. Y. 156.

Bailee was negligent in using a barge after discovering that it leaked dangerously, without repairing it or notifying the bailor, and was liable to the bailor for the resulting damages. *Higman v. Camody*, 112 Ala. 267.

Delivery of certificates to a bank to be delivered over upon payment to it of a price, was not a gratuitous bailment but a lucrative one, in which the bailee was liable for the loss of such certificates through the lack of ordinary care. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520.

Plaintiff left his horse to be shod. Shoer permitted one employed in an adjoining shop as a wheelwright, but with sufficient experience in shoeing, to do the job. Injury was due to the horse's restlessness, suddenly and without warning jumping while in the act of having her feet trimmed. Defendant was not negligent. It would be otherwise, however, it seems, had the injury been due to the assistant's incompetence. *Pusey v. Webb*, 2 Pennewill. (Del) 490.

If a hirer of a horse continues to use him after he knows him to be sick, he is liable for injuries sustained. *Thompson v. Harlow*, 31 Ga. 348.

Bailor directed the delivery of his cattle by the bailee, a stockyard company, to his purchaser; delivery to one recognized by the latter to be such, was not negligence. *Union Stockyard &c. Co. v. Mallory Co.*, 157 Ill. 554; rev'g s. c., 54 Ill. App. 110.

Bailee receiving grain to be malted was not liable for loss by fire, which was not due to any lack of due diligence. *Standard Brewery v. Hales &c. Malting Co.*, 70 Ill. App. 363; s. c. aff'd, 171 Ill. 602.

A bailee for hire must comply with the conditions of the bailment. On failure to comply, a promise to perform puts him in no better position than a refusal to perform. *Kansas Elevator Co. v. Harris*, 6 Kan. App. 89.

Bailee of horse to train so used it that it died. Was liable for the lack of ordinary care. *Kimball v. Dohoney*, (Ky.) 38 S. W. Rep. 3.

The hirer of a horse is liable for its full value, if it becomes sick by reason of improper care; and if owner used reasonable care in the selection of a surgeon, he is not defeated in his action because the surgeon was unskillful. *Eastman v. Sanborne*, 3 Allen, 594; *Edwards v. Carr*, 13 Gray, 234; *Mooers v. Larry*, 15 id. 451. See *Strong v. Connell*, 115 Mass. 575.

Dressmaker made up a dress from a customer's material, wrong side out. Was liable for the negligence though she received no instructions. *Lincoln v. Gay*, 164 Mass. 537.

A printer to whom plates had been delivered to print left them lying on the window sill in the shop from which they were stolen. Was liable for negligence. *Davis v. Tribune &c. Co.*, 70 Minn. 95.

A person who hires a barge is not liable for its destruction by ice, unless such liability is expressly set forth in contract of hire. *McEvers v. Sangamon*, 22 Mo. 187.

Hirer of a team failed to use ordinary care in its use. Was liable. *Purnell v. Minor*, 49 Neb. 555.

A hirer of a horse is not liable to the owner for injuries caused by immoderate driving, where owner sent his own driver. *Hayes v. Boyer*, 9 Watt (Pa.) 556.

Bailees of goods for storage took out insurance on them and collected it upon their destruction by fire. Was liable to the owner therefor. *McDonald v. Palmer*, (Tenn.) 48 S. W. Rep. 338.

It is not negligence as matter of law to drive a horse after it has become sick or exhausted. *Spencer v. Shelburne*, 11 Tex. Civ. App. 521.

Lessee of a soda fountain failed to properly pack and crate it, whereby it was injured in transportation. Was liable. *Phillips v. Hughes*, (Tex.) Civ. App.) 33 S. W. Rep. 157.

Where goods loaned for exhibition, at which fees for admission were charged, were destroyed by fire while on storage after the exhibition had closed, the bailor did not recover for the loss through the failure to provide a fire extinguishing apparatus, without showing the duty to

maintain it. *World's Exposition Co. v. Republic of France*, 91 Fed. Rep. 64; rev'g s. c., 83 id. 109.

As to the validity of a provision in the exhibition regulations exempting the company from liability for loss of exhibitor's goods, see *World's Columbian Exhibition v. Republic of France*, 96 Fed. Rep. 687.

(c). DEVIATION FROM CONTRACT BY BAILEE.

Where plaintiffs had hired out their barge to be used only as a *receiving* barge in the dock, and it was used by the defendants as a *transporting* barge, and was thereby sunk, held, that the defendants were liable in an action in the nature of trover for the value of the barge, independently of any question of negligence. *Beach v. Raritan & Delaware Bay R. Co.*, 37 N. Y. 457, rev'g judgt for plff.

Bailee for hire used horse contrary to instructions and burden was on him to show that defect arose without negligence on his part. *Collins v. Bennett*, 46 N. Y. 494.

Citing Story on Bailments, secs. 406, 411; *McDaniels v. Robertson*, 26 Vt. 340; *Roberts v. Riley*, 15 La. Ann. 103; *Kennedy v. Ashwaft*, 4 Bush. (Ky.) 530; *Howard v. Babcock*, 21 Ill. 259; *Buchanan v. Smith*, 10 Hun. 474.

Lessor of a bicycle in a dangerous condition was liable for injuries caused thereby only within period of bailment. *Moriarty v. Porter*, 22 Misc. 536.

Where one used oxen, loaned for a specific purpose, for another purpose, he was liable for injury, and the *presumption was that the injury arose during the improper use*. *Buchanan v. Smith*, 10 Hun. 474.

Keeping horse loaned beyond contract time and after demand, makes bailee liable for conversion. *Fox v. Pruden*, 3 Daly. 187.

As to value of use when article is by oversight not returned. See *Russell v. Roberts*, 3 E. D. Smith. 318.

Where bailee hired horse to go eight miles and went further, and horse died returning, he was liable in trover. *Disbrow v. Tenbroeck*, 4 E. Smith, (N. Y.) 397.

Bailee borrowed a mare for light work and used her for heavy work. It was not a hazardous task and was done in a careful manner. He was not liable for negligence notwithstanding the deviation; but he was liable for a conversion, though there was no negligence. *Cartlidge v. Sloan*, 124 Ala. 596.

A bailee of a mare to drive three miles, drove instead twelve or fourteen miles, and the mare died the next morning. He was liable, unless he could show that the death was due to other causes than his improper use. *Kennedy v. Ashwaft*, 4 Bush. (Ky.) 530; *Howard v. Babcock*, 21 Ill. 259.



Where defendant received a mare under implied promise to use her and return within a reasonable time, and failed to comply, he should be sued for breach of contract, not in tort. *Wilcox v. Hagan*, 5 Ind. 546.

See, also, *Collins v. Bennett*, 46 N. Y. 490; *McCullough's Lead Co. v. Strong*, 3 J. & Sp. 21; *Ross v. Southern Cotton Oil Co.*, 41 Fed. Rep. 152; *Keller v. Grath*, 45 Mo. App. 332; *Fidelity Investment Co. v. Carico*, 1 Col. App. 292; *Bradley v. Cunningham*, 61 Conn. 485; *Fareas v. Powell*, 86 Ga. 800; *Welch v. Mohr*, 93 Cal. 311; *Murphy v. Kaufman*, 20 La. Ann. 559.

If a hirer of horses violates the contract of hire, he will be liable for their loss; so where horses hired to go to "A" were driven beyond "A." to "B." and lost, hirer was liable. *Murphy v. Kaufman*, 20 La. Ann. 559.

Bailee of a horse for light work only was liable for lack of care in letting it to another who killed it by over driving. *Pelton v. Nichols*, 180 Mass. 245.

Where bailee, to carry bank notes for another, used the same, substituting other money therefor which was stolen, he was liable. *Anderson v. Foreman*, 1 Wright, (Ohio) 598.

Bailee was liable for the death of a horse driven beyond the distance for which she was hired, though he had used due diligence. *Everton v. Frier*, (Tex. Civ. App.) 45 S. W. Rep. 201.

Bailee was liable for the death of a horse kept beyond the time for which he was hired; though otherwise he was guilty of no negligence. *Cochran v. Walker*, (Tex. Civ. App.) 49 S. W. Rep. 403.

#### IV. Agistor, and Stable Keeper.

Agistor, not knowing that the pasture, previously occupied by Texan cattle, would infect native cattle pastured there, is not liable for negligence in receiving such cattle for pasture. *Gibbs v. Coykendall*, 39 Hun, 140; s. c. aff'd, 116 N. Y. 666.

An agreement by the plaintiff to pasture the defendant's cattle is no defense to an action for trespasses committed by the cattle in the plaintiff's garden and oatfield, unless the agreement is shown to be one to pasture them in the garden and oatfield, or unless it is shown that the cattle strayed to those places through some fault of the plaintiff. *Myers v. Parker*, 74 Hun, 129.

A mare, left with the owner of a stallion for the purpose of breeding and incidentally for pasturage, was injured by a barbed wire fence. The question of whether ordinary care had been used was left to the jury. *Saunders v. Hartsook*, 85 Ill. App. 55.

An agistor of cattle received them in good condition, but returned them damaged. Negligence was presumed and the burden was upon him to show due diligence. *Hudson v. Bradford*, 91 Ill. App. 218.

The burden of proof is upon the owner of cattle to show that death or injury to same arose from the negligence of the bailee. *Wood v. Remick*, 143 Mass. 453.

An agistor is liable for only ordinary care in preventing the escape of cattle. *Rayl v. Kreilich*, 74 Mo. App. 246.

During the removal with due care of cattle from one pasture to another on account of the failure of water, a steer was struck by lightning. Agistor was not liable as he is not an insurer. *Crawford v. Cashman*, 82 Mo. App. 554.

A person keeping cattle for another must furnish reasonable and ordinary feed, and use reasonable and ordinary care to protect them. *Calland v. Nichols*, 30 Neb. 532.

An agistor turned a cow requiring attention into a wood lot, wherein she hid and died from lack of attention. Held negligent. *Deyer v. Ackley*, 6 N. J. L. J. 283.

Agistor must use ordinary care. *Morgan v. Crocker*, 3 S. C. 301.

An agistor is bound to maintain a legal fence about a pasture. *Lucia v. Meech*, 68 Vt. 175.

#### STABLE-KEEPER.

A stable-keeper should use the care and diligence of an ordinary bailee for hire. See Wharton on Negligence, sec. 693, and cases cited.

Stable-keeper in charge of horses should, when they become sick, give them proper treatment, or at once notify the owner. *Hexamer v. Southall*, 49 N. J. L. 682.

### V. Loans

Evidence as to the dangerous character of a ram and of its owner's knowledge of it was conflicting, but the plaintiff and her son knew that the ram, which had been loaned them and allowed by them to run at large, was usually kept tied. The court erroneously refused to leave the question of the plaintiff's contributory negligence, in the care of the ram, to the jury in an action for personal injuries. *Barlow v. McDonald*, 39 Hun. 407.

An association was liable for the loss of an animal loaned to it for exhibition, which escaped through lack of care in caging it. *Moeran v. New York Poultry &c. Assn.*, 28 Misc. 537.

Borrower must exercise care of most prudent persons in the management of their own affairs. Burden of proof is on the borrower to show

that a loss resulted notwithstanding such care. *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5.

Defendant was gratuitously intrusted with money to be loaned. He failed without excuse to take security or collect it when it became due. Such action was gross negligence for which he was liable. *Samonset v. Mesnager*, 108 Cal. 354.

The borrower of a horse is bound to greater care than a hirer. *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 id. 250.

A bailment for sole benefit of bailee imposes upon him responsibility for slight neglect. *Wilcox v. Hogan*, 5 Ind. 546.

If article loaned perish, or is lost or is damaged without fault of borrower, owner must bear the loss; as, in case of plaintiff's mare dying while in defendant's charge, question of defendant's negligence is for the jury. *Woods v. McClure*, 7 Ind. 155.

More than ordinary care is required by law in the case of a loan. *Green v. Hollingsworth*, 5 Dana (Ky.), 173.

No recovery for conversion of a chattel borrowed, on proof of mere failure to return the article; a demand must be shown. *Ross v. Clark*, 27 Mo. 549.

The borrower is liable in damages for a chattel stolen from him, nothing being shown to excuse him. *Chiles v. Garrison*, 32 Mo. 475.

Servant of borrower was injured by a defect in brackets gratuitously loaned, of which the lenders were ignorant. The lenders were not liable. *Gagnon v. Dana*, 69 N. H. 264.

The owner of an exhibition building failed to provide fire extinguishing apparatus. It was not an insurer; such failure was not lack of due care, and it was not liable to one losing by fire goods loaned for exhibit. *World's Col. Exhibition Co. v. The Republic of France*, 91 Fed. Rep. 64, rev'g s. c., 83 id. 109.

Pledgee of stock was not negligent in failing to make arrangements with the corporation issuing it whereby the pledgor lost the benefit of the latter's reorganization. *Griggs v. Day*, 21 App. Div. 442; s. c. rev'd on another point, 158 N. Y. 1.

Pledgee's attorney upon selling the stock pledged, sent the pledgor a newspaper clipping of the auctioneer's advertisement of sale, containing a list of certain securities among which the pledgor's was included without other identification than their designation as "53 shrs. United States Printing Co.," with a mark in ink opposite it. Held, not a compliance by the pledgee with his duty to notify the pledgor before selling the goods pledged. *McCutcheon v. Dittman*, 23 App. Div. 285; s. c. aff'd, 164 N. Y. 355.

A bank to whom transfers of land certificates had been sent by a

pledgee to deliver to another, on collection of debt for which they were collateral, lost them through the lack of ordinary care. Pledgee's failure to have such transfers recorded as required by statute did not prevent his recovery against the bank. *First National Bank v. First National Bank*, 116 Ala. 520.

By false personation, a party procured goods which he induced defendant to take as security for a loan, under circumstances which put the latter upon notice. Defendant did not make reasonable inquiry and was not a *bona fide* purchaser. *Morning Star v. Sterne*, 124 Ala. 512.

Pledgee of a promissory note without authority, compromised with its maker. He was held liable to the pledgor for the true value of the note. *Union National Bank v. Post*, 64 Ill. App. 404, 407.

Exemptions from liability for loss by fire in pawn ticket must be considered in estimating pawnbroker's liability. *Oberman v. Reece*, 95 Ill. App. 645.

Pledgee was held liable for interest on neglected security, which, but for his negligence, might have been collected. *Mansur-Tebbetts Implement Co. v. Carey*, 1 Ind. Terr. 572.

Pledgee was not liable for failure to protect his pledgor's interests by watching debtor to prevent fraud, as the pledgor was not precluded from protecting it. *O'Kelly v. Ferguson*, 49 La. Ann. 1230.

Makers of a note pledged were insolvent at such time as it should have been collected. Pledgee who had lost the note was not chargeable with failure to collect it. *Spencer v. Plano Man. Co.*, 79 Minn. 35.

Where pledgee sells stock for the best price that can be obtained, which is the full market value thereof, he has discharged his duty. *Hewitt v. Steele*, 136 Mo. 327.

Pledgee failed to obtain security for notes pledged that could have been obtained. The omission was waived by their acceptance by pledgor without objection. Pledgee was not responsible for delay, as pledgor could have obtained security without their possession. *Silvey v. Axley*, 118 N. C. 959.

Pledgee was not responsible for lack of due diligence in realizing on securities which were never put in his possession or control. *Dean v. Church*, 3 Lack. L. News, 224.

Pledgee of notes collectable at a distant point through incidental legal proceedings, was not liable for the negligence of his attorney, where he exercised due diligence in the latter's selection. *Plymouth County Bank v. Gilman*, 9 S. D. 278.

Pledgee of a note, whose maker had conveyed his property to a *bona fide* creditor, surrendered it in exchange for one apparently more valuable. There was no negligence making him liable to the pledgor. *Hanover Nat. Bank v. Brown*, (Tenn.) 53 S. W. Rep. 206.

Owner, failing to reserve title or lien, vendee pledged goods on the representation that they were his, and paid for. Pledgee was not put on inquiry as to pledgor's title by knowledge of the latter's insolvency gained by his willingness to borrow at usurious rate. *Fischer v. Lee*, 98 Va. 159.

Pledgee must be diligent, in preventing outlaw of the security. But is not bound to foreclose security upon non-payment of one of several notes, where that would curtail his ability to provide for the rest. *Northwestern Nat. Bank v. Thompson &c. Man. Co.*, 71 Fed. Rep. 113.

Pledgee was not liable for selling stock at a price, pledgor, neither knowing the possibility of an enhancement, had previously stated would be satisfactory. *Smith v. Lee*, 84 Fed. Rep. 557.

A payee of note, by releasing, without the consent of makers, a judgment pledged as collateral, becomes liable for the value thereof as payment upon the note. *Brown v. First National Bank*, 112 Fed. Rep. 901.

Creditor is liable if loss results from allowing notes given for collateral security to become barred by the statute of limitations. *Farm Inv. Co. v. Wyoming &c. School*, (Wyo.) 68 Pac. Rep. 561.

## VI. Banks—Deposit of Securities with.

### (a). GRATUITOUS BAILEE.

If a banking corporation, organized under the "national currency act" of 1864 (13 U. S. Stat. at Large, 99), has authority to assume the duties and obligations of a naked bailee of property, either gratuitously or for hire (as to which, *quære*), it is outside of its ordinary business, and it is not within the scope of the general powers or apparent authority of its executive and ministerial officers to bind the corporation by a contract for such a bailment.

In the absence, therefore, of proof that special authority has been delegated by its board of directors, or has been exercised with their sanction or knowledge or of evidence that it has been the habit and practice of the corporation to receive property for safe keeping, it is not responsible for property so received by its cashier.

Neither a corporation nor an individual is responsible for neglect in protecting property of which he, or it, has not assumed the custody or any relation of duty or trust in regard thereto.

A circular, issued by such a corporation inviting the correspondence of other banks and offering to buy and sell securities for them, is no evidence of a consent, on its part, to become a general bailee and depository of such securities for its correspondents.

*There is no distinction between a deposit for safe keeping of United*

*States bonds and a deposit of other valuable property* and the provision of said national currency act (secs. 31, 32), authorizing the associations organized under it to keep one-half of the required "lawful money reserve" in cash deposits in the city of New York, do not authorize the deposit, or the receipt by a national bank in the city of New York, of such bonds as a part of such reserve.

A gratuitous bailee is only liable for gross negligence. He is not bound to resort to any special or extraordinary measures for the security of the property intrusted to him.

In an action for the loss of property intrusted to him, evidence of independent acts of negligence not connected with the loss, is inadmissible.

So, also, evidence is improper tending to show that the property was exposed to loss from some unusual cause, of which he had no knowledge. He is only called upon to protect it against risks known or of which he had notice.

In an action against a national bank, *as gratuitous bailee of property* which had been stolen by burglars, a witness, who had testified to conversations with defendant's president, in which he notified him of attempts by burglars to enter the bank and of indications of an intended robbery, and urged upon him the necessity of greater care, was permitted to testify, under objection that the president, after the burglary, requested him not to mention such conversations. Held, error; that the evidence was only material as an admission of culpable negligence on the part of the president; and that his acts and declarations after the transaction and when not acting within the limit of his authority, were not binding upon and could not affect the defendant. *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278; distinguishing, *Van Leuven v. First National Bank*, 54 id. 671.

**From opinion.**—"Whatever may be the extraordinary or incidental powers of the corporation under its charter, power to bind the corporation can only be presumed to exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties. *Life and Fire Ins. Co. v. Mech. Fire Ins. Co.*, 7 Wend. 31; *Minor v. Mech. Bank of Alexander*, 1 Pet. 46; *Hoyt v. Thompson*, 1 Seld. 320; *Leggett v. N. Y. Manf. Co.*, Sandf. Ch. 541.

The powers of the corporation defendant are banking powers only, with such incidental powers as may be necessary to carry on the business of banking, with the privilege of buying and selling exchange, coin and bullion. This does not necessarily include the business of a safe deposit company, or business of receiving for safe-keeping, and storing for hire, or without compensation, jewelry and valuables, or property of any kind. If the power exists in the corporation as a part of its franchise it is only as an incident of its principal business. The duties of the executive officer of a banking corporation who is ordinarily the cashier, are very well understood, and while those of the president are not so well defined,

he is but the executive agent of the board of directors, to perform such duties as may be devolved upon him, and is not the corporation, and cannot take the place of the governing board, and make contracts or incur liabilities outside of the ordinary business of the bank without special authority. The corporations formed under the currency act are banks of deposit as well as circulation. They are authorized to issue their own notes for circulation and to receive from others their money and circulate it. Money so received from others is termed a deposit, although it has none of the qualifications of a bailment. There is no trust or promise to redeliver the same money. By the deposit the money becomes the property of the bank, and the relation of debtor and creditor is created between the depositor and the bank. *Commercial bank of Albany v. Hughes*, 17 Wend. 94; *Marine Bank v. Fulton Bank*, 2 Wallace, 252. This is the character of the deposit which, by the currency act, the defendant was expressly authorized to receive, and in receiving such a deposit the cashier would be acting within the scope of his authority, and the bank, by his act, would become a debtor to the depositor.

The principal attributes of the bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money. Per *Spencer, J.*, 15 J. R. 390; *N. Y. Firemen's Ins. Co. v. Fly*, 2 Cow. 673, 710. \* \* \*

The deposit of these bonds cannot be distinguished from a deposit of jewelry or plate, or other valuable property, and was a special transaction not within the ordinary course of business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducements to burglars and robbers from without, and might prove of greater temptation to dishonesty, on the part of the clerks and employes within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation by the executive officers, or without the special authority of the board of directors, and a single transaction was without the general scope of the powers and duties of the executive officers of the institution.

*Giblin v. McMullen*, L. R. 2 P. C. Cases, 327, was an appeal from the Supreme Court of Victoria. The defendant represented the Union Bank of Australia, and no question was made as to the authority of the manager of the bank to receive the special deposit; and it is expressly said that the railway debentures, which were stolen by the cashier, were placed in the defendant's care by a customer, in the ordinary course of their business as bankers. The case turned upon the liability of the bailee for a theft by the officers of the bank, and the court following *Foster v. Essex Bank*, 17 Mass. 479, held the defendant not liable. *Foster v. Essex Bank* was a special deposit of coin, and the bank was held to be the depositary, rather than the cashier or other officers, although not held liable in the action, on the ground of a general recognition and authorization of the practice by the directors, and *Parker, C. J.*, places the responsibility of the defendant solely on that ground; and applying the principles of master and servant, and deducing the relation of bailor and bailee, says: 'Not so, if the servant secretly, and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties.'

*Scott v. National Bank of Chester*, 72 Penn. St. 471, followed the case last cited,

in principle. A case very analogous to, if not in all respects like this principle, was *Lloyd v. West Branch Bank*, 15 Penn. St. 172, and it was adjudged that the cashier had no authority to receive, as a special deposit, a sealed package of small notes, issued by a corporation, without authority of law, and that if so received, without the permission of the directors, or their knowledge of any usage or practice to receive such packages on deposit, the law would not imply a contract on the part of the corporation with the depositor for the safe keeping of the package. Coulter, J., says, that, 'It was never designed by the provisions of the statute that the bank should be converted into a kind of pawnbroker shop.' The case turned upon the point as expressed by the court, that there was 'no evidence that the bank made any contract with Oliver (the depositor), express or implied.' The whole tenor of authority is in favor of holding corporations for the acts of their officers, especially executive officers and general agents, within the general scope and apparent sphere of their duties, and not holding them for acts done without special authority in cases without such general scope and sphere of duty. The cases are all reconcilable and sustainable on this principle and no other. Courts and judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations for the acts of their officers and agents, in the absence of an expressed authority to do the particular act, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties. Such are presumed to be by authority of and within the knowledge of the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business. The duties of the cashier are well understood, and as recognized judicially, are restricted to the care and management of the property and fiscal concerns of the bank, and the conduct of its business as a bank, in the usual and ordinary way. *Story on Agency*, sections 114, 115; *Badger v. Bank of Cumberland*, 27 Maine 428; *Merchants v. State Bank*, 10 Wallace 604; *Bank of Genesee v. Patchin Bank*, 3 Ker. 309. The president and cashier of a bank cannot assign the choses in action of the corporation to its creditors as a security for the payment of a precedent debt, without authority from the board of directors. They can do no act outside of their ordinary duties in the conduct and management of the banking business, unless by authority, either express or implied from the fact that they have been permitted to do the like acts without objection. *Hoyt v. Thompson*, 1 Seld. 320. Judge Wayne, in *United States v. City Bank of Columbus*, 21 How. U. S. 356, says: 'The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through the subordinate officers of the bank, all the money and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank when they have been deposited, and, as the executive officer of the bank, transacts most of the business.' After this summary of the duties and powers of the cashier, the same judge says that he may not make any contract involving the payment of money not loaned in the usual or customary way, or purchase or sell property, or create any agency of any kind for the bank,



unless expressly authorized by those to whom has been confided the power to manage the business of the bank, both ordinary and extraordinary. Judge Story limits the authority of bank officers, to bind the corporation, to acts and contracts within the ordinary sphere of their duties, and the scope of the ordinary business. *Minor v. Mech. Bank of Alexandria*, 1 Peters 46, 70; *Fleckner v. Bank of United States*, 8 Wheat. 338; see, also, *Fulton Bank v. New York and Sharon Canal Co.* 4 Paige 127. The doctrine of estoppel may give effect to the acts of the officers of a corporation as against the corporation, as in other cases of principal and agent. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125. But there is no question of estoppel in this case.

A class of cases were cited by the learned counsel for the plaintiff, which do not very directly bear upon the question under consideration. They are those in which a statutory power has been conferred and has been executed, apparently within the terms and in the manner and by the agents prescribed by statute, and a presumption has been allowed in favor of those who have in good faith acted upon the apparent compliance with the statute and the terms of the grant. The cases are circumstantially different, but all may be brought within one general principle, and they do not conflict with the views before advanced. *Commissioners of Knox County v. Aspinwall*, 21 How. 539; *Royal British Bank v. Turquard*, 5 E. & B. 248; s. c., 6 id. 327; *Commonwealth v. Pittsburgh*, 34 Penn. St. 496; *Farmers' L. & T. Co. v. Curtis*, 3 Seld. 466, are among the cases cited by counsel, and illustrate the principles governing all. They do not touch the principle upon which this branch of the present appeal rests.

No general principle was decided in *Van Leuven v. First National Bank of Kingston*, 54 N. Y. 671. By a divided court it was held that the contract in that case, under the peculiar circumstances, was the contract of the corporation, and not the individual contract of the president. The question now under consideration was not considered by the learned commissioner, and does not appear to have been made in the action.

It was earnestly and ably urged upon the court by the counsel for the plaintiff that the corporation was liable as a wrongdoer or tortfeasor within the principle of *Philadelphia, Washington and Baltimore Railroad Company v. Quigley*, 21 How. (U. S.) 202, and other cases which were cited, in which the doctrine was applied under different circumstances. The difficulty with this argument is, that there was no wrong by the corporation, and could be none, if there was no contract. If there was no bailment to the corporation it neglected no duty, and was guilty of no negligence. The whole duty of a bailee rests upon contract, and if there was no contract there was no duty. Neither a corporation or individual can be called upon to pay that which he or it does not owe, and neither is responsible for want of care or for neglect in protecting property of which he or it has not assumed the custody, or any relation of duty or trust in respect to it.

Having arrived at the conclusion that if the power of the corporation to assume the position of bailee, with its responsibilities and obligations, be conceded, there was no evidence of the delegation of the power to the executive and ministerial officers of the bank, and that for that reason the judgment should be reversed and a new trial granted, it is unnecessary to consider the question back of it as to the power of the corporation itself in that direction. It is a question not free from difficulty, but can be more satisfactorily considered when it becomes (if it shall) necessary to a judgment."

The last case came a second time to the court of appeals, and the following is the decision:

Bonds were received by a national bank and placed in a safe, the door of which was sometimes open, and became thereby exposed to persons from the street and was not always kept in view of the bank employés. No account was given of the disappearance of the bonds, but they, together with some belonging to the bank, were stolen. The question of the bank's negligence was for the jury.

National banks have power to receive special deposits gratuitously or otherwise, and when received gratuitously they are liable for their loss by gross negligence. When a national bank has habitually received such deposits this liability attaches to a deposit received in the usual way. The term "special deposits" includes money, securities and other valuables delivered at the bank to be specifically kept and re-delivered, and is not confined to securities held by banks as collaterals to a loan.

The fact that property of the bank was stolen from the same place, at the same time, was not conclusive against the charge of gross negligence. *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Tracy v. Wood*, 3 Mason 132; *Wilson v. McIntosh*, 1 Stark (N. P.) 237; *Bank v. Gorham*, 79 Pa. St. 106.

As to whether, assuming the receipt of special deposits to have been beyond the legal power conferred upon the defendant, yet having in fact received plaintiff's property into its custody, it could set up its own want of corporate power as a defense, *quære*. *Pattison v. The Syracuse National Bank*, 80 N. Y. 82, aff'g judg't for pl'ff, distinguishing *Lloyd v. W. B. Bank*, 15 Penn. St. 172; distinguishing and limiting *F. N. Bank v. O. N. Bank*, 60 N. Y. 278; and disapproving *Wiley v. F. N. Bank*, 47 Vt. 546; 50 id. 389.

**From opinion.**—"In the leading case upon the subject, *Foster v. Essex Bank*, 17 Mass. 479, A. D. 1821, where a special deposit had been made with the defendant, of a cask containing gold coin, it was shown that it had been the practice of the bank to receive special deposits of money and other valuable things, but there was no regulation or by-law or provision of the charter upon the subject. \* \* \*

The court held that the practice of the bank having been to receive such deposits, and its building and vaults having been allowed to be used for that purpose, and its officers employed in receiving into custody the things deposited, the corporation must be deemed the depository, and not the cashier or other officer, through whose particular agency the property had been received into the bank.

The next case on the point is *Lloyd v. The West Branch Bank*, 15 Penn. St. R. 172, decided in 1850. It was there held that the power to receive deposits, conferred on the bank by the Pennsylvania banking law, referred to deposits of current money received as such, and not to special deposits. But the court, although indulging in some strong expressions, indicative of an opinion that

the statute did not intend to confer power, states the question to be, whether there was any such *general custom or practice of the cashier of the bank to act as a voluntary bailee without regard, as to make the bank liable for his acts, and the decision rests upon the want of evidence to make any such practice.* The court was undoubtedly correct in holding, as it expresses itself, that it was not intended that banks should be turned into pawnbrokers shops, or receive old clothes on deposit. But the case is not an authority for the proposition, that if a bank is in the habit of receiving on deposit coin or other valuables, such as are usually the subject of special deposits in banks, it will not be bound by the act of its officers in receiving them.

But in later cases in the same state, the doctrine of *Foster v. Essex Bank* is expressly recognized, and applied to national banks. In *Lancaster Co. National Bank v. Smith*, 62 Penn. St. R. 47, where a special deposit of United States bonds had been made with the bank by delivering them to the teller, and the teller had subsequently delivered them to a third party, supposed to be the depositor, but without ascertaining his identity, the bank was held liable. The case of *Lloyd v. West Branch Bank* was referred to, but the power of the bank to bind itself by receiving the deposit was not disputed, and it was held that it was a question for the jury whether the bank had been guilty of gross negligence.

In *Scott v. National Bank of Chester Valley*, 72 Penn. St. R. 471, the facts were almost identical with those in *Foster v. The Essex Bank*. A special deposit of bonds for safe keeping had been made with the defendant by one of its customers, and the bonds were stolen by the teller of the bank, but *no negligence on the part of the bank was established and a verdict for the defendant on that ground was sustained.* The receipt of the bonds was not claimed to be *ultra vires*.

In the *First National Bank of Carlisle v. Graham*, 79 Penn. St. R. 106, the plaintiff sued for the loss of United States bonds claimed to have been deposited by her with the bank, and relied upon a receipt for the bonds, signed by the cashier of the bank, in which he acknowledged that she had left the bonds in the bank for safe keeping. It was admitted that *government bonds were received by the bank for safe keeping, with the knowledge of the president, cashier and teller, and without compensation.* A verdict and judgment having been rendered for the plaintiff, it was reversed on exceptions to ruling on questions of evidence, and to some portion of the charge in submitting to the jury the question of negligence, but on the point of liability of the bank, *the doctrine of Foster v. Essex Bank was emphatically reiterated*, and it is stated that the rule as laid down in that case has been uniformly applied in the supreme court of Pennsylvania in cases involving the rights and duties of national banks.

In *Turner v. First National Bank of Keokuk*, 26 Iowa 562, the liability of a national bank for a special deposit of bonds was also recognized. *Smith v. First National Bank of Westfield*, 99 Mass. 605, was also a case of a special deposit of bonds with a national bank, and the bank was held to be bailee of the bond, *but liable only for want of ordinary care.* To the same effect is *Giblin v. McMullen*, L. R. (2 P. C.) 317.

In *Chattahoochee National Bank v. Schley*, 58 Ga. 369, the court after referring to some of the cases, which have been cited, and also to the recent case of *First National Bank v. Ocean National Bank*, 60 N. Y. 278, and *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546, summarizes its view of the

existing law as follows: '*By habitually receiving through its cashier special deposits to be kept gratuitously for mere accommodation, a national bank will incur liability for gross negligence in respect to any such deposits, received in the usual way.*' This I adopt as a concise and accurate statement of the result of the decisions to which I have referred.

The only adjudication to be found in conflict with this doctrine, are the case of *Wiley v. First National Bank*, 47 Vt. 546, followed by the same court in 50 Vermont 389, where it was held, in direct opposition to all the cases I have cited, that when a special deposit is received by a national bank, *even in accordance with usage, and with the knowledge and acquiescence of the directors of the bank, the bank is not liable for its loss, even by gross negligence*; and this put upon the ground that the bank has no corporate capacity to receive such deposits for safe keeping, and consequently cannot empower any of its officers to incur liability in its behalf by so doing.

There are some cases in which the Vermont cases are referred to with approval, by the judge writing the opinion (*Third Nat. B'k of Baltimore v. Boyd*, 44 Md. 47, and *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278), and there is no other adjudication to the same effect. In the case in 60 N. Y. the opinion expressly states that it is unnecessary to consider the question of the power of the bank, that it is a question not free from difficulty, but can be more satisfactorily considered when it becomes necessary to a judgment. The opinion proceeds upon the ground that the receiving of special deposits was not shown to be part of the ordinary business of the bank. That there was an entire lack of evidence that it was the habit or practice of the defendant to receive such deposits. That no authority to the cashier or the assistant cashier to receive special deposits had been shown, and that, whatever might be the incidental powers of the corporation, the power of its officers to bind it can be presumed only to exist within the scope of its ordinary business and their ordinary duties. It is upon this distinction between the facts in the case before the court and those in *Foster v. Essex Bank* that the opinion proceeds, and not upon a rejection of the doctrine of that case."

A bank, pursuant to directions of a correspondent, to deliver a draft and receive a note together with specified securities of a certain amount, accepted them after glancing at their backs to verify the amount and without inspecting the inside, which would have revealed their spurious character. It had complied with the custom of banks in such transactions and was held not liable. *Clinton Nat. Bank v. National Park Bank*, 37 App. Div. 601; s. c., aff'd, 165 N. Y. 629.

Plaintiff deposited certificates with a bank to be delivered to a third party upon the payment of a certain sum. Bank was liable where they were lost through the want of ordinary care. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520.

#### (b). PLEDGE.

Securities deposited with a bank as collateral to a note disappeared. The bank was bound to account for such disappearance and to use ordinary care to prevent it. It was proven, as an item of negligence,

that the president was accustomed to use securities for his personal business and that he and the manager conducted the bank with little attention from the trustees. The bank was held liable. *Cutting v. Marlor*, 78 N. Y. 454, aff'g, 17 Hun, 513, and judg't for def't. Distinguishing, *Foster v. Essex Bank*, 17 Mass. 479; *Jenkins v. Bank of Bowdoinham*, 58 Me. 275; *Giblin v. McMullen* (L. R.) 2 P. C. Appeals 318; *Scott v. Bank of Cherry Valley*, 12 Penn. 471.

A regular customer of defendant deposited bonds with it as collateral security for discounts. Discounts and renewals upon the security of such bonds were obtained by plaintiff, during a period of four years. When the last note so discounted was paid, defendant's cashier, at his own suggestion, delivered to plaintiff a receipt signed by him as cashier, acknowledging the receipt of the bonds as collateral and stating that, all loans having been paid, the bonds were retained for future like use or safe keeping, subject to the plaintiff's order. Defendant thereafter, as it had done before, paid the coupons falling due on the bonds to plaintiff until October, 1887. In February, 1888, plaintiff demanded a return of the bonds, but was informed, that they could not be found; no information was afforded him, in respect to the circumstances attending their disappearance, or the mode by which they had been removed, if at all, from the possession of the bank. There was evidence tending to show, that it was its custom to return securities, held as collateral, to the owner upon payment of loans; that, while held, they were kept with other valuable securities belonging to defendant in a steel box inclosed in an iron safe; that the safe and box had combination locks, the combination on the box being known to the defendant's president and cashier alone, and the latter alone having the key. It was also proved that the cashier had been in the defendant's employ for many years, and had borne a good reputation until December, 1887, when he was removed for the alleged reason that he was a defaulter. All the defendant's officers, except said cashier, testified that they had no knowledge of its possession of the bonds, or of the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them. Defendant's by-laws provided for the appointment by its president, once at least in every three months, of a committee, consisting of two members of the board, who with the president and cashier, should constitute a committee of examination, and they were required to examine all matters "pertaining to the affairs of the institution" and report the same. Examinations were only made once in six months by three examiners, and were confined to the securities owned by defendant, and those it held as collateral for unpaid loans. The reports showed no account of such collaterals or of special deposits. Defendant was accustomed to receive special deposits from its customers for safe

keeping, which were usually kept in the vault, but were not entered upon its books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. Held, that defendant was not a gratuitous bailee, but the bailment was made one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purposes for which they had theretofore been used.

The burden of showing the circumstances of the loss rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property bailed. *Caldwell v. Mohawk Bank*, 64 Barb. 333; *Collins v. Bennett*, 46 N. Y. 490; *Cutting v. Marlbor*, 78 id. 454; *Russell M'fg Co. v. N. H. S. Co.*, 50 id. 121. *Ouderkirk v. C. N. Bank*, 119 id. 263; affirming, 52 Hun, 1, and judg't for pl'ff.

The defendant, to secure a debt to the plaintiffs, delivered to them a warehouse receipt for certain wet, salted calf skins. The plaintiffs gave no personal attention to the skins, while in the warehouse, and exercised no supervision over them, but the defendant had free access to them and frequently examined the same. They were injured by the heat of those in the center and this did not appear upon the surface of the pile. The defendant discovered this and advised that they be resalted or tanned, which the plaintiffs declined to do, but, to the proposition of the defendant that they be taken to his warehouse and treated, the plaintiffs did not consent, but suggested that the defendant pay the debt and take the skins.

The legal title to the property was vested in the plaintiffs, and the warehousemen were their bailies, yet the defendant had at least an equal interest in the preservation of the property, and it was not the duty of the plaintiffs to cause the skins to be handled over and inspected, nor to permit the defendant to take them to his own warehouse; and whether any action on their part, for the purpose of preservation, was necessary was a question for the jury. *Willets v. Hatch*, 132 N. Y. 41, aff'g. judg't for pl'ff.

If the plaintiffs had taken the actual custody of the property, a different question would have arisen. 2 Kent's Com. 587; *Wheeler v. Newbould*, 16 N. Y. 392; *G. F. & M. Ins. Co. v. Marr*, 46 Penn. St. 504; *Hanna v. Holton*, 78 id. 334.

See *Hamilton v. McPherson*, 28 N. Y. 72.

## VII. Cheese Factories.

The plaintiff and his assignors agreed with the defendant that the latter should manufacture cheese and butter from milk delivered at his factory by the former, and to sell the same and distribute the proceeds. The factory was destroyed by fire and a quantity of the material and product was lost. The defendant was bound to use ordinary care to preserve the property, and the burden was upon the plaintiff to show a breach of this duty, as no presumption of negligence arose from the fact that the loss resulted from fire. *Stewart v. Stone*, 124 N. Y. 500, aff'g judg't for def't. (Citing, *Whitworth v. Erie R. Co.*, 87 id. 413.)

## VIII. Safe Deposit Company.

An officer with a search warrant demanded admission to a box of securities, deposited with the defendant, which having been accorded him, the officer took securities not described in the warrant. The defendant was negligent in permitting removal of property not described in the warrant.

When property, in the custody of a bailee for hire, is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender it; if it is not, it is his right and duty to refuse to surrender it; also to offer such resistance to the taking and to adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded, and taken under a claim of right, without legal process.

While a bailee may excuse himself for permitting the property of the bailor to be taken by a stranger, by showing that he yielded to the power of legal process, a seizure under such a process, after the bailee has negligently allowed the property to pass into the hands of trespassers, is not a protection to him in an action by the owner.

The mere levy, therefore, of an execution or attachment upon property by a creditor of the owner, while in the possession of the tortfeasor, is not available, as a defense or in mitigation, in an action against the bailee.

It seems, if it can be shown that the bailee has had the benefit of the property, by application through regular legal proceedings upon a judgment against him, this will go in mitigation of damages. *Roberts v. Stuyvesant Safe Deposit Company*, 123 N. Y. 51; reversing 49 Hun. 117.

See, *Clegg v. Boston Storage Warehouse Co.*, 149 Mass. 451; *Simmons v. Donfour*, 126 Ind. 322; *Waller v. Parker*, 5 Cald. 476; *Edson v. Weston*, 7 Cowen 278; *Labenstein v. Pritchett*, 3 Kan. 213.

Owner of safety deposit vaults is a bailee for hire and is not excused from the exercise of ordinary care by the fact that the depositor has a key. Clerk admitted two strangers without other identification or appearance of authority than the possession of the key and what purported to be a power of attorney without taking the name of the notary thereon. *Mayer v. Brensinger*, 180 Ill. 110; aff'g s. c., 74 Ill. App. 475.

### IX. Warehousemen.\*

A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property, in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur, without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. *Collins v. Bennett*, 46 N. Y. 490, rev'g judg't for pl'ff.

Plaintiff's goods, while upon defendant's wharf, were destroyed by fire occurring in the nighttime, originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. Evidence was given tending to show that no apparatus or means for extinguishing fires were kept there. A private watchman was left in charge, with some colored men, but neither he nor any of them were produced as witnesses, nor did it appear that he was at his post, or that any person was upon the wharf when the fire broke out. Held, that evidence was such as to require the submission of the question of negligence to the jury, and that a direction of a verdict for defendant was error. *J. Russell Manufacturing Co. v. New Haven S. Co.*, 50 N. Y. 121, distinguishing *Lamb v. The Camden and Amboy R. R. Co.*, 46 id. 271.

Action was for non-delivery of goods; defense was loss of goods by burglary. Held (1) Warehouseman must show to a reasonable certainty that goods were lost by theft, burglary, or fire, as the case may be. (2) The burden is then on the plaintiff to show that this happened through such want of care on the part of the bailee, as a prudent man would take, under similar circumstances, of his own property. *Claffin v. Meyer*, 75 N. Y. 260, rev'g judg't for pl'ff.

**From opinion.**—"Examining the case under this rule of law we find that there was no proof tending to show when the warehouse was entered, whether in the night or daytime. It was, it seems during a large portion of every twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the scuttle or roof or by the ordinary entrances, whether the thieves got in by stealth and broke out through the roof or broke in through the roof. The evidence was clear

\* NOTE.—As to when common carrier is liable as warehouseman, see post p. 322.



that access to the roof was gained from an adjoining tenement-house by means of a burglar's ladder, and a blank brick wall some twenty or twenty-five feet above the roof of the tenement-house was scaled by means of this ladder; that the goods were removed from the third story of the warehouse where they were stored, the packages being carefully replaced so as to delay observation and discovery, and the marks removed from the goods in an upper room of the tenement-house, hired probably by the thieves for the purpose." The evidence was held insufficient.

The plaintiff contracted for the storing of her goods in a partitioned room, in the defendant's warehouse, and each party had one key. Some of the goods were stolen and it was held that the defendant, if liable at all, was liable as a warehouseman and bound to use ordinary care. *Jones v. Morgan*, 90 N. Y. 4, aff'g, 24 Hun, 372, and judg't for pl'ff.

**From opinion.**—"It is not absolutely essential to determine whether the contract between the plaintiff and the defendant was one of bailment of the goods or of hiring the room in which they were stored, because whichever it was; the defendant *was bound to exercise ordinary care and prudence in guarding them*. Such a responsibility was imposed upon him by the very nature of the transaction. The plaintiff was seeking a safe place for the storage of her goods. The defendant had a storehouse in which the storage business was carried on, and he assured her that her goods would be safe therein, and that they would be under the guard of a watchman by night and a responsible or reliable man by day. The price for the space in the storehouse allotted to the plaintiff was fixed in reference to these circumstances. The parties could not have understood that the defendant was to take no care of the goods. The very nature of the contract and the relation between the parties imposed upon the defendant the obligation of ordinary care and prudence in keeping the goods. It is like the case of one who hires a box contained in the safe of a safe-deposit company. He may keep the key, but the company, without special contract to that effect, would be held to at least ordinary care in keeping the deposit, and the duty of such care would arise from the nature of the business it was carrying on, and the obligation to discharge it would be implied from the relation between the parties.

But we are of the opinion that the judge was right in holding that the contract was one of bailment. The building in which the goods were stored was a storehouse, and the business therein carried on was the storage business. The business was advertised as such, and the plaintiff went to the storehouse to have her goods stored there. When she paid money on account of the space occupied by her in the building, it was always paid as storage, and receipted to her as such. It matters not that in some of the conversations between the parties the price was called rent. It was generally called the price of storage, and by whatever name it was called it is clear that the parties always understood it to be the price or charge for storage.

It matters not that a space was assigned to the plaintiff for the storage of her goods, and separated from the rest of the room in which it was by board partitions. That was by special arrangement between the parties, and the defendant accepted the goods in that way. They were in bulk in his storehouse under his charge and in his keeping, just as they would have been, if they had been placed in a large box or in locked-up boxes in the same room. It is a species

of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the key; but as I have before stated, it is unnecessary to define the precise nature of the contract, or to give it a name. The defendant assumed the obligation of ordinary care and prudence in keeping the goods, and that is sufficient to sustain the charge of the judge."

See *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31.

In the absence of a definite term for their bailment, a cold storage warehouseman must maintain a proper temperature as long as the goods remain on storage, or give the customer notice to remove his property. *Southerland v. Albany Cold Storage Co.*, 171 N. Y. 269; rev'g s. c., 55 App. Div. 212.

A trunk containing goods of a husband and wife placed in storage, and a receipt given therefor reciting "this receipt must be delivered on receipt of the goods." The trunk was, however, delivered to the husband, and without demanding the return of the receipt. Bailee was liable to the wife for conversion as to goods of hers in the trunk. *Markoe v. Tiffany & Co.*, 26 App. Div. 95; s. c. aff'd, 163 N. Y. 565.

The president of a warehouse company signed a receipt, reciting the possession of goods in storage, and, upon inquiry, its superintendent so stated. Company was liable to one advancing money on the faith of such representations. *Corn Exchange Bank v. American Dock &c. Co.*, 14 App. Div. 453; s. c. rev'd on another point, 163 N. Y. 332.

Warehouseman, to whom apples had been delivered for cold storage, who fails to maintain the proper temperature whereby the fruit became damaged, becomes liable for the damage. *Wilson v. Linde Co.*, 47 App. Div. 327.

In an action to recover for goods returned by a warehouseman, damaged, proof of their delivery to his predecessor in good condition makes a *prima facie* case. *Isler v. Linde Co.*, 33 Misc. Rep. 465.

If liable for goods injured, warehouseman continues liable, although they be thereafter destroyed without negligence on his part. *Powers v. Mitchell*, 3 Hill, 540.

Is liable for negligent delivery to unauthorized person. *Willard v. Bridge*, 4 Barb. 361.

Must use that reasonable and ordinary care that a person of ordinary prudence would employ in performing the same duty. *Smith v. Simms*, 51 How. Pr. 305.

Warehouseman failed to remove perishable goods from wharf in freezing weather. Was sufficient evidence of negligence to go to the jury. *Leber v. Campbell Stores*, 62 N. Y. Supp. 1121; s. c. aff'd, 64 N. Y. Supp. 464.

Delivery of dressed poultry for storage to one known as keeping a "cold storage" room does not render the proprietor liable for damages

resulting from temperature usual in a "cold storage" room, but too high for a "freezer," in which such goods are usually stored. *Allen v. Somers*, 13 Conn. 355: s. c., 52 L. R. A. 106.

Destruction by incendiary fire, though without negligence, not within the exemption of an agreement to deliver, "damage by elements excepted." *Pope v. Farmer's Union & Milling Co.*, 130 Cal. 139.

Where warehouse receipt stated that loss by leakage was at owner's risk, it was error to charge in respect to liability for lack of ordinary care regardless of the stipulation. *Taussig v. Bode*, 134 Cal. 260.

Duty of one taking grain for storage to be mixed with other grain is to deliver on demand grain of the same quality and quantity. *Baker v. Born*, 17 Ind. App. 422.

See, also, *Snydacker v. Blatchley*, 176 Ill. 506.

Warehouseman not liable for taint from rooms; where owner had equal opportunity of judging its effect on the goods. *Parker v. Union Ice &c. Co.*, 59 Kan. 626.

Grain was stored at owner's risk who knew of custom to mix it with other grain of like quality. Recovery could not be had for loss by fire on the ground that the identical wheat had been sold where sufficient of like quality to make delivery was at all times kept on hand. *Moses v. Tectors*, (Kan.) 67 Pac. Rep. 526.

Warehousemen were not liable for goods received for sale, where they were not notified of owner's interest before the proceeds were turned over to consignors. *Fields v. Blane*, (Ky.) 37 S. W. Rep. 850.

Warehouseman was liable, where he paid proceeds of goods consigned to one giving no other identification than his own representations. *Irvin v. Phelps*, (Ky.) 45 S. W. Rep. 659.

Clause in a receipt from a cold storage company relieving it from liability for loss due to variation of temperature arising from accident to machinery or other unforeseen causes, construed not to cover variation due to negligence or oversight in storage. *Marks v. New Orleans Cold Storage Co.*, (La.) 31 South Rep. 671.

Where damaged condition of goods returned by warehouseman was accounted for by the fall of the warehouse, burden was held to be on plaintiff to show negligence of warehouseman. *Willett v. Rich*, 142 Mass. 356.

Agent of warehouseman to whom goods were delivered, took them to his room whence they were lost or stolen. Verdict for plaintiff was sustained. *Bagley Elevator Co. v. American Exp. Co.*, 63 Minn. 142.

Where goods stored were not properly protected from taint, it was held negligence, and not within an exemption, to the effect that warehouseman should not be liable for "loss to perishable property at owner's risk." *Hunter v. Baltimore Packing &c. Co.*, 75 Minn. 408.

Warehouseman allowed temperature to rise and melt the ice which dripped on the goods. The damage was deemed the result of negligence, and not within an exception in the contract to the effect that goods were at owner's risk of any loss or damage from water. *Minnesota Butter &c. Co. v. St. Paul Cold Storage &c. Co.*, 15 Minn. 445.

Certificate of deposit of flour at a mill, reciting toll due on presentment, made exemption of liability for loss by fire. No recovery was allowed for loss by fire. *Wells v. Pointer*, (Mo.) 69 S. W. Rep. 282.

A warehouseman is not liable for damage caused to goods stored, from unprecedented rainfall. *Cowles v. Pointer*, 26 Miss. 253.

A wharfinger is liable for loss in the sale of cotton resulting from mistake in forwarding to the wrong party. *Thompson v. Gynn*, 46 Miss. 522. See, also, *Archer v. Sinclair*, 49 Miss. 343.

Warehouse was well constructed with a solid foundation, but a flood caused the ground to sink and the building collapsed. There was no negligence in failing to remove grain stored in upper rooms where there was no intimation of the disaster. *American Brewing Assn. v. Talbot*, 141 Mo. 614.

Limitation of liability for negligence by charter of a warehouse corporation, to matters stated in its receipts, is in contravention of a constitutional provision forbidding exclusive privileges. *Motley & Co. v. Southern Finishing &c. Co.*, 122 N. C. 341.

Knowledge by bailor of ignorance of bailee of the proper handling of property stored, does not relieve the latter of liability for lack of ordinary care in the construction and management of his warehouse. *Motley & Co. v. Southern Finishing &c. Co.*, 126 N. C. 339.

Duty of warehouseman is not that of an insurer; and he is not liable for loss by fire without negligence. *Walker v. Eikleberry*, 7 Okla. 599.

Goods delivered in good condition and re-delivered decayed and mouldy from dampness in warehouse, raises a presumption of negligence. *Leidy v. Quaker City &c. Co.*, 180 Pa. St. 323.

Bailee of goods for storage took out insurance upon them, and after their destruction by fire, collected the insurance. Held liable to the owner for money collected. *McDonald v. Palmer*, (Tenn.) 45 S. W. Rep. 338.

A warehouseman must use the reasonable and ordinary care that a person of ordinary prudence would employ in performing the same duty. *Galveston, H. & S. A. R. Co. v. Smith*, (Tex. Civ. App.) 24 S. W. 668.

Insurance policy covered goods stored; but settlement only covered the warehouse. Warehouseman not liable in absence of contract to insure. *Pittman v. Harris*, (Tex. Civ. App.) 59 S. W. Rep. 1121.

A railway company, receiving cotton for through shipment with privilege of stoppage in transit for compression and reshipment, was held

liable to pledgee of a bill of lading for delivery from compress without production of bill of lading to one not entitled to receive it. *Southern R. Co. v. Atlanta Nat. Bank*, 112 Fed. Rep. 861.

## X. Innkeepers.

An innkeeper is bound to receive all travellers and wayfaring persons and entertain them for a reasonable compensation, if they can be accommodated. *Mowers v. Fethers*, 61 N. Y. 34.

And he is liable for such property of his guest, whether the same be in his general or special keeping. *Wilkins v. Earle*, 44 N. Y. 172; *Smith v. Wilson*, 36 Minn. 334; *Mason v. Thompson*, 9 Pick. 280; *Clute v. Wiggins*, 14 Johns. N. Y. 175.

This liability does not arise unless the relation of innkeeper and guest exists. *Ingallsbee v. Wood*, 33 N. Y. 577.

But where it does not exist the innkeeper may be liable as an ordinary bailee for property deposited with him.

The relation of innkeeper and guest is not distinguished by the mere fact that there is a special agreement as to time and price. *Hancock v. Rand*, 94 N. Y. 1; *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 CUSH. 417.

But the circumstances may establish that the alleged guest was but a boarder under a special contract as to time and price. *Vance v. Throckmorton*, 5 Bush, (Ky.) 41; *Pollock v. Landis*, 36 Iowa, 651; *Lusk v. Belote*, 22 Minn. 468; *Johnson v. Reynolds*, 3 Kan. 257.

Or that although provided with food, drink and lodging he did not sustain the relation of guest. *Gastenhoper v. Clair*, 10 Daly, (N. Y.) 265; *Commonwealth v. Moore*, 145 Mass. 244; *Fitch v. Casler*, 17 Hun, 126.

In some states an innkeeper may limit his liability in the same way as common carriers of goods; such limitation is frequently provided by statute. The statute must be strictly observed both by the guest and the innkeeper. *Purvis v. Coleman*, 21 N. Y. 111; *Hyatt v. Taylor*, 42 N. Y. 258; *Ramaley v. Leland*, 43 N. Y. 539; *Bendetson v. French*, 46 N. Y. 266; *Porter v. Gilky*, 57 Mo. 235.

A guest must conform to the reasonable rules and regulations of inns, and his negligence contributing to loss of his property is a matter of defense for the landlord. The innkeeper's liability ends when the guest has had a reasonable opportunity to remove his goods at the expiration of the relation.

### (a). \*WHO IS ENTITLED TO BE A GUEST.

The person or persons undertaking this public employment are bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any possibility they could

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\*NOTE.—N. Y. Laws 1893; Chap. 632 Penal Code of New York, sec. 383, sub-divisions 1 and 2 provides:

"A PERSON WHO—

1. Excludes a citizen of this state, by reason of race, color or previous condition of servitude, from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, or by teachers and officers of common schools and public institutions of learning or by cemetery associations, or

2. Denies or aids or incites another to deny to any other person because of race, creed or color full

be accommodated. *Mowers v. Fethers*, 61 N. Y. 34, rev'g, 6 Lansing 112 and judg't for plaintiff. (See opinion post p. 143.)

Where plaintiff had stolen from his room money which the clerk refused to keep for him, the fact that he had, previous to such refusal, occupied the room with a disreputable woman, did not deprive him of his rights as a guest. *Lucia v. Ormel*, 46 App. Div. 200; s. c., 53 id. 641.

An unlicensed peddler held entitled to be a guest. *Cohen v. Manuel*, 91 Me. 274; s. c., 40 L. R. A. 491.

One who by reason of intoxication, is obnoxious to the other guests is not entitled to be a guest. *McHugh v. Schlosser*, 159 Pa. St. 480.

An innkeeper has the right to eject a person not a guest who enters the house to drum up business for his employers. *State v. Steele*, 106 N. C. 766.

#### (b). NATURE AND EXTENT OF LIABILITY.

An innkeeper, is an insurer of property, committed to his custody by a guest, unless the loss be due to the culpable negligence or fraud of the guest, or to the act of God, or the public enemy.

The rule that the landlord shall be held responsible for goods entrusted to him for safe keeping by the traveler, and subject to detention for his charges, is founded in considerations of public policy.

The statute enables him to require the observance of appropriate precautions by the guest: but it does not absolve him from his obligation to respond for losses caused by the negligence of himself or his servants, or by the depredations of knaves or marauders, within or without the curtilage.

Held, accordingly, that the innkeeper is responsible for the loss of the goods of his guest by fire, the cause of the fire being unknown, and the guest being free from negligence. *Hulett v. Swift*, 33 N. Y. 571.

**From opinion.**—"In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question, on which of them it should properly fall. In the case of *Cross v. Andrews*, the rule was tersely stated by the court. 'The defendant, if he will keep an inn, ought, at his peril, to keep safely his guests' goods.' Croke's Eliz. 622. He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond to their loss, whether caused by his own negligence or by the depredations of knaves and marauders, within or without the curtilage.

This doctrine is too well settled in the English courts, to be shaken by the exceptional case on which the appellant relies. *Calve's case*, 8 Coke, 32; *Cross v. Andrews*, Croke's Eliz. 622; *Richmond v. Smith*, 8 Barn. & Cress 803; *Cashill v. Wright*, 37 Eng. Law & Eq. 175."

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enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars nor more than five hundred dollars "

In the courts of this state, it has always been held that the innkeeper, like the carrier, is, by the common law, an insurer. *Purvis v. Coleman*, 21 N. Y. 111, 112, 117; *Wells v. Steam Navigation Co.*, 2 Comst. 204, 209; *Gile v. Libby*, 36 Barb. 70, 74; *Ingallsbee v. Wood*, id. 458; *Washburn v. Jones*, 14 id. 193, 195; *McDonald v. Edgerton*, 5 id. 564; *Taylor v. Monnot*, 4 Duer 117; *Stanton v. Leland*, 4 E. D. Smith, 94; *Grinnell v. Cook*, 3 Hill 488; *Piper v. Many*, 21 Wend. 282, 284; *Clute v. Wiggins*, 14 Johns. 175.

The rule, as recognized by us, is sanctioned by the leading authorities in the other states. 1 Pars. on Cont. 623; 1 Smith's Lead. Cas. (Hare & Wallace's Ed.) 307; *Shaw v. Berry*, 31 Me. 478; *Sibley v. Aldrich*, 33 N. H. 533; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 427; *Mason v. Thompson*, 9 Pick. 280; *Towson v. Havre de Grace Bank*, 6 Harr. & Johns. 47; *Thickston v. Howard*, 8 Blackf. 535, 537; *Kisten v. Hildebrand*, 9 B. Monr. 72.

A shade of doubt has, at times, been thrown over the question, by the unguarded language of elementary writers and especially by the suggestion of Judge Story, in his treatise on the law of bailments, that the innkeeper could exonerate himself from liability by proving that he was not guilty of actual negligence; and this view seems to have been adopted in two of the Vermont, and one of the English, cases. Story on Bailments, sec. 472; *Dawson v. Champney*, 8 Adolphus & Ellis, N. S. 164; *Merrit v. Claghorn*, 23 Vt. 177; *McDaniels v. Robinson*, 28 id. 337.

\* \* \* No degree of diligence or vigilance on the part of the innkeeper could absolve him from his common law obligation for the loss of his guest, unless traceable to one of these exceptional causes. *Shaw v. Berry*, 31 Me. 478; *Sibley v. Aldrich*, 33 N. H. 533. \* \* \*

The doctrine of these cases is opposed to the general current of English and American authority, and evidently had its origin in a misapprehension of the rule as stated by the judges in *Calve's case*. It is true that the liability of the innkeeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy.

Innkeepers are still insurers of the safety of the property of their guests, notwithstanding the act of 1855 (chap. 421, p. 774); the only effect of that statute being to so far modify their common law liability that it does not extend to money, jewels or ornaments not deposited in the safe, provided for that purpose, where the innkeeper has complied with the provisions of the act on his part.

The liability is not limited to such an amount of money as may be

reasonably necessary for the traveling expenses of the guest, but covers whatever amount may be received and deposited by the innkeeper in the safe.

The plaintiff, being a guest at the defendant's inn delivered a package, containing \$20,000, to a young man in charge of the office, to be deposited in the safe. It was enclosed in a sealed envelope, and the name of the guest was written in pencil on the outside; but no indorsement indicated its contents or value. The notices posted in the rooms of the inn required that valuable packages should be "properly labeled." The plaintiff was asked what the envelope contained, and replied "money." It was received and placed in the safe, and was subsequently stolen therefrom. Held, that the defendants were liable to the full amount of the moneys so deposited. *Wilkins v. Earle*, 44 N. Y. 112, rev'g. 3 Rob. 352.

**From opinion.**—"Is there any basis in principle or in the authorities for the distinction made by the defendant, to wit, *that an innkeeper is liable only for such an amount of money as is necessary for the reasonable expenses of the guest?* This distinction is sought to be maintained upon the analogy to the case of a carrier of passengers, who is liable only for money or articles convenient to the traveler on his journey, and not for goods or merchandise as such. I will cite a few among the many cases reported in the English courts, as well as in those of this state, to show that this distinction cannot be maintained. I think it will appear that the innkeeper is liable to the guest for the value of all his property lost, whether it be intended for his personal convenience, or for traffic, or for any other general or permanent purpose.

"The law was correctly laid down by Lord Coke in Calve's case, more than 250 years since. 8 Co. Rep. 203, 32a. That case contains an abstract of the law touching the liabilities of innkeepers. 'It was resolved *per totam curiam* this term. 1. That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to be put to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it. 2. The words are *corum bona et catalla infra hospitium*, and because the horse which, at the request of the owner is put to pasture, is not *infra hospitium*, the innholder is not bound by law to answer for him if he be stolen out of the pasture \* \* \* but it was holden that if the owner doth not require it, but the innholder, of his own head, puts the guest's horse to grass, he shall answer for him if he be stolen. \* \* \* 3. Although the words *corum bona et catalla* do not, of their proper nature, extend to charters and evidences concerning freehold, or inheritance or obligations, or other deeds or specialties, being things in action, yet, in this case, it is expounded by the latter words to extend to them; and, therefore, if one brings a bag or chest, etc., of evidences into the inn, as obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona catalla* generally, and the declaration shall be special.'

"In *Bennet v. Mellor*, 5 T. R. 273, the case was this: The plaintiff's servant had taken a quantity of goods to market to sell. Being unable to dispose of them, he went with them to defendant's inn, and asked the defendant's wife if



he could leave the goods there till the next market day, the week following. She replied that she could not tell, for they were very full of parcels. The servant then sat down, had some liquor, and put the goods on the floor immediately behind him. When he got up, after sitting a little while, the goods were missing. It will be observed that the subject here was merchandise, which the servant had taken to market, and which he wished to store until the next market day. It had none of the quality of baggage or of articles of personal convenience.

"In *Kent v. Shuchard*, 2 B. & Ad. 803, the head note is, 'An innkeeper is responsible for money belonging to his guest.' The plaintiff and his wife were guests at the defendant's inn. The wife left her reticule, containing money, on her bed. Returning for it in a few minutes, it was gone. The report does not state the amount of the money lost. On the trial it was urged, on behalf of the innkeeper, that he was responsible for goods and chattels only, and not for money. The jury found a verdict for the plaintiff. \* \* \* The court sustained the verdict. \* \* \*

"In *Jones v. Tyler*, 1 Ad. & Ellis, the horse and gig of the guest were taken in charge by the defendant's hostler, who placed the gig in the open street. The gig having been stolen, the innkeeper was held responsible.

"*Richmond v. Smith*, 8 B. & Creswell 9, was a recovery against the innkeeper for the value of certain packages of silk which the plaintiff had and exposed for sale. The defense was attempted on the ground that the plaintiff had taken the goods under his own protection in his private room.\* \* \*

"Of the same character are the reports in our own state. *Clute v. Wiggins*, 14 J. R. 175, was this: The plaintiff came to the defendant's inn with a load of wheat and barley, and was received as a guest for the night. The horses were put into the stable, and his sleigh with its contents into a wagon-house, where it was usual for the defendant to receive loads of that description. The next morning it was discovered that the wagon-house had been broken open, and the wheat and barley stolen. The innkeeper made two points. 1. That the goods had not been delivered into his special custody. 2. That he derived no profit from keeping the wheat. The recovery for the value of the grain was sustained.

"In *Hallenbake v. Fish*, 8 Wend. 547, the plaintiff stopped with his horse at the defendant's inn, and upon calling for his horse, his saddle and bridle could not be found. The plaintiff brought trover for the saddle and bridle. The Supreme Court held, that in trover, he must prove an actual conversion, and that a conversion was not sufficiently proved. They say, that upon the facts presented, there could be no doubt that an action on the case upon the custom, would have lain against the defendant.

"In *Piper v. Many*, 21 Wend. 283, the plaintiff, with his horses and a sleigh-load of butter, stopped at the defendant's inn. A portion of his butter was stolen during the night. The defendant endeavored to protect himself on the ground that the butter was not brought within the inn, but was left in the yard. The court held the defendant liable.

"So recently as the year 1865, in *Hulett v. Swift*, 33 N. Y. 571, a similar case was presented. The plaintiff's servant, with his horses, wagon, and a load of buckskin goods, stopped for the night at the defendant's inn. A fire occurred during the night, by which the property was destroyed. It did not appear how the fire originated, and there was no evidence of negligence on the part of the defendant. The defendant was held to be responsible.

"On the general principle, see, also, Story Com. secs. 480-1; 2 Bl. Com. 430; 2 Kent's Com. 593.

"The cases cited, show that the distinction contended for by the defendant's counsel cannot be maintained. I am not aware of a single reported case which sustains it, nor of any elementary writer, who gives countenance to it."

Sheep put to pasture under direction of a guest are not *infra hospitium* and innkeeper is not liable for their loss in absence of negligence. *Hawley v. Smith*, 25 Wend. (N. Y.) 642.

Servant of innkeeper admitted a fellow guest to a guest's room, simply because she had seen the former in the room with the latter conversing about the goods in question. Proprietor was liable for theft. *Jacobi v. Haynes*, 14 Misc. 15.

Delivery of a boarder's trunk to an unknown expressman who simply showed a slip of paper with her name on it and without requiring its being given up or ascertaining his name or license number, without other warrant than such boarder's statement that she would send an expressman for the trunk, was held to be gross negligence. *George v. Depierris*, 17 Misc. 400.

A special agreement as to price per week for room at a hotel for an indefinite time does not alter the relation of innkeeper and his liability for the loss of goods. *Metzger v. Schnabel*, 23 Misc. 698.

Guest hung up his coat at a place in the office usually used for that purpose, in the presence of one apparently in charge. It was held to be "specially intrusted" to the hotel keeper's care and custody within N. Y. L. 1883, ch. 227, sec. 2. *Bradner v. Mullen*, 27 Misc. 479.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for loss of the same. *Fowler v. Dorton*, 24 Barb. 384.

Goods are within possession of innkeeper although not delivered into his special keeping. *Clute v. Wiggins*, 14 Johns. (N. Y.) 175.

Under sec. 1859 of Cal. Civ. Code, providing that an innkeeper is liable for the loss of personal property of guest's placed in his care, unless caused by "irresistible superhuman cause," an innkeeper is liable for loss occasioned by an accidental fire unless started by lightning or some superhuman agency. *Fay v. Pacific Improvement Co.*, 93 Cal. 253. Compare *Chicago & C. R. Co. v. Sawyer*, 69 Ill. 285; *Moore v. Development Co.*, 87 Ala. 183.

After innkeeper has accepted money according to notice and deposited it in his safe, and it has been stolen, he cannot object as to the kind and amount so taken. *Pinkerton v. Woodward*, 33 Cal. 557. See *Mateer v. Brown*, 1 id. 221.

In law there is an implied contract with a common innkeeper to secure his guests' goods in his inn; and loss of an overcoat deposited

on the shelf at direction of servant is chargeable to the innkeeper. *Rockwell v. Proctor*, 39 Ga. 105.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for the loss of same. *Johnson v. Richardson*, 17 Ill. 302; *Eden v. Drey*, 75 Ill. App. 102; *Hulbert v. Hartman*, 79 Ill. App. 289.

Hotel keeper, to whom checks were given by a guest, employed an expressman to bring the baggage to the hotel. Was liable for its loss by the expressman, though it never reached the hotel. *Williams v. Moore*, 69 Ill. App. 618.

Innkeeper was liable for not only such baggage as is usually carried by a traveller but for articles of merchandise also. Liability began with their receipt at the hotel, though owner was only a prospective guest. *Eden v. Drey*, 75 Ill. App. 102.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for the loss of the same. *Laird v. Eichold*, 10 Ind. 212.

Is liable for the theft of goods, theft of valise containing valuables. *Bowell v. De Wald*, 2 Ind. App. 303.

Money in trunk of guest for loss of which landlord is sued, should be such an amount only as would be convenient to meet his traveling expenses. *Simon v. Miller*, 7 La. Ann. 360.

A horse belonging to a guest at an inn and stabled in the inn's hostelry was injured; the court held, that while innkeepers were not insurers of goods, they are nevertheless responsible for the well and safe-keeping of them; and an instruction that the defendant was not liable, if he was found to be without fault, was error. *Shaw v. Berry*, 31 Me. 478.

See Story on Bailments, sec. 472; *Bennett v. Miller*, 5 Term. R. 273; but see, if guest's servant, or companion makes way with the goods. *Burgess v. Clements*, 4 M. & Sel. 306; see, also, *Clute v. Wiggins*, 14 Johns. N. Y. 175; also, *Shultz v. Wall*, 134 Pa. St. 262.

Innkeepers are insurers of goods, except for loss caused by act of God, the public enemy, neglect or fault of owner or his servants. So, innkeeper is liable for loss of guest's overcoat hung in a place allotted for that purpose. *Norcross v. Norcross*, 53 Me. 163.

Loss of cow taken by innkeeper for safe keeping over night chargeable to him. *Hilton v. Adams*, 71 Me. 19.

Plaintiff, a guest in defendant's inn, cannot recover for valuables left in bath-house apart from the inn, and kept by defendant for convenience of persons bathing in the sea. *Minor v. Staples*, 71 Me. 316.

Under statute limiting the liability of an innholder for losses of "wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use," an innholder is liable for the loss of a gold

watch, a pair of gold bracelets, a gold thimble, some gold rings and a gold neckpin, carried by a female traveler in her trunk and stolen therefrom at the defendant's inn. *Noble v. Milliken*, 77 Me. 359. See, *Noble v. Milliken*, 74 Me. 225.

Delivery at a livery stable at innkeeper's direction is delivery to him for safe keeping, though the stable is not connected with the inn. *Cohen v. Manuel*, 91 Me. 274.

Money in trunk of guest, for loss of which landlord is sued, should be such an amount only as would be convenient to meet his traveling expenses. *Treiber v. Burrows*, 27 Md. 130.

See *Wilkins v. Earle*, 44 N. Y. 172, ante p. 138.

Is liable for theft of horse and chaise belonging to a guest. *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woolen Co. v. Proctor*, 61 Mass. 417.

Innkeeper held not liable for loss by accidental fire. *Cutler v. Bonney*, 30 Mich. 259.

Innkeeper was liable for loss of \$500 kept in a belt upon guest's person. *Smith v. Wilson*, 36 Minn. 334.

Valuables gratuitously received for safe keeping by innkeeper imposes liability for gross negligence only. *Wiser v. Chesley*, 53 Mo. 549.

Whether a guest deposits money on the credit of the inn or not is for the jury; if he deposits it on the credit of the inn, the innkeeper is liable for its loss. *Houser v. Tulley*, 62 Pa. St. 92. *Sneider v. Geiss*, 1 Yeates (Pa.) 34.

Is liable for money of guest stolen while in defendant's inn. *Shultz v. Wall*, 134 Pa. St. 262; *Houser v. Tulley*, 62 Pa. St. 92; *Walsh v. Porterfield*, 87 Pa. St. 376.

No recovery was allowed for loss of horses by fire where the fire was the work of an incendiary. *Merritt v. Claghorn*, 23 Vt. 177.

An innkeeper's guaranty as an insurer, extends to the acts of his servants in case of theft by one of them. *Cunningham v. Bucky*, 42 W. Va. 671; s. c., 35 L. R. A. 850.

#### (c). WHEN THE RELATIONSHIP EXISTS.

The liability of an innkeeper as an insurer, presupposes the relation of host and guest.

He is not responsible, except as an ordinary bailee for hire, for the safe keeping of a horse left at the inn stable for the night, by one who is neither a lodger nor a guest.

The innkeeper was not liable for the loss of the horse, by a fire which consumed the stable, the proprietor being free from negligence. *Ingalls-lee v. Wood*, 33 N. Y. 577, aff'g 36 Barb. 452, disapproving. *Mason v. Thompson*, 9 Pick. 280.

**From opinion.**—"As there was no negligence on the part of the intestate, he was not liable for the loss, unless he was an insurer of the property. There was no express contract of insurance, and none can be implied, unless it sprung from the relation of innkeeper and guest. No such relation existed between the parties. The horse was left at the stable by one who was not, and did not expect to be, a guest at the inn. There was no contract, either express or implied, except for the keeping of the animal for the night; and this created no other or greater liability than if the intestate, instead of being an innkeeper, had been the proprietor of a livery stable. The liveryman, like the agistor, has no lien on the property committed to his charge. *Grimmell v. Cook*, 3 Hill 486, 492; *Fox v. McGregor*, 11 Barb. 41; *Wallace v. Woodgate*, 1 Car. & Payne, 575; *Jackson v. Cummins*, 5 Mees. & Wels. 342. \* \* \*

"The theory of the appellant, that one who contracts for the stabling of his horse by an innkeeper, is constructively an inmate of his house, is supported by a case reported in Massachusetts, but we think that decision was made under a misapprehension of the law. *Mason v. Thompson*, 9 Pick. 280. Its correctness has since been questioned by the court in which it was pronounced. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 425-6. The authorities, on which it rests for support, were fully considered in the able opinions delivered by Judge Bronson, in the case of *Grimmell v. Cook*, and by Judges Potter and Bockes in the present case in the court below, and we think their reasoning conclusive against the doctrine, that an innkeeper can be held as an insurer of property, received from one who is neither traveler nor guest."

Owner of stallion for certain days hired a stall at an inn; the price of oats and meals was reduced, but there was no agreement as to lodging, hay or use of stall. The plaintiff kept the horse under lock and took care of him. Defendant was not liable as innkeeper, hence as insurer, for accidental fire. *Mowers v. Fethers*, 61 N. Y. 34, rev'g. 6 Lansing, 112 and judg't for pl'ff.

**From opinion.**—"An innkeeper at common law, has been said to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. 5 Bacon Abr. (Inns, etc.) 228; Story on Bailments, § 475. The person or persons undertaking this public employment were bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any possibility they could be accommodated, and the innkeeper was bound to guard the goods of his guests with proper diligence. 5 Term. R. 274; 2 Barn. & Ad. 285; 1 Carr. & K. 404; 7 Carr. & P. 213; 4 Exch. 367. The common-law rule has been generally followed by the courts in this country, save so far as it has been modified by statute. The duties, rights and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common-law liability of an innkeeper, the technical relation of guest and innkeeper must be established, and the question is, whether it existed in the present case. I think it did not, for reasons now to be suggested. \* \* \*

"He is doubtless bound to receive and entertain a strolling peddler, and securely guard his pack of trinkets if brought *infra hospitium*, so long as he remains a mere guest. So, also, would he be bound to receive and entertain

a wayfarer, encumbered with a stallion, but under no obligation as an innkeeper to allow his curtilage to be turned into an asylum for the breeding of horses. It is very manifest in this case that the sojourn of the plaintiff, Eggner, with the horse, at the defendant's inn, was not that of an ordinary traveler. The purpose and object was entirely different, and the defendant, as an innkeeper, was under no common law obligation to receive and entertain the plaintiff, Eggner, and his horse for such a purpose, and where he is not bound to receive and entertain the person as his guest, the strict rule of common-law liability for the preservation of his property does not obtain. The obligation to respond to injury to property, depends upon his duty to receive and entertain as an innkeeper, and they must stand or fall together. *Grennell v. Cook*, 3 Hill 485; *Ingalsbee v. Wood*, 36 Barb. 455; s. c., 33 N. Y. 577; *Hulett v. Swift*, id. 571. \* \* \*

"The case of *Washburn v. Jones*, 14 Barb. 193, has no analogy to this. There the defendant was made liable for negligence in fact in the construction of the stall, by reason of which the horse received the injury, and that liability would follow if he was to be regarded merely as an ordinary bailee."

From opinion of Supreme Court, *contra*.—"Some of the authorities hold that where there is a stipulated contract as to time, price, etc., the party is a boarder, but when he is at the inn without any bargain he is a guest. 1 Par. on Con. 628; *Thompson v. Lacy*, 3 Barn. & Ald. 283; *Parkhurst v. Foster*, 1 Salk, 387; *Dausey v. Rich*, 2 Ellis & Bl. 144; *King v. Ives*, 7 C. & P. 213; *Wintermute v. Clark*, 5 Sandf. 247; *Crommell v. Stevens*, 3 Abb. N. S. 34; *Stewart v. McReady*, 24 How. 62; *Bennett v. Ditson*, 5 Term. 273; *Manning v. Wells*, 9 Thomp. 746. A careful examination of the cases cited evinces that the contract was entire, covering the whole case; while, in the case at bar, the agreement only embraced a portion of the accommodations to be furnished by the defendant, and which the plaintiff, Eggner, actually had. The meals and the oats only were provided for, while the rest remained to be determined upon a mere question of value. It was not enough that the price for the meals and the oats was agreed upon, for fixing a price per day for a sojourner at an inn does not make him a boarder, or anything but a guest. *Pinkerton v. Woodward*, 23 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Maine 169; *Parker v. Flint*, 12 Mod. 225. Nor does the fact that Eggner, one of the plaintiffs, was to take care of the horse, make him any the less a guest. In *Seymour v. Cook*, 53 Barb. 451; 35 How. 180, the guest led the horses out of the stable, when one of them was kicked and injured, and it was held that the innkeeper was liable. The same principle has been applied to actions brought against common carriers for the loss of or injury to property. *Mallory v. Tioga R. R. Co.*, 39 Barb. 488; *Medgett v. Bay State*, 1 Daly, 151; *Cavle's Case*, 3 Coke, 32, 33a. Nor is it important how often Eggner came there, or whether he came regularly. *Bac. Ab. tit. Ins. Co. 5*. The length of time is not material. 5 Tenn. 273. 5 Barb. 563; *Allen v. Smith*, 12 C. B. (N. S.), 104; *Eng. C. L. 630*; *Walling v. Potter*, 9 Ann. L. Reg. (N. S.) 618. The purpose for which the horse was used is also of no consequence. 33 Cal. *supra*, 602; 7 Cush. *supra*, 423." See *Washburn v. Jones*, 14 Barb. 193.

Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns; to deprive them of their privileges as such, and to

give to them the character of boarders merely, it must appear that an explicit contract was made to that effect.

Plaintiff and her husband H., who was an officer in the United States army, having no permanent home, but living where military duty called him, occupied rooms in the defendant's hotel under an agreement, by which they were to so occupy, upon terms specified, until the spring or summer following, provided everything was satisfactory, and the husband was not sooner ordered away on military duty. H. and family took their meals at the hotel restaurant, paying for each meal the same as other guests. No notice was posted in said rooms as prescribed by the Innkeepers Act (Chap. 421, Laws of 1855). In an action to recover the value of property of plaintiff, stolen from said rooms while so occupied, held, the facts justified a finding that the relation between the parties was that of innkeeper and guest; and so that defendants were liable.\*

It appeared that the defendants kept separate apartments for boarders and for transient persons, and that H. and family were registered among the former. Held, in the absence of proof that H. was aware of this fact, defendant's liability was not affected thereby. *Hancock v. Rand*, 94 N. Y. 1, aff'g 17 Hun, 279, and judg't for pl'ff, distinguishing *Vance v. Throckmorton*, 5 Bush. 41; *Manning v. Wells*, 9 Humph. 746; *Hursh v. Byers*, 29 Mo. 469; *Pollock v. Landis*, 36 Iowa 651; *Lusk v. Belotte*, 22 Minn. 468.

**From opinion.**—"The authorities hold beyond question that the fixing of the price does not make a party a boarder. See *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Walling v. Potter*, 35 Conn. 183. \* \* \*

'The length of time that a man is at an inn makes no difference, whether he stays a week, or a month or longer; so although he is not strictly transient, he retains his character as a traveler,' but he may, by a special contract to board and sojourn, make himself a boarder, and being such the innkeeper is not liable. Story on Bail, sec. 477; 2 Pars. on Contracts, 150 *et seq.* The decisions have not been entirely harmonious as to whether fixing in advance the price to be paid and the length of the stay has the effect in law to constitute such person a mere boarder or lodger, and to deprive such visitor of the character of guest. There are numerous decisions in the books of recent date which hold that where there is a special agreement as to time and price that does not absolutely disturb the relationship of innkeeper and guest. *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Maine 169; *Walling v. Potter*, 35 Conn. 183; *McDaniels v. Robinson*, 26 Vt. 316. See, also, *Parker v. Flint*, 12 Mod. 255. These cases indicate a tendency in the

\* Chap. 253, Laws 1894, provided—Sec. (1) "Whenever the keeper of any hotel or inn shall receive into his hotel or inn any person as a boarder, he shall have lien upon and right to detain the baggage and effects of such boarder to the same extent and in the same manner as if such boarder had been received as a guest; and such lien may be enforced in the manner prescribed by law for the enforcement of a lien upon the baggage or effects of a guest." This act was repealed by the Lien Law, Laws 1897, ch. 418, which, in § 71, provides for liens of hotel, inn, boarding and lodging house keepers.

courts to conform the old rule to the changes made in hotel keeping in modern times.

We are referred by the learned counsel for the appellants to numerous cases to sustain the doctrine he contends for, among which are: *Vance v. Throckmorton*, 5 Bush. (Ky.) 41; *Manning v. Wells*, 9 Hump. (Tenn.) 746; *Hursh v. Byers*, 29 Mo. 469; *Pollock v. Landis*, 36 Iowa 651; *Lusk v. Belote*, 22 Minn. 468, and others. A careful examination of these authorities discloses that in each of them it is very apparent that the relation of landlord and guest did not exist, and that the party who claimed damages of the innkeeper was in every case a boarder beyond any question, and that in most, if not in all of them, there was a special contract as to time and price which established that relationship."

Horses are not given into the innkeeper's custody, so as to make him responsible for their safe keeping, where they are tied under his shed without notifying him or his servants of their presence or requesting attention to them. *Bradley Livery Co. v. Snook*, (N. J. L.), 50 Atl. Rep. 358; s. c., 55 L. R. A. 208.

#### 1. WHO IS A GUEST.

Innkeeper was liable when goods of guest were deposited, by direction of former's servant, in uninclosed space near highway. *Piper v. Manny*, 21 Wend. 282.

An innkeeper may refuse to receive goods for lodgers from third persons, but if he does receive them he will be liable as an innkeeper.

Goods of a firm deposited by a member thereof, as a guest, makes innkeeper responsible to firm. *Needles v. Howard*, 1 E. D. Smith, 54.

One purchasing liquor at an inn is a guest. *McDonald v. Edgerton*, 5 Barb. 560.

Contract for board at less than customary prices does not destroy relation of innkeeper and guest. *Beale v. Posey*, 72 Ala. 323.

For failure to make a special contract with a guest as required by statute, innkeeper would not be entitled to receive compensation for such a one's lodging; but would be liable as innkeeper for loss of guest's goods, even though no license has been taken out as required. *Lanier v. Youngblood*, 73 Ala. 587.

A traveler who enters an inn as a guest does not cease to be such by (1) proposing to remain a certain number of days, or (2) by paying in advance. *Pinkerton v. Woodward*, 33 Cal. 557.

A rule of the house to charge guests a less rate per diem weekly when he remains more than a week not brought to the notice of a guest does not make him a boarder, instead of a guest. *Magee v. Pacific Improvement Co.*, 98 Cal. 678.

The fact that one staying at an inn lives in the same town where the inn is situated will not relieve the proprietor from an innkeeper's liability. *Walling v. Potter*, 35 Conn. 183.



Though not a traveler, one who receives transient accommodation at an inn is a guest. *Walling v. Potter*, 35 Conn. 183.

Where porter gave traveler check for his baggage at depot, and it was lost while being conveyed to hotel by carrier. The latter became entitled to rights of guest. *Caskeney v. Nagle*, 83 Ga. 696.

See, for distinction between guest and boarder, *Shoecraft v. Bailey*, 25 Iowa, 553.

Innkeeper is liable for loss of guest's horse, chaise and harness. Committing the same to innkeeper to be fed constitutes him a guest although he himself does not lodge there nor take any refreshment there. *Mason v. Thompson*, 9 Pick. (Mass.) 280. See *McDaniels v. Robinson*, 26 Vt. 316.

A traveler received as a guest does not become a boarder by making an agreement for the price of his board by the week. *Berkshire &c. Co. v. Proctor*, 7 Cush. 417.

See, also, *Hall v. Pike*, 100 Mass. 495.

The jury should decide in a doubtful case whether a person is a guest or a boarder. *Ross v. Mellin*, 36 Minn. 421.

A trunk left on platform erected by hotel for reception of guests' baggage is *infra hospitium* and innkeeper is liable for its loss. *Maloney v. Bacon*, 33 Mo. App. 501.

A guest is a wayfarer who stops at an inn and is accepted. *Manning v. Wells*, 9 Hump. (Tenn.) 746.

A guest at an inn is one who seeks rest or lodging for a night or a day. *Comer v. State*, 26 Tex. App. 509.

If a man retains his status as a traveler, neither the length of his stay nor an agreement for board by the day or week will change his relation from that of guest to that of boarder. *Jailie v. Cardinal*, 35 Wis. 119.

## 2. WHO IS NOT A GUEST.

One who is not otherwise a guest cannot hold the proprietor to an innkeeper's liability for the loss of his horse left at the stable of the inn for the night. *Ingallsbee v. Wood*, 33 N. Y. 577.

A person attending an entertainment at an inn upon invitation and payment is not a guest so as to bind the innkeeper as such for injury to such person's horse, although he may be liable for negligence. *Fitch v. Casler*, 17 Hun, 126. See *Carter v. Hobbs*, 12 Mich. 52.

Peddler who left his pack at an inn by consent of innkeeper without engaging room or food cannot charge the liability of innkeeper for the loss of it. *Toub v. Schmid*, 60 Hun. 409.

Innkeeper is not liable for goods left at his house by one not a guest. *Centlivre v. Ryder*, Edm. Select Cas. (N. Y.) 273.

Innkeeper is not liable for loss of coat of one dining at the hotel on invitation of a guest. *Gastenhoper v. Clair*, 10 Daly (N. Y.), 265.

Plaintiff sold out her business and removed to defendant's town where she engaged rooms and board for so much a month, staying there for six months. She was a boarder and not a guest. *Haff v. Adams*, (Ariz.) 59 Pac. Rep. 111.

Not liable for goods of guest, left to be called for on his return, after settling his bill and departing. *O'Brien v. Vaill*, 22 Fla. 627.

Hotel proprietor is liable as innkeeper for guest's baggage a reasonable time after his departure. *Adams v. Clein*, 41 Ga. 67.

See, also, *Hayes v. Turner*, 23 Iowa, 214.

Regular boarder by the week deposited gold with hotel keeper, who put it with his own valuables in his safe, and the court held that he was not liable as innkeeper, plaintiff not being a traveler or guest. *Johnson v. Reynolds*, 3 Kas. 257.

Persons who enter the house of a licensed innholder for the purpose of procuring drinks are not guests. *Commonwealth v. Moore*, 145 Mass. 244.

An innkeeper is not liable to one, for the loss of overcoat and gloves, who buys a ticket to a ball given at defendant's inn by a fire company. The fact that during the night he spent money for liquor and cigars in the saloon of the inn does not affect the question. *Carter v. Hobbs*, 12 Mich. 52.

Liability of innkeeper as insurer is only in favor of *travelers*; so where persons entered defendant's hotel in August and remained until October following, the proprietor was not liable for jewelry of theirs stolen while in the hotel. *Lusk v. Belote*, 22 Minn. 468.

One who was a guest in an inn, but to avoid payment of bill while absent a day had his name checked off the register, cannot recover for valise left in a friend's room and stolen while he was away. *Miller v. Peebles*, 60 Miss. 819.

Plaintiff, without an intention to occupy a room, engaged one for the purpose of securing a place of safety for his valuables, depositing them with the clerk of the inn. Was not a guest. *Bunn v. Johnson*, 77 Mo. App. 596.

One whose only business in a hotel is to deposit his money there for safe keeping, is not a guest and cannot hold the proprietor to an innkeeper's liability for the loss of it. *Arcade Hotel Co. v. Wiatt*, 44 Oh. St. 32.

Innkeeper was held not liable for loss of hats of guests of a club which contracted with the former for a dinner, though they had been

registered and assigned a room. *Aney v. Winchester*, 68 N. H. 447; s. c., 39 L. R. A. 760.

Where money of guest was left with clerk, after his bill had been paid, the relationship had ceased and hotelkeeper was not liable. *Whitemore v. Haroldson*, 2 Lea (Tenn.), 312.

Plaintiff, to entertain a friend, removed with his family from his home to a hotel in the same city and engaged rooms and board for two or three weeks at boarders' rate and was assigned to rooms on the regular boarders' floor. He was a boarder and not a guest. *Meacham v. Galloway*, 102 Tenn. 415.

#### (d). WHAT IS AN INN.

Where no license could be issued for the sale of liquors except to an innkeeper, if defendant admits he has a license, he will be held to an innkeeper's liability for loss of guest's property. *Korn v. Schedler*, 11 Daly, 234. *Kopper v. Willis*, 9 Daly, 460.

A hotel having a cafe where guests may take their meals and pay for them is an inn. *Krohn v. Sweeney*, 2 Daly (N. Y.), 200.

A person who, without contract, as to terms or definite period of remaining, receives whoever comes, is an innkeeper. *Taylor v. Monnat*, 4 Duer (N. Y.), 116.

One providing temporary accommodations for emigrants is an innkeeper. *Willard v. Reingardt*, 2 E. D. Smith (N. Y.), 148.

Lodging house, with arrangements for meals, if desired, is an inn. *Krohn v. Sweeney*, 2 Daly (N. Y.), 200; *Bernstein v. Sweeney*, 1 J. & S. (N. Y.) 271.

Defendant ran a "European Cafe" with a hotel attachment. Plaintiff engaged rooms but took her meals elsewhere. Defendant was liable as an innkeeper. *Bullock v. Adair*, 63 Ill. App. 30.

A house used for accommodating boarders and travelers for pay is an inn. *St. Louis v. Siegrist*, 46 Mo. 593.

#### (e). WHAT IS NOT AN INN.

A boarding house keeper is not an insurer, like an innkeeper, of his guest's goods, but where the same were purloined he is only answerable for negligence. *Seigman v. Keeler*, 4 Misc. (N. Y.) 528.

A building used strictly as a lodging house in which there is no arrangement for boarding guests is not an inn. *Cromwell v. Stephens*, 2 Daly (N. Y.), 15.

A restaurant, where meals are only furnished, is not an inn. *People v. Jones*, 54 Barb. 311; *Carpenter v. Taylor*, 1 Hilt. 193.

Parlor car company is not liable as an innkeeper. *Welsh v. Pullman &c. Co.*, 16 Abb. U. S. 352; *Pullman &c. Co. v. Smith*, 73 Ill. 360.

In Wharton on Negligence it is said that such companies are by a weight of authority, regarded as ordinary bailees for hire. Sections 610 and 680, citing, *Palmer v. Wagner*, 11 Alb. L. J. 149; *Pfaelzer v. Car Co.*, 1 Weekly Notes, 240; s. c., 2 Weekly Notes, 324. But it was held that a sleeping car company so far as it renders service similar in kind to that furnished by an innkeeper is subject to the same liabilities; overcoat left in care of porter was lost. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239. (See Common Carriers of Passengers, post 360.)

Customer at a restaurant was held not to be a guest at an inn. *Sheffer v. Willoughby*, 61 Ill. App. 263; s. c. aff'd, 163 Ill. 518.

The proprietor of a private boarding house is a private housekeeper. *Smith v. Amcannon*, 3 Brewst. (Pa.) 311.

A farmer, yielding to the laws of hospitality and taking in travelers for a compensation is not necessarily an innkeeper; the question as to whether he is an innkeeper is for the jury. *Howe v. Franklin*, 20 Tex. 798.

#### (f). \*LIMITATION OF LIABILITY.

A personal notice to a guest that a safe is provided for money, &c., and that unless so deposited the innkeeper will not be liable, is equivalent to posting a notice in the guest's room as provided by ch. 42, L. 1855. Independently of the statute, it is negligence for the guest to leave two thousand dollars (\$2,000) in his room in the city of New York after such notice. *Purris v. Coleman & Stetson*, 21 N. Y. 111 aff'g judg't for def't. See, *Classen v. Leopold*, 2 Sweeny, 705.

An innkeeper who provides a safe for money and jewels of the guests

\* Note. Chapter 27 of the Laws of 1883, amended by chapter 285 of the Laws of 1892, N. Y., provides:

Sec. (1). Whenever the proprietor or proprietors of any hotel or inn shall provide a safe in the office of such hotel, or other convenient place for the safe-keeping of any money, jewels or ornaments belonging to the guest of such hotel or inn, and shall notify the guest thereof by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited) in a public and conspicuous place and manner in the office and public room, and in the public parlors of such hotel; and, if such guest shall neglect to deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments sustained by such guest by theft or otherwise; but no hotel proprietor or lessee shall be obliged to receive property on deposit for safe-keeping exceeding five hundred dollars in value; and if such guest shall deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe, said proprietor or proprietors shall not be liable for any loss thereof, sustained by such guest, by theft or otherwise, in any sum exceeding the sum of two hundred and fifty dollars, unless by special agreement in writing by proprietor or manager.

Sec. (2). No hotel-keeper shall be liable to any guest for loss of wearing apparel, goods or merchandise for any sum exceeding the sum of five hundred dollars, where it shall appear that such loss occurred without the fault or negligence of such hotel-keeper; nor shall he be liable in any sum for the loss of any article or articles of wearing apparel, cane, umbrella, satchel, valise, box, bag, bundle or other chattel belonging to such guest, and not within a room assigned to him, unless the same shall be specially intrusted to the care and custody of such hotel-keeper or his servants.

and posts a notice thereof in the room, pursuant to statute, that he shall not then be liable for the loss thereof, is not liable for money not so deposited. *Hyatt v. Taylor*, 42 N. Y. 258, aff'g order rev'g judg't for pl'ff.

At common law, innkeepers are insurers of the property of their guests.

Under our statutes (Laws of 1855, chap. 42) innkeepers who have provided a safe, and posted notices of the fact in accordance with the act, are exonerated from liability for "money, jewels and ornaments" of a guest not deposited in the safe.

But the exemption is limited to the particular species of property named, and being in derogation of the common law, cannot be extended in its application by doubtful construction.

Held, accordingly, that the watch of a guest at an inn, worn and used by him in the ordinary manner, is neither a "jewel or ornament" within the meaning of the act, and that the innkeeper is liable for the loss thereof in the room of the guest, notwithstanding his compliance with the act of 1855. *Ramaley v. Leland*, 43 N. Y. 539. See, *Burnstein v. Sweeney*, 1 J. & S. 271.

Plaintiff, a guest in defendant's hotel, offered to the bookkeeper a large package containing jewelry, and without stating its contents, requested him to deposit it in the safe. The bookkeeper replied that it was not necessary, and requested plaintiff to take it to his room, saying, it would be just as safe there. When plaintiff was ready to leave, he packed his trunk, in which the package then was, delivered up the key of his room to the hotel clerk, and requested the trunk to be brought down immediately. This was not done; and upon plaintiff's calling for it shortly after it was found broken open and the package stolen. Held, that defendant could not be held responsible for a refusal to receive; but that there was a "neglect to deposit" within the meaning of the innkeepers' act of 1855. Laws of 1855, chap. 421.

That said act, however, only relieves the hotel proprietor from losses occasioned by such neglect; and that, as in this case, the loss happened at a time when the package, if it had been deposited, would have been returned to the guest to be packed prior to departure, defendant was liable.

A considerable portion of the property recovered for, was neither money, jewels, or ornaments, and hence, the landlord was not exempt from liability for the loss thereof, under this statute. It was neither within the statute or the notices posted in the hotel. *Bendetsou v. French*, 46 N. Y. 266, rev'g 44 Barb. 31 and aff'g judg't for pl'ff. See *Stanton v. Leland*, 4 E. D. Smith 88; *Kellogg v. Sweeney*, 46 N. Y. 291, modifying 1 Lans. 397 and judg't for pl'ff.

\*Chap. 658, L. 1866, exempts an innkeeper for loss by fire in a barn and outstanding building, caused by an incendiary and without negligence. The burden is on the innkeeper to show both facts. Evidence showed that the door was open into the loft and the lumber left so that the incendiary could get in. This was sufficient to sustain a verdict of negligence. *Faucett v. Nichols*, 64 N. Y. 317, rev'g 2 Hun, 521 and judg't for pl'ff for rejection of evidence: citing. *Dausey v. Richardson*, 3 E. & B. 165; *Schwerin v. McKie*, 51 Hun, 180.

A statute providing that innkeepers, who furnish a safe place of deposit for valuables and notify guests, shall not be liable for loss of valuables not so deposited, being enacted for the protection of proprietors of hotels, may be waived; and, where the rooming clerk was the manager of the hotel and authorized plaintiff's assignor to leave her jewelry in her room, he was deemed to have waived it. *Freidman v. Breslin*, 51 App. Div. 268; s. c. aff'd, 169 N. Y. 514.

A watch is neither "money, jewels or ornament" of a guest under a statute providing that they must be deposited with the innkeeper, to charge him with their safe keeping. *Becker v. Warner*, 90 Hun, 187.

Nor are silver forks, a silver ladle with the coat of arms of Virginia engraved thereon and a gold watch with a picture of the owner's mother inside, all locked in a trunk. *Briggs v. Todd*, 28 Misc. 208.

Under a statute providing that, when an innkeeper shall provide a safe, and post a notice of the same in the rooms, the guest shall bear the loss of money not deposited in the safe, it was held that the proprietor is not liable for loss of any money not so deposited. *Hyatt v. Taylor*, 51 Barb. 632; s. c. aff'd, 42 N. Y. 258. See *Gile v. Libby*, 36 Barb. 70.

When a guest subscribes a register, at the head of the page of which is an agreement exempting innkeeper from liability for valuables not deposited, etc., the latter is not so exempted, unless guest had knowledge thereof or assented thereto at the time of signing. *Bernstein v. Sweeney*, 1 J. & S. 271.

Merely posting of notice in guest's room will not limit innkeeper's liability. *Bodwell v. Bragg*, 29 Iowa 232.

A notice on a register on which guests wrote their names, that money, coats, etc., must be left at the office, otherwise proprietor is not responsible, was not a publication as required by statute, and would not relieve innkeeper from liability. *Murchison v. Sergeant*, 69 Ga. 206.

As to the construction of Mass. Pub. Stats. chap. 102, secs. 12-16, limiting common law liability of innkeepers, see the following cases.

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\*NOTE.—The duty of hotel keepers to provide fire escapes is governed by § 40 of the Domestic Commerce Law, N. Y. Laws 1893, ch. 376.

Burbank v. Chapin, 140 Mass. 123; Spring v. Hagar, 145 Mass. 186; Becker v. Haynes, 29 Fed. Rep. 441.

The statutory notice to limit liability, to be effective, must be brought to the knowledge of the guest, so that his assent may be presumed. *Olson v. Crossman*, 31 Minn. 222.

Where the statute permits innkeeper to limit his liability by posting notices, the notices must be not only printed and posted as pursuant to the statute, but must observe all the requirements thereof. *Porter v. Gilky*, 57 Mo. 235.

See, also, *Batterson v. Vogel*, 8 Mo. App. 24.

A statute requiring notice to innkeeper of merchandise of guest for sale or sample in the inn, is satisfied by nothing short of a written notice. *Fisher v. Kelsey*, 16 Fed. Rep. 71.

#### (g). RULES AND REGULATIONS AND DISOBEDIENCE THEREOF.

Innkeepers may make reasonable rules and regulations for safe keeping of goods, but they must be clear and specific. *Van Wyck v. Howard*, 12 How. Pr. 147.

When guest neglects to deposit baggage when directed, innkeeper is not liable. *Wilson v. Halpin*, 1 Daly (N. Y.), 496; s. c., 30 How. Pr. 124.

A guest was allowed to recover from an innkeeper for the loss of a trunk and its contents, except valuable mineral specimens, where notice was posted in the room instructing guests to leave their valuables in the office vaults. *Brown Hotel Co. v. Burckhardt*, 13 Colo. App. 59.

But the fact that a place is provided for overcoats does not relieve for loss of one committed to a servant, according to known custom of house. *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

#### (h). CONTRIBUTORY NEGLIGENCE OF GUEST.

Where guest takes exclusive custody of his property the landlord may not be liable. Wharton on Negligence, sec. 690.

Whether leaving the door unlocked and valuables exposed, or whether leaving door unlocked under circumstances likely to induce a theft of the goods, constitutes contributory negligence may be a question of fact for a jury. Wharton on Negligence, sec. 691.

A guest took a strumpet to his room, who stole part of his money; the rest he asked the clerk to take charge of, which he refused to do. His prior misconduct and contributory negligence did not prevent liability for loss of the remainder, which was subsequently stolen. *Lucia v. Omel*, 46 App. Div. 200; s. c. aff'd, 53 App. Div. 641.

Guest cannot recover where he exposes his goods or neglects to lock his door. *Fowler v. Dolorn*, 24 Barb. 384.

Guest need not lock his door to recover for theft. *Buddenberg v. Benner*, 1 Hilt. 84; even upon retiring for the night. *Classen v. Leopold*, 2 Sweeney, 705.

Guest's failure to inquire for goods delivered at the hotel for him for several days was not contributory negligence. *Eden v. Drey*, 75 Ill. App. 102.

Innkeeper repelled presumption of negligence from loss of goods by showing that guest's room was probably unlocked. *Hulbert v. Hartman*, 79 Ill. App. 289.

Remaining away all night is not as matter of law contributory negligence on the part of a guest. *Turner v. Whitaker*, 9 Pa. Super. Ct. 83.

Failure of guest to comply with reasonable rules of innkeeper brought to his knowledge will discharge innkeeper from liability for loss of goods occasioned thereby. *Fuller v. Coats*, 18 Oh. St. 343; *Houser v. Tully*, 62 Pa. St. 92.

The question of the plaintiff's negligence in laying his gloves under his overcoat on a bench in the presence of the innkeeper is for the jury. *Rend v. Amidon*, 41 Vt. 15.

Selection of a room, which was known by a guest to be defective and dangerous, was held contributory negligence. *Glass v. Colman*, 14 Wash. 635.

Guest was intoxicated and left his door unlocked. Innkeeper was, nevertheless, liable for theft by a servant. *Cunningham v. Bucky*, 42 W. Va. 671; s. c., 35 L. R. A. 850.

When guest neglects to lock the door of a room containing goods belonging to him, he cannot recover for loss of the same from innkeeper. *Burgess v. Clements*, 4 Maule & S. 306.

#### (i). WHEN INNKEEPER IS LIABLE AS AN ORDINARY BAILEE.

Although an innkeeper be not liable as such by statutory exemption or otherwise he will be liable for negligence as an ordinary bailee. Wharton on Negligence, sec. 689, citing *Hawley v. Smith*, 25 Wend. 612; *Grennell v. Cook*, 3 Hill, 485; *Hayes v. Turner*, 23 Iowa, 214; *Wiser v. Cheslev*, 53 Mo. 549; *Adams v. Clem*, 41 Ga. 67.

Goods leased to another and by him deposited with innkeeper, makes innkeeper liable only as a bailee to such owner. *Coykendall v. Eaton*, 55 Barb. 188.

As plaintiff was a boarder and not a guest and the hotelkeeper was without negligence, he was not liable for loss. *Haff v. Adams*, (Ariz.) 59 Pac. Rep. 111.

Valise of guest was stolen when he was absent from the hotel. *Murray v. Marshall*, 9 Colo. 482.



Innkeeper liable only as naked depository for a valise left in hotel office, without attention to it, and taken by clerk to a room where baggage was kept. *Stewart v. Head*, 70 Ga. 449.

Although an innkeeper be not liable as such by reason of the termination of the relation he may be liable for negligence as an ordinary bailee. *Hayes v. Turner*, 23 Iowa, 214.

For a discussion of an innkeeper's relation toward a pedler without a license as that of an ordinary bailee, see *Cohen v. Manuel*, 91 Me. 274; s. c., 40 L. R. A. 491.

Innkeeper is responsible only for gross negligence when he receives valuables for deposit without hire, "that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns." *Wiser v. Chesley*, 53 Mo. 547.

Innkeeper is liable only for negligence to members of a dinner party. *Amey v. Winchester*, 68 N. H. 447.

An innkeeper, having exercised due diligence, was not liable for loss by theft from a boarder. *Meacham v. Galloway*, 102 Tenn. 415.

Damages to goods of traveling salesman displayed in a sample room chargeable to innkeeper although full innkeeper liability does not attach as regards such goods. *Scheffer v. Corson*, 5 S. D. 233.

#### (j). WHEN LIABILITY ENDS.

Liable for injury to one horse by another, while owner is taking it from stable to depart. *Seymour v. Cook*, 53 Barb. 451; s. c., 35 How. Pr. 180.

But not if guest has departed without intention of returning; even if it be specially intrusted to him, innkeeper is only an ordinary bailee. *Wintermute v. Clark*, 5 Sand. (N. Y.) 242.

Where guest leaves his valise after paying his hotel bill, without any directions, and not intimating that he intended to return, the landlord is not liable for its loss. *Glenn v. Jackson*, 93 Ala. 342.

But when, after departure of guest, the innkeeper delivers baggage to an unknown person, *without inquiry*, he is liable for the loss of it. *Wear v. Gleason*, 52 Ark. 364.

Innkeeper is liable for the baggage of a guest left for a reasonable time in his care after the guest's departure. *Adams v. Clem*, 41 Ga. 65.

Innkeeper is not liable as such if after departure of guest his trunk is delivered to the wrong person. *Hays v. Turner*, 23 Iowa, 214. See *Grinnel v. Cook*, 3 Hill (N. Y.) 485.

Innkeeper is liable while guest continues to pay for his board although he be temporarily absent. *McDonald v. Edgerton*, 27 Vt. 171; *Hays v. Turner*, 23 Iowa, 214.

## XI. Banks—Savings.

Mere possession of the book, delivered to a depositor by a savings bank, by a stranger or other person than the owner, does not authorize a payment of the deposit to such person. *Smith v. Brooklyn Savings Bank*, 101 N. Y. 58; *Kimball v. Norton*, 59 N. H. 1.

Yet, if the depositor has contracted that all payments may be made to one presenting the pass book, and that payment under such circumstances shall be deemed good and valid, he is bound thereby, unless the bank be chargeable with want of ordinary diligence or care. If, at the time of such payment, a fact or circumstance is brought to the knowledge of the bank's officers which is calculated to excite the suspicions and inquiry of an ordinarily careful person, it becomes the duty of the officers of the bank to institute such inquiries, and for failure to do so they may be regarded as negligent and the payment be held invalid. *Gearns v. Bowery Savings Bank*, 135 N. Y. 557; *Kummel v. G. S. Bank*, 127 id. 488; *Wall v. Emigrants' Industrial Savings Bank*, 64 Hun, 249; *Israel v. Bowery Savings Bank*, 9 Daly, 507; *Sullivan v. Lewiston, etc.*, 56 Maine, 507; *Levy v. Franklin Savings Bank*, 117 Mass. 448.

And if, in connection with such contract, the bank stipulate to use its best efforts to prevent fraud, etc., more than ordinary care will be required. *Allen v. Williamshburgh Savings Bank*, 69 N. Y. 314.

But a depositor may not recover if he was guilty of contributory negligence, as where he furnished a stranger with the information whereby to answer test questions put by the bank upon making a payment. *Wall v. Emigrants' Industrial Savings Bank*, 64 Hun, 249.

A savings bank, upon the receipt of a deposit, entered the same in and delivered to the depositor a pass book containing the rules of the bank, and among others that no depositor should be paid without producing the pass book, and that all payments made to the person producing the same should be deemed good and valid payments.

The rules constituted the conditions upon which the deposit was received, and the bank was authorized to pay upon the production of the book without an order from the depositor, and where the bank is not chargeable with want of diligence or an omission of duty, such payment is binding upon the depositor although made to a wrong person.

The pass book was presented with a forged order purporting to have been signed by the depositor. The forgery was immaterial inasmuch as presentation of the book justified the payment.

The pass book provided that "the secretary will use his best efforts to prevent fraud, but all payments made to persons producing the book shall be deemed good and valid payments to the depositors respectively." The deposit was made by a female, while the person wrongfully drawing the money was a male. The judge, writing the opinion, said: "I do not discover that there was anything in the transaction to indicate that the order was forged, as upon somewhat questionable evidence the jury has found;" and, also, "The bank had the right to make the payment it

did on the simple production of the pass book." *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. 418. [This case was criticised in *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 318, and was distinguished in *Smith v. Brooklyn Savings Bank*, 101 id. 58, 63, and *Kummel v. G. S. Bank*, 127 id. 488, 491.]

The defendant's rule provided that "although the bank would endeavor to prevent fraud upon its depositors, yet all payments to persons presenting the pass books issued by the bank shall be valid payments to discharge the bank; in the case of lost books, the bank will decide as to the person to whom payment shall be made, without right of the depositors of such lost books to question the correctness of the payment." Also, "the pass book shall be a voucher of the depositor, and the possession of the pass book shall be sufficient authority to the bank to warrant any payment made and entered in it; and the bank shall not be liable or called on to make any payments without the presentation of the pass book at its counter, that the proper entering may be made in it."

It was the custom of the bank to require the signature of each depositor, at the opening of an account, in a book kept for that purpose. The book of the plaintiff, who had so signed, was stolen and was presented to the bank by a person who signed the plaintiff's name to the receipts for the amounts of the deposits, and received the same. In an action to recover the amount by the depositor, the assistant teller, who paid the money, testified that he compared the signature to the receipt with that of the plaintiff upon the book, and was satisfied that the former was genuine. The plaintiff's evidence tended to show that the signatures were unlike, and the question was whether the failure to discover the discrepancy was negligence. A verdict was directed for the defendant.

It was held that, while the bank was not absolutely discharged by payment upon the production of the pass book, irrespective of the exercise of ordinary care in the examination of signatures, yet, to be evidence of negligence, the dissimilarity must be so marked and apparent that it can be readily discovered by the person competent to hold the position of teller; and the judgment was upheld for the defendant. These institutions are required to exercise reasonable care. 56 Maine 507; 27 Conn. 229; 46 N. H. 18. *Appleby v. E. C. Savings Bank*, 62 N. Y. 12.

Defendant's by-laws provided that "the bank will use its best efforts to prevent fraud; but all payments made to persons producing the pass book shall be good and valid payments."

"A draft may be made personally or by order in writing of the depositor (if the bank have the signature of the party to their signature book), or by letters of attorney duly authenticated, but no person shall

have the right to demand any part of his or her principal or interest without producing his or her bank book that such may be entered therein."

The wife of the plaintiff obtained possession of the deposit book, which she presented with a forged check or order, and the same was paid to her. On the trial, defendant's own officers stated that there was a difference between the signature to the order and that in the signature book. The court declined to charge that the payment was valid, but left it to the jury to determine whether defendants used its *best efforts* to prevent fraud.

It was held that, as the appellate court had not the benefit, which the trial court did have, of the inspection of the signatures, it could not say but that said court, on inspection, discovered such a difference, as, with the other circumstances of the case, authorized a submission of the case to the jury; and that the exercise of ordinary care and diligence and good faith was not sufficient, as the contract of the bank to use its best efforts required more than ordinary care, and, in such case, the bank was *not protected by the clause in the rules that a payment to one producing the deposit book should be deemed good and valid*. If the payment had been made in reliance upon the order alone, and in the absence of agreement as to the pass book, the defendant could not have been excused as it would have been bound to know that the signature of its customer was forged. *The National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Allen v. Williamsburgh Savings Bank*, 69 id. 314, aff'g judg't for def't.

Distinguishing, *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. 418, and *Hayden v. Brooklyn Savings Bank*, 15 Abb. N. S. 297, where it was found by the referee, as a matter of fact, that the bank was not negligent, *Appleby v. Erie Co. Savings Bank*, 62 N. Y. 125.

See *Welsh v. German American Bank*, 73 N. Y. 424.

The defendant delivered to "S." a depositor, a pass book which stated that the account was with her "in trust for Christopher Boone." After receiving one year's interest, "S." died and the defendant paid the amount of the deposit to her administrator. In the absence of any notice from the beneficiary the payment was good, as the deposit constituted "S." a trustee with title to the fund (distinguishing *Martin v. Funk*, 75 N. Y. 134), and upon her death her rights as trustee devolved upon her administrator (*Banks v. Ex'rs of Wilks*, 3 Sandf. 99; *Bucklin v. Bucklin*, 1 Abb. Court of App. 242; *Bunn v. Vaughn*, id. 253; *Emerson v. Bleakley*, 2 id. 22; *Trecothlie v. Austin*, 4 Mason, 16, 29), and the defendant had no right to inquire into the nature of the trust, and, until notice, owed no duty to the beneficiary. *Boone v. Citizens' Savings Ins. &c.*, 84 N. Y. 83, rev'g 21 Hun, 235, and judg't for pl'ff.

Approving, *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 311.

In 1869 a person deposited in a savings bank, \$1,880 in the name of Henry Seaman of a certain address, and left his signature. One Harry Vail, living at the same place, was, in 1872, sent to prison, where he died, and under a stack of hay on his farm was found a deposit book issued by the bank to Henry Seaman, of like number and amount as of the one already stated. This book was delivered to Vail's administrators who demanded from the receiver of the bank payment of the dividend due on the deposit. Before such presentation, however, some person presented to the receiver's clerk, a deposit book apparently issued by the bank in the name of Henry Seaman, and demanded payment of the dividend, which was made to him, as the book contained the whole account, and was a precise duplicate of the book found under the hay stack. The person presenting it was questioned as to his age, occupation and residence, and answered the description given by the actual depositor. The signatures were compared and believed to resemble each other sufficiently.

The claim by the administrators was determined by the referee, who reported that the receiver had used reasonable and ordinary care and diligence on his previous payment of the dividend, and that the administrator was not entitled to the same. The appellate court held (1), that the burden rested upon the plaintiff to show that the deposit was made by Vail, and to establish title to the deposit book, and that the evidence failed to establish such conclusions; (2) that the evidence justified a finding that the duplicate pass book was issued, and that Seaman transferred one, or that it came to the hands of the person who drew the dividend, and the payment having been made with due care and diligence by the receiver to the one presenting the deposit book, he was entitled to protection; (3) that in case the deposit was made by Vail with a false description of occupation and age, and no duplicate book was issued, his administrator should not recover, as Vail by his action created confusion and doubt, which misled the receiver, and as the latter had acted in good faith. *The People v. Third Avenue Savings Bank*, 98 N. Y. 661.

The possession by a stranger of the pass book of a depositor of the savings bank constitutes no evidence of a right to draw money thereon, unless the bank show that there was a special contract with the depositor authorizing such a mode of payment. There was in such pass book the following rule, "All payments made by the bank upon presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor: money may also be drawn upon the written order of the depositor or his attorney, when accompanied by the pass book."

The by-laws contemplated but two modes of payment, one to the depositor personally, and the other upon his written orders, both requiring the presentation of the pass book as the condition thereof, and did not authorize the bank to make any payment to a stranger whose only evidence of authority was the possession of the pass book. *Smith v. Brooklyn Savings Bank*, 101 N. Y. 58; distinguishing *Schoenwald v. Metropolitan Bank*, 57 id. 418.

The pass book of a savings bank contained the rule, that payments should only be made to the depositor or his duly constituted attorney, on the presentation of the pass book, and that the bank would not be responsible "for any fraud committed on its officers in producing the pass book and drawing money without the knowledge and consent of the owner."

Money was drawn upon a forged check or receipt by a stranger, who had stolen the pass book. It was held that the pass book was not negotiable and its possession did not constitute proof of the right to draw money thereon; but imports liability of the bank to the depositor for the amount of moneys entered therein, as deposited, and an agreement to pay at such times and in such manner as the depositor shall direct.

The jury found upon evidence authorizing a submission of that question to them, that the defendant's officers were negligent in making the payment, and judgment thereon was upheld. The negligence seemed to consist, as to one item, in this: the cashier asked the person presenting the book where he lived, to which he first replied, "New York," and afterwards stated that he had lived in Brooklyn before that at 56 Tillary street, and the cashier asked him no further questions. Another payment was made by the clerk, who judged from the first that the signature to the receipt was not exactly right, and he asked the person presenting it if he could not write with a more fluent hand, and received the answer that he was not feeling well.

It appeared that, as to the first item, the cashier did not avail himself of the means at hand to identify the person presenting the pass book and forged receipt; but upon this evidence and the fact that the signature was before the jury for comparison, a submission of the question upon both items was held to be correct. *Kummel v. G. S. Bank*, 127 N. Y. 488; distinguishing *Schoenwald v. Metropolitan Savings Bank*, 57 id. 418.

The plaintiff, as administrator of "M." deceased, brought action to recover balance of the deposit with the defendant. The defendant proved that the balance had been paid to one "K." a person unknown to the defendant's officers, upon presentation of "M's" pass book, together with a paper purporting to be a power of attorney executed by

plaintiff in his individual capacity, wherein he was described as executor of the will of "P," and which, although it gave a correct number of the pass book, by its terms authorized "K" to draw all moneys on deposit with defendant credited to the plaintiff as such executor. The pass book and power of attorney were obtained by fraud.

The trial court refused to submit the question as to whether the defendant acted with ordinary care and diligence in making such payment, to the jury. This was error, as the alleged power of attorney, upon its face, did not relate to the deposit in question, and conferred no power upon "K" to draw money, and this might furnish reasonable grounds for suspicion, and the question of defendant's negligence respecting the same should have been submitted to the jury.

The court laid down the rule that "if at the time (of payment) a fact or circumstance was brought to the knowledge of the defendant's officers which was calculated to have excited the suspicion and inquiry of an ordinarily careful person, it was clearly their duty to institute such inquiry, and their failure to do so presented a question for the consideration of the jury." *Gearns v. Bowers Savings Bank*, 135 N. Y. 557.

The defendant's rule, which was agreed to by the depositor, was, that "the officers and clerks will endeavor to prevent frauds on the depositors, but all payments made to any person presenting the proper deposit book shall be good and valid payments." Also, "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives."

A depositor died in Pennsylvania and an administrator was appointed and discharged. One Devlin got possession of the book and tried, unsuccessfully, to obtain the money thereon, and later began an action to recover the deposit. A referee was agreed upon to try the action: he had an office in the same building with the defendant's attorney. The plaintiff's attorney prepared the defendant's answer and the referee's report, and paid all expenses of obtaining a judgment, but taxed no costs against the defendant, and recovered judgment that the defendant pay the money to Devlin. In an action by the depositor's administratrix to recover the deposit, it was held that the judgment was collusive, and did not protect the bank from the second rule, and the question for the jury was of the defendant's negligence. The court seemed to have thought that the second rule applied only to the facts of the case, but that if this were not so the plaintiff should have been allowed to go to the jury on the question of the defendant's negligence, and the complaint should not have been dismissed. *Farmer v. Manhattan Savings Institution*, 60 Hun. 462.

The bank book of a savings bank provided, that the possession of the

pass book should be sufficient authority to warrant any payment made and entered in it, and that the bank should not be liable, or called upon to make any payment, without the presentation of the pass book at its counter, etc., also, the following: "Although the bank will endeavor to prevent fraud on its depositors, yet the payments to persons presenting the pass book issued by the bank shall be valid payments to discharge the bank."

The plaintiff, having a deposit in the bank, upon the request of a stranger, gave him information, as to certain facts, which would enable the stranger to answer the test questions commonly put by a bank to a depositor, and thereafter the stranger, as James Wall, appeared at the bank with the pass book. The paying teller regarded the signature as slightly different from that in the signature book, put the test questions, and, as these were answered correctly, paid the money. In an action brought by Wall it was held, that the defendant was bound *to exercise reasonable care and diligence in making payments*, and that the plaintiff, in furnishing the stranger with the information enabling him to answer the test questions was guilty of contributory negligence and could not recover. *Wall v. Emigrant Industrial Savings Bank*, 64 Hun, 249.

A deposit in the name of "Ellen C. Maxwell, in trust for George T. Maxwell," is presumptively a trust fund and payment to the representatives of the *cestui que trust* out of the deposit, upon presentation of the pass book, discharges the bank from liability. *Bishop v. Seamen's Bank for Sav.*, 33 App. Div. 181.

See *Matter of Dohrman*, 15 App. Div. 67.

A bank's by-laws, discharging it from liability upon payment to one producing the pass book, were held to apply only in the lifetime of depositor or upon his death without its knowledge, where they also provide for payment upon depositor's death to his legal representatives. Where the book was produced by another to whom the deposit was paid upon an affidavit purporting to show possession of the pass book as a gift *causa mortis* it must prove such title before it can be discharged. *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218; s. c., 55 App. Div. 624.

Plaintiff permitted another to take her savings bank deposit book and failed to notify the bank, when he reported to her that it was lost. Payments were afterwards made by the bank on orders purporting to be signed by the depositor presented with the book. The bank was held not negligent. *Winter v. Williamsburgh Sav. Bank*, 68 App. Div. 193.

A bank rule that payment to those producing the pass book shall discharge it of liability, does not relieve it of the duty of exercising reasonable care. Asking one presenting the pass book the usual questions



asked of a depositor upon the original deposit without asking if he was the depositor, was not, as a matter of law, the exercise of such care. *Abramowitz v. Citizen's Sav. Bank*, 17 Misc. 297.

It was not due diligence in a bank to pay out an entire deposit to one whom it knew was not the depositor, although he produced the pass book. And in view of such negligence, its rule that payment to one producing such pass book should relieve it of liability, was unavailing. *Geitelsohn v. Citizens' Sav. Bank*, 29 Misc. 84; aff'g s. c., 19 Misc. 422; s. c., 17 Misc. 574; rev'g s. c., 17 id. 57.

Where an indorsement is forged, it is the bank's duty to discover it before the check is paid. A depositor is under no obligation to the bank to examine pass book for the purpose of discovering forgeries, and his right of action depending on a refusal by the bank to satisfy his demand, is not barred by the statute of limitations if, not discovering the forgery until seven years after the check was paid, he made no demand until that time. *Bank of Brit. N. Am. v. Merchant's &c. Bank*, 13 Weekly Dig. 374; s. c., aff'd, 91 N. Y. 106.

Notwithstanding the following regulations: That no person should have the right to demand any part of his principal or interest without producing the original book, and all payments made to persons producing the deposit book should be deemed good and valid payments to depositors respectively, the bank officers were not absolved from the exercise of ordinary care in making payments upon faith of the depositor's book. On the trial it devolves upon the plaintiff to show a failure of ordinary care. *Israel v. Bowery &c. Bank*, 9 Daly. 507. *Schoenwald v. Met. Sav. Bank*, 57 N. Y. 418.

Unless bank has by its silence been induced to take any action or lost its rights, the depositor is under the necessity of proving fraud, error or mistake in the accounts. *Frank v. Chem. Nat. Bank*, 37 N. Y. Supr. Ct. 26; s. c., 45 id. 452; s. c., aff'd, 84 N. Y. 209.

A rule of a bank, that, on the death of a depositor, the money shall be paid to her legal representative did not justify its refusal to honor the demand of one to whom she had made a gift of the deposit during her life and who thereby was substituted as the depositor. *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. 4.

A rule, that, in case of lost books, the bank would decide who was entitled to the deposit, did not justify its refusal to honor the demand of the executor of a depositor, where he was the only claimant and the book had been lost for several years. *Mills v. The Albany Exch. Sav. Bank*, 28 Misc. 251.

A bank did not use the requisite diligence, where a party presenting a pass book, though answering the usual questions satisfactorily and

giving the usual identification by another, failed to make the depositor's "mark," where the doubt could have been settled by sending to the depositor a short distance from the bank. *Rosen v. State Bank*, 32 Misc. 231.

A rule of a bank, that payments to persons producing the pass book would relieve it of liability, did not protect a bank, where it knew that the party producing it was not the depositor. *Ficken v. Emigrants' Industrial Sav. Bank*, 33 Misc. 92.

Savings bank cannot avail itself of payment on forged order of depositor with pass book, as a defense *under a by-law printed conspicuously on the pass book* providing that "payment on deposits shall be made only to the depositor's order or to his legal representatives, on the presentation of the depositor's book." *Eaves v. People's &c. Bank*, 27 Conn. 229.

Pass book obtained of a bank by fraud is not of itself proof of negligence. Therefore, bank is not estopped from denying its liability to *bona fide* assignee of the book. *McCaskey v. Conn. Savings Bank*, 60 Conn. 300.

The diligence due to a special depositor is not measured by the fact that the bank was no more diligent in a like case with its own funds. *Merchant's Nat. Bank v. Carhart*, 95 Ga. 394; s. c., 32 L. R. A. 775.

Officers of a bank, using reasonable care and diligence, taking present means of identification, may pay money to one apparently in lawful possession of depositor's pass book, and not be accountable for loss incurred thereby. *Sullivan v. Lewiston Ins. Co.*, 56 Me. 507.

Where a bank, under the impression that a depositor was dead, after he had been absent for more than seven years without being heard from, paid the deposit to one appointed administrator who had produced the deposit book, it was accountable to the depositor. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87.

By-law stipulating that "presentment of a deposit book shall be a discharge to the corporation for the amount so paid," and requiring notice of loss of book, protects the bank when it pays, in the *exercise of reasonable care and in good faith*, on a forged order and production of book, although depositor was ignorant of the loss of it. *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Goldrick v. Bristol &c. Bank*, 123 id. 320.

Where a depositor subscribed to by-laws by making his mark, and bank was ignorant of the fact that he could not read, it was not liable to his executor for money paid, without negligence, and without notice that the book had been stolen, to a stranger personating the depositor, notwithstanding the usual probate citation had been published by the executor. *Donlan v. Provident Institution &c.*, 127 Mass. 183.

A bank was not warranted in requiring a bond of indemnity before

paying a deposit upon the loss of a pass book where there had been a fire in the testator's house in which it might have been lost and the treasurer of the bank testifies no one since had demanded payment of the account. *Hudson v. Roxbury Inst. for Sav.*, 176 Mass. 522.

A bank by-law, releasing it of liability, upon payment to anyone presenting the pass book, did not relieve the bank for payment upon a forgery of the depositor's name, where the by-law was not brought to his attention so as to become a part of his contract with it. *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175.

It is not an exercise of ordinary fiduciary care for a bank to take a deposit of books from one, whom it knows to be not the owner, without the owner's consent, without an assignment, order or proof of delivery, and without sufficient evidence of pledgor's authority. *Kimball v. Norton*, 59 N. H. 1.

A bank by-law, that it is relieved of liability where depositor gave no notice of the loss of his book, is not effective where the bank fails to exercise ordinary care, as, by requiring identification, comparison of signatures, &c. Due diligence is not measured by the degree of care the bank exercises in regard to itself. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

A by-law that a bank shall be relieved of liability upon payment to parties producing the pass book, which is assented to by the depositor, is a valid contract limiting its liability where it has used due diligence. *Cosgrove v. Provident Institution &c.*, 64 N. J. L. 653.

It is error, where it appeared that the custom in the case of a depositor who could not write, was to enter answers to questions asked him in the signature book, to refuse to instruct the jury that such action on the part of the bank was not negligence. Where a depositor cannot write and permits another to sign for him without informing the officials of the facts, he cannot recover for money paid to this other person. *Fiore v. Ladd*, 22 Ore. 202.

Depositor living at a distance will be presumed to have assented to by-laws contained in deposit book received by him, although he never left his signature at the bank; so, where depositor's brother, presenting the book, signed depositor's name, and the bank made payment, it was held not liable, notice of loss of book, as required by by-laws, not having been given. *Gifford v. Rutland Savings Bank*, 63 Vt. 108.

It is a question for the jury, whether bank was guilty of negligence, under circumstances calculated to arouse suspicion, such as dissimilarity in handwriting; the rule requiring a previous notice of thirty days for the withdrawing of a deposit is for the protection of the depositor as well as the benefit of the bank. *Wegner v. Second &c. Bank*, 76 Mo. 242.

## BILLS, NOTES AND NEGOTIABLE INSTRUMENTS.

- I. FORGED BILLS.
- II. NEGLIGENCE IN EXECUTING.
- III. ALTERATION.
  - (a) Completed paper.
  - (b) Uncompleted paper.
- IV. NEGLIGENCE IN COLLECTING.
- V. BONA FIDE PURCHASERS.

### I. Forged Bills.

It being the duty of the drawee to satisfy himself of the genuineness of the bill, before he accepts or pays; and it being important to the holder and other previous parties that he should do so, it is settled that he accepts or pays at his peril. If he accepts he is bound to pay, although the drawer's signature turn out to be forged; and if he pays he cannot recover back his money, unless the forgery is discovered and notice given immediately, or within such time as to give the holder the same advantage of proceeding against the party from whom he received the bill, as if it had been dishonored. *Price v. Neale*, 3 Burrow, 1354; *Smith v. Chester*, 1 T. R. 654; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & Cres. 428; *Cocks v. Masterman*, 9 id. 922. Where the plaintiffs intervened and paid the bill for the honor of the supposed drawers, *without having seen it*, it was held that they were not precluded by negligence from recovering the money back. It seems, that had the drawees paid the bill under the same circumstances they might have recovered the money. *Goddard v. Merchants' Bank*, 4 N. Y. 147, aff'g judg't for plff.

In an action against the indorser of a note, protested for non-payment, evidence of the forgery of the maker's signature was held to be immaterial. *Lennon v. Grauer*, 159 N. Y. 433; aff'g s. c., 2 App. Div. 513.

**From opinion.**—Defendant, "as indorser of the note, must be regarded, in effect, as having contracted with the plaintiff a subsequent holder, that the instrument was what it purported to be; that it and as well the preceding indorsements were genuine and that he had a clear legal title thereto. (*Erwin v. Downs*, 15 N. Y. 575; *Turnbull v. Bowyer*, 40 N. Y. 456; *White v. Continental Nat. Bank*, 64 N. Y. 316; *Daniel on Negotiable Ins.*, sec. 1357). The plaintiff in taking this note for value and before maturity, was entitled to rely upon this contract, to be implied from Grauer's indorsement of the note, that the note was the genuine obligation of the person purporting to have made it. If it were the fact that the name of the maker was forged, it would not discharge the indorser. *Coggill v. American Ex. Bank*, 1 N. Y. 113."

Where a husband, knowing of forgery of checks by his wife, fails to

make complaint to the bank, he cannot complain of future forgeries. *Neal v. First Nat. Bank*, 26 Ind. App. 503.

H. procured a loan representing himself as "D." The check for the money payable to D. was indorsed by H. as "D.," and again as H. As far as the bank was concerned H. was the intended payee, and it was not liable to the depositor. *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354.

One, whose name had been forged on a note, called at the bank that protested it in answer to a notice of protest, and, after examination of the note, told the cashier that it would be paid. But on the next day, in response to a demand for payment, he denounced the signature as a forgery. He was not necessarily negligent in failing at once to detect the forgery and notify the bank thereof, where he was in no way connected with the transaction. *Trader's Nat. Bank v. Rogers*, 167 Mass. 315.

Bank was not chargeable as upon a forgery, where the party was the one to whom the check was actually delivered in the belief that he was the payee. *States v. First Nat. Bank*, 11 Pa. Super. Ct. 256.

Both at common law and under a statute providing that a forged signature to negotiable paper creates no rights against a party thereto, a bank was liable for the payment of a check to the order of A. delivered to one falsely representing himself to be A., and forging his indorsement. *Tolman v. American Nat. Bank*, 22 R. I. 462.

The holder of a forged draft is not negligent in cashing it for one introduced by a reputable person without further inquiry; the drawee pays it at its own risk. *Moody v. First Nat. Bank*, 19 Tex. Civ. App. 278.

A bank was not negligent in failing to detect a forgery on a renewal note by failing to compare it with the original. *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81.

## II. Negligence in Executing.

When one having the opportunity and the power to ascertain with certainty the exact obligation he is assuming, chooses to rely upon the statements of the person with whom he is dealing and executes a negotiable instrument without reading or examination, as against a *bona fide* holder for value, he is bound by his act, and is estopped from claiming that he intended to sign an entirely different obligation, and that the statements upon which he relied were false, unless he can show that he was guilty of no laches or negligence in signing. *Chapman v. Rose*, 56 N. Y. 137.

Defendant entered into a contract with Miller to act as agent for the sale of a patent hay fork and pulley. A contract was filled out by Mil-

ler and signed by both; also an order, which was signed by defendant, for one of the hay forks and two of the pulleys, for which, by the order, defendant agreed to pay nine dollars. These were delivered to defendant. Another paper was then presented to defendant for his signature, which Miller represented to be but a duplicate of the order. Defendant, without reading or examining it, signed it and delivered it to Miller; the paper so signed was the note in suit. Plaintiff purchased in good faith before maturity, paying therefor \$245. The trial court erred (1) in submitting negligence of plaintiff in purchasing note; (2) in refusing to submit question of defendant's negligence in signing the note. *Chapman v. Rose*, 56 N. Y. 137, rev'g, 44 How. Pr. 364, and judg't for pl'ff.

The action was upon an indorsement of a bill of exchange, and the evidence was that the defendant indorsed it believing it to be a guarantee—that being represented to him as its nature by a person in whom he put confidence. The judge charged the jury that if the defendant signed it not knowing it to be a bill, but believing it to be a guarantee, in consequence of a fraudulent representation as to its character, and if he was not guilty of any negligence or laches in signing it, he was not bound. The jury found for the defendant. Upon a review of the decision, and after a full and able discussion of the questions involved, the court held the direction at the trial to have been right; but a new trial was granted upon the ground that they were not satisfied with the finding of the jury on the question of fact. *Foster v. McKinnon*, L. R. (4 C. P.) 701. See the principle discussed and applied in *Page v. Krakey*, 137 N. Y. 307, "Contracts," post. 626.

In an action upon a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defense, that when he signed it, it was represented to him, and he believed it to be a contract entirely different in character.

The case distinguished from that of a note fraudulently obtained, and which the maker intended to make. *Whitney v. Snyder*, 2 Lansing (N. Y.) 477, granting new trial on motion of defendant.

From opinion.—"This was an action against the defendant as maker of a promissory note. The plaintiff had testified that he purchased the note for value and before maturity. The defendant offered to prove in defense, that he was unable to read, and that when he signed the note it was represented to him, and he believed that it was a certain other contract, offered to be also produced in evidence, and which purported to be a contract *inter partes* of an entirely different character. The offer was overruled and the defendant excepted, and now moves for a new trial. We think learned judge at *nisi prius* erred in rejecting the evidence offered. The consent of the party alleged to have made

it is essential to the binding force of a contract. This principle has been often applied to the case of deeds and other instruments misread, or the contents of which have been misrepresented to the party against whom the instrument is sought to be enforced. A *bona fide* holder of commercial paper for value and before maturity, is protected in many cases against defenses which are perfectly available as between the original parties, such as that the signature was obtained by false and fraudulent representations; that the paper has been diverted; that a blank bill or acceptance has been filled up for a greater amount than the party to whom it was delivered was authorized to insert, etc. But in all these cases the party intended to sign and put in circulation the instrument as a negotiable security; where this is the case he is bound to know that he is furnishing the means whereby third parties may be deceived, and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts. But, while this is a rule of convenience and propriety, there are, and must be some limits to its application, some defenses as to which even a *bona fide* purchaser, purchases at his peril.

The familiar case of the note declared void by the statute, as in the case of usury, furnishes an illustration. During the period when, according to the statute law of this state, a *bona fide* holder for value, and before maturity, was protected against even the defense of usury, the statute against usury was practically almost abrogated as to negotiable paper. \* \* \*

If, as to a party who can give evidence, that he purchased the bill for value, and before maturity, and as to whom the defendant is unable to bring home notice, the question of liability is reduced to a mere question of the genuineness of the signature, we do not see how a party would be able to escape liability, as suggested by the court in the case referred to, where he had written his name in lady's album, or for the purpose of franking a letter, or for any one of the thousand purposes for which a man is often called upon to furnish signature, without the intention of making a negotiable instrument. The true distinction was tersely stated by Bovill, Ch. J., in *Foster v. McKinnon*, interrupting counsel, *arguendo*, who was stating the proposition, that where the plaintiff proves he is a *bona fide* holder for value, it is immaterial that the signature of the defendant was obtained by fraud. 'That,' said the chief justice, 'is where the defendant intended to put his name to an instrument which was a bill.'

This action was brought by a *bona fide* purchaser of a promissory note, which the maker claimed to have signed under the belief that it was a contract to act as agent for a patent cultivator. Upon the trial evidence was given to prove that the note was signed by the defendant at his own house: that he and his two sons, who were present, could read; that defendant attempted to read the paper, but did not understand it well, and that it was then read over by the person presenting the paper, who was an entire stranger to the defendant and his family, and signed by the defendant. Held, that it was proper to submit the question of defendant's negligence to the jury, and that a motion to direct a verdict in favor of the plaintiff was properly denied. (Learned, P. J. dissenting.) *Fenton v. Robinson*, 4 Hum. 252; denying motion for new trial by pl'ff.

Defendant entered into two agreements with two unknown persons one to act as agent for the sale of some cornshellers, and the other, that he might return all cornshellers not sold. Later another unknown person with the servant of the liveryman and employed to carry him to the defendant's house, came and represented that twenty cornshellers were at the depot, and asked defendant to receipt the same, which he did, and the receipt was in fact the note that came to the plaintiff as a *bona fide* holder.

Defendant, before signing, stated that he had fears that the receipt might turn out to be note, but was assured otherwise.

The defendant was a German and could not read English, and his nearest neighbor was a half mile away, but he consulted his wife, who could not read it. *National Exchange Bank of Auburn v. Veneman*, 43 Hun, 241, sustaining verdict for def't.

**From opinion.**—"It was not disputed upon the trial that the signature of the defendant to the note was procured by gross fraud and imposition, perpetrated by the person to whom he delivered it, and that the latter was acting in concert with the persons with whom the defendant had the first negotiations.

The jury was also justified in reaching the conclusion that when the defendant signed the note he believed it was a paper of a different character, and did not contain a promise to pay money to any one unconditionally. The defendant admitted that he intended to execute an instrument which would contain a promise on his part of some kind, and that the form of the same and the extent of his liability was to be ascertained and measured by the writing itself. The general rule of law applicable to the case is, that where a party is induced to sign a negotiable instrument by reason of fraud, artifice or deception practiced upon him by another, as to the nature of the instrument, and the maker signs the same innocently and under the belief that it is a contract of a different character, then there can be no recovery upon the bill or note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument. If, however, the maker was guilty of laches or negligence in this respect, he will be liable to a *bona fide* holder for value, who purchased the note before maturity. Dan. on Neg. Inst. § 850; *Chapman v. Rose*, 56 N. Y. 137; *Foster v. McKinnon*, 38 Law Jour. (N. S.) 310; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Penn. R. R. Co. v. Shay*, 82 Pa. 202; Big. on Bills and Notes, 583. \* \* \*

We think a case was made for the consideration of the jury, and that the question of the defendant's negligence was properly submitted to them for their determination. As the maker could not read the English language he was obliged to rely upon the representations made by the other party, or consult and ascertain its contents from some third person. His wife, who was present, could give him no information, as she was unable to read the paper. It cannot be said, as we think, that it was negligence *per se* not to seek his neighbors and learn from them the contents of the writing. The subject matter of the negotiations was not of great importance, and the terms of the agreement assented to by the defendant were plain and could be readily and accurately expressed in writing by any person



who could write and was accustomed to business. The nature and character of the paper intended to be executed must always be considered in determining the question of the defendant's negligence, so far as it is based on the omission to inquire of others for the purpose of ascertaining from them the contents of the writing. If a farmer, who could not read, should sell and deliver to a mill a load of grain and receive pay therefor, and should then be requested to sign a voucher in the miller's counting room, and should sign a paper prepared for that purpose, and it turned out to be a negotiable instrument, could it be said that the farmer was guilty of negligence, as matter of law, because he did not seek some third person for the purpose of ascertaining the import of the writing? The case supposed is not like the one before us in all respects, but it has been stated for the purpose of illustrating that the question of negligence is not always one of law and often becomes a question of fact for the consideration of the jury. \* \* \*

The plaintiff cites us to our decision in the case of this Plaintiff v. Ogden, 31 Hun, 452, as an authority in support of his argument that the exception was well taken. In that case it was held that the defendant therein, the maker of a note, was guilty of negligence in omitting to consult the members of his own family, who could read and were present at the time of its execution.

In sustaining the ruling of the trial judge in submitting the question of negligence to the jury, we do not intend to depart from the rules of law stated in our opinion in that case."

Maker, ignorant of the language, was induced to sign a note without negligence on his part, under the belief that he was signing another instrument. Note was void, even in hands of an innocent purchaser. *Hutkoff v. Moje*, 20 Misc. 632.

Usury between maker and payee, and ignorance of its contents, did not invalidate a note as against an innocent purchaser where maker signed the note without reading it. *Orr v. Sparkman*, 120 Ala. 9.

It is not *per se* negligence for one who cannot read nor write to sign a memorandum about a certain agency, which is, in reality, a promissory note. *Bedell v. Herring*, 11 Cal. 512.

Defendant, who cannot read, is not liable on a promissory note made payable one day after date, which was represented to him as payable six months after date. *Wenzel v. Shulz*, 78 Cal. 221.

The presumption that the maker has read the note and knew its contents was rebutted, where he was, without negligence on his part, fraudulently induced to sign upon the representation that it was another kind of an instrument. *Kingman v. Reinemer*, 166 Ill. 208; aff'g s. c., 58 Ill. App. 173.

That maker's signature was procured fraudulently did not invalidate the note in the hands of a *bona fide* holder, where he was negligent in failing to use care to inform himself of its contents; especially where the note signed was no different in legal effect from the one he supposed he was signing. *Exchange Nat. Bank v. Plate*, 69 Ill. App. 489.

Defendant, a farmer, signed, what purported to be a contract consti-

tuting him agent for a pulverizing machine. He was not liable even to *bona fide* purchaser. *Detwiler v. Bish*, 44 Ind. 70; *Gibbs v. Linaburg*, 22 Mich. 419; *Martin v. Smylee*, 55 Mo. 571; *Briggs v. Ewart*, 51 id. 245; *De Camp v. Hanna*, 29 Oh. St. 467; *Walker v. Ebert*, 29 Wis. 194; *Butler v. Carns*, 37 id. 61; (case of illiterate man) *Willard v. Nelson*, 35 Neb. 651.

The maker of a promissory note was not allowed to defend a suit of a *bona fide* holder on the ground that he had signed it under the belief that it was a different contract, induced by the misrepresentations of the payee. *Doughlass v. Matting*, 29 Iowa, 498.

**From opinion.**—"It is better that the defendants and others who so carelessly add their names to papers, the contents of which are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired and the business of the country thus interfered with and unsettled."

At request of agent defendant signed his name to a blank piece of paper in order that his signature might be identified; and the instrument sued upon was printed over that signature. No liability. *Caulkins v. Whistler*, 29 Iowa, 495; *Nance v. Lary*, 5 Ala. 370; *Baxendale v. Bennett*, 3 Q. B. Div. 525.

The signature of an illiterate person was fraudulently procured to a mortgage note for one amount, where, without negligence on his part, he was induced to believe he was executing a lease and a note for another. Was not liable even to an innocent purchaser for value. *Green v. Wilkie*, 98 Iowa, 74.

Defendant did not intend to sign a note, but admitted signing a contract referring to the note in question, which constituted him agent for the sale of certain machines. He incurred no liability on the instrument as a note. *Anderson v. Waller*, 34 Mich. 113.

Where the evidence shows that defendant signed a paper thought by him to be a note for five dollars, but which, in reality, was a note for sixty dollars, it is error to instruct the jury that the recovery be for the full amount claimed. *Closs v. Theifels*, 79 Mich. 589.

Chapter 114, general laws, 1883, construed not to avoid maker's liability on a note on the ground of misrepresentation as to its nature and effect. *Yellow Md. County Bank v. Tagley*, 57 Minn. 391.

If defendant knew that he was signing a promissory note, and did not read it, but relied upon the assurance of the other party, he is liable to a *bona fide* purchaser. *Ward v. Johnson*, 51 Minn. 480; *Cowgill v. Petifish*, 51 Mo. App. 264; *Cannon v. Lindsay*, 85 Ala. 198; *Trimble v. Thorson*, 89 Iowa, 246; *Bank v. Stanley*, 46 Mo. App. 440.

It is not *per se* negligence for an aged and infirm man to fail to call

in the assistance of some one to help him read a document he is about to sign. *Bank v. Clark*, 52 Mo. 593.

Fraud in procuring signature of a co-maker did not invalidate note in hands of innocent holder for value. *Riley v. Reifert*, (Tex. Civ. App.) 32 S. W. Rep. 185.

Defendant was sued on a note made to one, "or bearer," but in fact signed a note in which the words "or bearer" were crossed out, and recovery was not allowed. *Kellogg v. Steiner*, 29 Wis. 626.

A note for any amount other than that for which defendant signed is not defendant's note. *Griffiths v. Kellogg*, 39 Wis. 290.

The defendant, who was well advanced in years, signed his name on the back of what he thought, and was informed, was a guarantee, but which was, in reality, a bill of exchange for £3,000, and was sued as indorser of the same. The jury found that he was free from negligence, and the court held that he was not liable as indorser to an innocent holder for value. *Foster v. MacKinnon*, L. R. 4 C. P. 704.

### III. Alteration.

Where the drawer of a bill or check, or maker of a note, leaves a blank, which has been filled up so as to give no evidence of alteration, he may be found guilty of such negligence, as will make him liable to a *bona fide* holder for the apparent amount of the indebtedness. The distinction between an instrument that the maker delivers as a completed instrument and one that is intentionally incomplete is important, but not conclusive.

In Bigelow on Estoppel it is said, that there has arisen a misconception of this doctrine from *Younge v. Groat*, 4 Bing. 253, where it was held that the drawer of a bill thus negligently leaving a blank should bear the loss of such filling up of the same as between him and the acceptor; but that the better authorities agree that no estoppel can exist upon any such facts to prevent the drawer or maker from alleging the alteration. See the cases cited in Bigelow on Estoppel, p. 494, notes 4 and 6, among which are *Holmes v. Trumper*, 22 Mich. 427; *Greenfield Bank v. Stowell*, 123 Mass. 196. But, see, *Rainboldt v. Eddy*, 34 Iowa, 440; *McCramer v. Thomson*, 21 Iowa, 249; *McDonald v. Muscatine Bank*, 27 Iowa, 319; *Capital Bank v. Armstrong*, 62 Mo. 59; *Reddington v. Woods*, 45 Cal. 406; *Wirrell v. Gheen*, 39 Pa. St. 388; *Garrard v. Hadden*, 67 id. 82.

#### (a). COMPLETED PAPER.

Where completed instruments were delivered and opportunity to alter the same was furnished by the manner in which they were drawn there have been some decisions, that seem to be exceptions to the general rule above stated respecting complete paper.

Where a blank space was left after the words "one hundred" so that the additional word "fifty" could be and was inserted thereafter, the maker was liable to a *bona fide* holder for value, upon the principle that if one, by his acts, or silence, or neglect, misleads another, or affects a transaction whereby an innocent party suffers, the blamable party must bear the loss. *Garrard v. Hadden*, 61 Pa. St. 82.

Where before the words "fifty pounds, two shillings" in a check, space was left which a clerk filled up with the word "three," and the banker having paid the whole amount of 350 pounds, 2 shillings, the clerk retained 300 pounds thereof, the loss fell upon the drawer. *Younge v. Groat*, 4 Bing. 253.

But, in *Benedict v. Cowden*, 49 N. Y. 396, the defendant was applied to to become agent for certain persons, and executed a note for a certain amount payable to the bearer one year from date. At the bottom of the note were these words, "the above note to be paid from the proceeds of machines, when sold." There not being room to sign after these words, the maker was advised to sign just above them, upon the assurance that it would be the same. This he did, and such words were thereafter cut off and the note then sold to the plaintiff for value and without notice. The question was held to be properly submitted to the jury, as to whether the words at the bottom of the note were designed by the parties as a part of the contract, and it was so held upon appeal that the cutting off of the same was a destructive alteration of the instrument. *The question of the maker's negligence was not raised and did not enter into the decision.*

Where the maker of a negotiable instrument puts it forth in such condition that an alteration can be made without defacing it or exciting the suspicions of a prudent man, the maker may be estopped from alleging the alteration, as a defense, as against a *bona fide* holder. *Daniel on Negotiable Instruments*, 371; *Town of Solon v. Williamsburgh Savings Bank*, 35 Hun. 414; *Zimmerman v. Roat*, 15 Pa. St. 191; *Garrard v. Hadden*, 61 Pa. St. 82; *Statton v. Stone*, (Colo. App.) 61 Pac. Rep. 181; *Howie v. Lewis*, 14 Pa. Sup. Ct. 232; *First &c. Bank v. Webster*, 121 Mich. 149.

But where a space, negligently left, was filled in such a manner as to be a palpable alteration, the maker was held not liable even to an innocent purchaser. *Alexander v. Buckwalter*, 8 Del. Co. Rep. (Pa.) 74; S. C., 17 Lane. L. Rev. 366.

See, also, *Walsh v. Hunt*, 120 Cal. 46; S. C., 39 L. R. A. 697.

Where parties executing unsealed bonds certified, that they were issued under their hands and seals, and the seals were thereafter placed upon the bonds, and so came into the hands of innocent parties, the

makers were liable. *Metropolitan Life Insurance Co. v. Bender*, 124 N. Y. 47; even when the certificate was made by agents of a municipality. *Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465, aff'g 65 Hun, 166, and judgment for plaintiff.

In Daniels on Negotiable Instruments, page 364, it is said: "The true principle applicable to such cases is, that the party who puts the paper in circulation invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge the actual defect *in that which, through his act, ostensibly has none*. The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when that inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration."

While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, he is not bound to so prepare the check that nobody else can successfully tamper with it. A depositor owes his bank the duty of reasonable care in verifying returned vouchers to detect forgeries and alterations and is liable to it for negligence in this regard. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; modifying s. c., 60 App. Div. 241.

#### (b). UNCOMPLETED PAPER.

Unquestionably where the instrument has not been delivered as complete, but blank places have been purposely left, the maker will be liable, if *his negligence* has, in connection therewith, caused loss to an innocent party.

Where one makes and delivers his promissory note, perfect in form, except that a blank is left after the word "at" for the place of payment, it carries with it an implied authority for any *bona fide* holder to fill the blank, and the insertion of a place of payment and negotiation of the note contrary to agreement of the original parties does not avoid it in the hands of a *bona fide* holder for value, although the note be delivered not to be used or filled up in any way. *Redlick v. Doll*, 54 N. Y. 235, rev'g judg't for def'd't.

Where drafts were delivered to the drawee with directions to fill them for a certain sum, and they were filled up for a larger sum, the drawer was liable for such latter sum to a *bona fide* holder, and although the violation of the agreement of the parties was forgery, the acceptor was estopped from setting up the facts. *Van Duzer v. Howe*, 21 N. Y. 531.

In the following cases the question of improperly filling in uncompleted paper arose: *Ledwich v. McKim*, 53 N. Y. 307; *Chemung Canal Bank v. Bradner*, 44 id. 680; *Day v. Saunders*, 3 Keyes, 347; *Mitchell v.*

Culver, 3 Cowen, 336; Boyd v. Brotherson, 10 Wend. 93; Michigan Bank v. Eldred, 9 Wall. 544; Angle v. N. Y. Mutual Life Ins. Co., 92 U. S. 330; Weaver v. Lescure, 89 Ill. App. 628; Roberson v. Blevins, 57 Kan. 50; Weidman v. Symes, 120 Mich. 657.

One who signs or indorses a note in blank, to be used as a security, authorizes the person to whom it is delivered to fill the blanks *in respects essential to the completeness of the note* as such; but, in the absence of express authority or consent, no authority can be implied from the delivery, to *insert a special agreement not so essential*.

The date, the amount, the name of the payee, and place of payment may be inserted in their appropriate blanks. Page v. Morrell, 3 Keyes, 117; Van Duzer v. Howe, 21 N. Y. 531; Kitchen v. Place, 41 Barb. 465; Angle v. N. W. M. L. Ins. Co., 92 U. S. 339; but not rate of interest not allowed by law.

Where, therefore, in a note, which was indorsed for the accommodation of the maker, blanks were left for the date, the time the note was to run, the payee and the principal sum, held, that while the maker had authority to fill these blanks, the indorsement conferred no authority to write in the note an agreement that after maturity it should draw a special rate of interest, greater than the regular rate, although the law of the State where the note was made permits special arrangements to be made for the rate specified.

Also, held, when a note so filled in, was delivered by the maker in renewal of another note, and received by a collecting agent, authorized by the owner of the old note to renew it, that such authority did not justify the agent in the acceptance of the new and the surrender of the old note.

But held, that where the agent acted in perfect good faith, believing he was obeying instructions, and relying upon a supposed authority in the maker to fill in the note, although he assumed to be a professional expert in the business, he was not liable to his principal for damages unless the defect might have been discovered by the *diligent exercise of that professional skill he was bound to possess and exert*.

Such agent is responsible to his principal for the negligence of an attorney whom he employs. Weyerhauser v. Dewey, 100 N. Y. 150.

Where a note is executed and delivered to another with carelessly unfilled blanks, an innocent purchaser may properly regard the latter as the agent of the former to do the filling. Lescure v. Weaver, 99 Ill. App. 315.

The defendant had left with a clerk some signatures on blank pieces of paper, intended to be used as notes or indorsements, according to specific instructions. The clerk was by fraud to part with one of these

blank signatures, and it was filled up as a note, leaving the signature to appear as that of a payee and indorser. The action was by a holder in good faith, who recovered. *Putnam v. Sullivan*, 3 Mass. 45.

**From opinion.**—"The counsel make a distinction between the cases where the indorser through fraudulent pretense has been induced to indorse the note he is called upon to pay, and when he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail; as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others. Here, one of two innocent parties must suffer. \* \* \* The loss has been occasioned by the misplaced confidence of the indorser in a clerk too young or too inexperienced to guard against the arts of the promissors." Upon these grounds the indorsers were held liable.

Part of contract was in form of a skeleton note, which was detached and the blanks filled out. Signers of the contract were held not negligent. *Porter v. Hardy*, 10 N. D. 551.

One who put it in the power of his agent to issue checks like ones he authorized a bank to cash, cannot complain, where the bank in good faith cashes such fraudulent checks. *Armour v. Greene County State Bank*, 112 Fed. Rep. 631.

#### IV. Negligence in Collecting.

A holder of a note, payable on demand, is not chargeable with negligence in not making such demand within any particular time. *Parker v. Stroud*, 98 N. Y. 379, reversing 31 Hun, 578.

Surety on a note is not discharged by negligence of payee to proceed against the principal debtor upon surety's request, when such debtor was, and continues, insolvent and the note was uncollectible. *Thompson v. Hall*, 45 Barb. 214; *Frost v. Benedict*, 21 id. 247.

If a surety requests the creditor to collect the debt from the principal, and the creditor neglects to do so, at the time when it is collectible, and, from a subsequent change of circumstances, it becomes uncollectible, the surety is exonerated from liability. *Rensen v. Beekman*, 25 N. Y. 552; *King v. Baldwin*, 17 Johns. 384; *Pain v. Packard*, 13 id. 174.

Mere indulgence on the part of a creditor and neglect to prosecute principal, will not discharge surety. *Fulton v. Matthews*, 15 Johns. 433; *Schroeppell v. Shaw*, 3 N. Y. 446; *Dorlon v. Christie*, 39 Barb. 610; *Thompson v. Hall*, 45 id. 217. *Field v. Cutler*, 4 Lansing. 195, aff'g judgt for pl'ff, distinguishing *Craig v. Parkis*, 40 N. Y. 181. See *Thompson v. Hall*, 45 Barb. 214; *Frost v. Benedict*, 21 id. 247.

Surety was released when holder failed to sue his principal when solvent, as the surety requested. *Kendall v. Milligan*, 62 Ark. 629.

A statute providing that a demand note shall be considered dishonored after four months, held not extended by an act imposing the contract of indorsement on one who indorses a negotiable or non-negotiable note in blank, so as to make a delay of more than four months in presentment of a non-negotiable demand note a discharge of an indorser thereon. *Oley v. Miller*, 74 Conn. 304.

Holder of check on bank at a considerable distance did not deliver it to his own bank for three days after receiving it; drawee in meantime failed. Was negligent. *Tomlin v. Thornton*, 99 Ga. 585.

Holder, by carelessness, failed to perfect a default in a suit against maker and indorser for one or more terms. Accommodation indorser was not discharged by the extension of time. *Hall v. Pratt*, 103 Ga. 255.

Failure of holder to file claim against a solvent estate, which was sufficient to pay all claims, discharged surety. *Wauhop v. Barlett*, 165 Ill. 124; aff'g s. c., 61 Ill. App. 252.

Holder of a check on a local bank may present it at any time during banking hours on the day following delivery, though he knows the bank is likely to fail. *Northwestern Iron Co. v. National Bank*, 70 Ill. App. 245.

Failure to make the statutory presentment of a note for probate did not relieve surety, where estate was insolvent and nothing could be realized. *Watts v. Bolin*, 86 Ill. App. 474.

Notes indorsed after maturity must be presented within a reasonable time after maturity. *Kimmel v. Well*, 95 Ill. App. 15.

Where all the parties live in the same city the holder may have until the close of banking hours on the day following delivery of the checks for presentment and demand. *Brown v. Schintz*, 98 Ill. App. 452.

Obligation of a holder of a note payable at a particular place is discharged by presentment there. He is not bound to go beyond and make personal presentment to maker. *Ewen v. Wilbor*, 99 Ill. App. 132.

Holder of non-negotiable notes, who delayed for several years to proceed against maker, thereby released indorser. *Matchett v. Anderson Foundry &c. Works*, (Ind. App.) 64 N. E. Rep. 229.

Notice "to sue the note which I signed as surety, or I will not continue to be liable," was not a compliance with Ind. Rev. Stat. 1894, section 1224; as it omitted the equivalent of "forthwith," and the surety was not discharged. *McMillin v. Deardorff*, 18 Ind. App. 428.

Failure to present, released the drawer of a check, where, though his account in the bank was overdrawn, he had a special deposit, which he had reason to believe the bank would pay it from. *Hamlin v. Simpson*, 105 Iowa, 125.



Mere indulgence to maker of note did not release surety. There must be a valid agreement definitely extending his time. *Hall v. First Nat. Bank*, 5 Kan. App. 493.

Negligence in attempting to collect an acceptance given as collateral did not release sureties, where it had been satisfied by check before its transfer as collateral. *Turner v. New Farmer's Bank*, (Ky.) 39 S. W. Rep. 425.

An assignee, as against the assignor, is not negligent in failing to test the genuineness of the signature of the note. *Spalding v. Gates*, (Ky.) 41 S. W. Rep. 440.

Nine days' delay in bringing suit on note after it fell due was held to be such negligence as would discharge the assignor; and his request for further indulgence did not relieve the liability. *Riggs v. Covenant &c. Asso.*, (Ky.) 49 S. W. Rep. 190.

Mere forbearance of holder to sue payee did not discharge accommodation maker. *Forstall v. Fussell*, 59 La. Ann. 256.

Mere delay of two and a half years in foreclosing security did not discharge surety though it in the meantime depreciates. *Gray v. Farmer's Nat. Bank*, 81 Md. 631.

Eight months in making demand on a demand note was not unreasonable, where the note was intended to be of a more or less permanent character. *Yates v. Goodwin*, 96 Me. 90.

Mere delay or indulgence does not discharge surety. Must be an agreement to extend the time or vary the contract. *Way v. Dunham*, 166 Mass. 263.

Delay from whatever cause within the statutory period of limitation does not discharge maker though the note was for the indorser's accommodation. *Agawam Nat. Bank v. Downing*, 169 Mass. 297.

Demand must be made on a demand note, under a statute requiring demand within a reasonable time, within 60 days of its issue in the absence of evidence of custom and usage justifying delay. *Merritt v. Jackson*, (Mass.) 62 N. E. Rep. 987.

An instruction that drawee bank should not be made a collecting agent held correct. *Carson &c. Co. v. Fincher*, (Mich.) 89 N. W. Rep. 570.

Check, received on Friday deposited on Saturday, was held to be properly presented the following Monday morning. The drawee bank at the time of presentment was open and doing business though it closed during the afternoon. *Haggerty v. Badwin*, (Mich.) 91 N. W. Rep. 150.

Collecting bank held liable for failure to use reasonable care and diligence to protect the rights of its correspondent against the indorser and drawer by proper protest of the check delivered for collection. *Ft. Dearborn Nat. Bank v. Security Bank*, (Minn.) 91 N. W. Rep. 257.

Holder lost his rights against a surety under a statute requiring former, when notified to do so, to sue principal, where he brought suit in wrong county without attempting to ascertain the principal's residence. *Coar v. Jeffries*, 73 Mo. App. 412.

Drawer of a check was not discharged by negligence in its presentation unless injured thereby. *Long Bros. v. Eckert*, 73 Mo. App. 445.

Mere failure to apply depositor's deposit upon his note did not release surety. *Citizens' Bank v. Booze*, 75 Mo. App. 189.

Holder is not negligent in failing to collect collateral, where maker is insolvent and nothing could be realized. *Fourth Nat. Bank v. Blackwelder*, 81 Mo. App. 428.

Indorsee's failure to present check for 26 days was negligence, which subjected it to the equities of the drawer. *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 399.

Suit was begun within 30 days after notice by surety to sue, as provided by Mo. Rev. Stat. 1889, sec. 8344, but at M., where summons was returnable one week later than at D. Was not negligence. *Collum v. Luckinger*, 83 Mo. App. 110.

Suit was begun two days after notice to sue, as provided by Mo. Rev. Stat. 1889, sec. 8344. The summons was made returnable more than 30 days from its date; but it was no longer than necessary to obtain service. Surety was not discharged. Surety appealed and ordered justice not to issue execution against principal; the fact that plaintiff failed to take out the execution against the principal was not negligence. Principal sold homestead in meanwhile. Failure to file transcript in Circuit Court did not injure surety as it would have created no lien on the homestead. *Patton v. Cooper*, 84 Mo. App. 427.

After the certification of a check, the holder held not chargeable with laches in presenting it. *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596.

Mere delay in collecting note did not discharge sureties. *Hefferlin v. Krieger*, 19 Mont. 123.

Indorsee, requested by surety to seize collateral and apply it on the note, failed to do so. Did not release surety. *Myers v. Farmers' State Bank*, 53 Neb. 824.

Where holder merely forbore to sue in the absence of request, or neglected to do so upon request, surety was not discharged. *Bank of Maywood v. McAllister*, 56 Neb. 188.

The drawer of a draft was permitted to recover its proceeds from a collecting bank to whom it had been sent for collection, and by whom it had been credited on an account between it and the forwarding bank which had become insolvent. *Nash v. Second Nat. Bank*, (N. J. L.) 51 Atl. Rep. 721.

Negligence in presenting check did not discharge drawer, where he had no funds in bank applicable to its payment. *First Nat. Bank v. Linn &c. Bank*, 30 Or. 296.

A check received after banking hours was deposited for collection the next day, and presented for payment the day following. There was no negligence. *Loux v. Fox*, 111 Pa. St. 68; *Willis v. Finley*, 173 id. 28.

Holder, having sufficient money on deposit to pay the note at maturity, failed to apply it thereon. Discharged indorser. *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621.

Holder's attachment was dissolved by reason of defect in affidavit. Indorser was not discharged where accident occurred through the mistake of former's attorney who was of reputed skill and good standing. *City Sav. Bank v. Kensington Land Co.*, (Tenn.) 37 S. W. Rep. 1037.

Indorser is not injured by the negligence of the holder in failing to sue or protest, where maker was, at and after maturity, insolvent. *Fontaine v. Bohn*, (Tex. Civ. App.) 40 S. W. Rep. 637.

Assignor of an insurance policy was released under a statute, requiring assignee of non-negotiable instrument, in order to hold assignor as surety for debt, to use due diligence in collecting, where latter failed for two terms to commence an action. *Gooch v. Parker*, 16 Tex. Civ. App. 256.

A written notice to holder of a note, that the writer was not a principal, but signed as a surety, and requesting collection from other makers and a failure to sue within the statutory period, discharged the writer, though he was not injured thereby. *Sullivan v. Dwyer*, (Tex. Civ. App.) 42 S. W. Rep. 355.

Mere delay in suing after maturity did not discharge indorser as surety. *Rice v. Farmer's &c. Bank*, (Tex. Civ. App.) 42 S. W. Rep. 1023.

Holder must present the check or forward it for presentation on the day following its receipt. Deposit in a local bank for collection does not extend the time or permit the latter to forward it to a correspondent so remote that it will take longer than if sent direct. *Gregg v. Beane*, 69 Vt. 22.

Failure to duly present a claim against estate of principal guarantor did not release a surety on the guaranty. *Donnerberg v. Oppenheimer*, 15 Wash. 290.

Surety was not discharged by reason of bank's failure to apply, at debtor's direction, his deposit, which was insufficient to pay the note in full. *Kirkland Land &c. Co. v. Jones*, 18 Wash. 107.

Delay in suing principal at request of surety until third day of month following notice was not unreasonable. *Rotting v. Cleman*, 20 Wash. 116.

Surety was not released by mere continuance of suit by consent of creditor who was under an obligation to do so. *First Nat. Bank v. Parsons*, 45 W. Va. 688.

A check was mailed to payee at a place a short distance from his residence. He was not charged with its receipt so as to charge him with delay in sending it on for presentment, until it had reached him. *Lloyd v. Osborne*, 92 Wis. 93.

Payee of a check residing in the same place as the bank must present it within banking hours on the day after its reception, exclusive of Sunday or holidays. *Grange v. Reigh*, 93 Wis. 552.

Holder allowed statute of limitations to bar action upon the note. Did not discharge surety, who could have paid the note and sued the principal or, under a state statute, have compelled him to satisfy it. *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798.

A drawer of a check is only discharged to the extent that a failure to present it has injured him. *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430.

A holder of a check may recover on it though he has been negligent in delaying to present it, where the holder has not been prejudiced thereby. *Andrus v. Bradley*, 102 Fed. Rep. 54.

## V. Bona Fide Purchasers.

Gross negligence *only* is not a good defense to an action on a note; it may however be evidence of *mala fides*. *Goodman v. Harvey*, 4 A. & E. 870; *May v. Chapman*, 16 M. & N. 355; *Jones v. Gordon*, 2 App. Cases 616; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Pittsburgh Bank v. Neal*, 22 id. 96; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Hotchkiss v. Nat. Bank*, 21 Wall. 354; *Collins v. Gilbert*, 94 U. S. 753; *Brown Spoffard*, 17 Alb. L. J. 31; *Ex parte Estabrook*, 2 Lowell 511; *Schoen v. Houghton*, 50 Cal. 528; *Brush v. Scribner*, 11 Conn. 395; *Craft's Appeal*, 42 id. 146; *Bank v. McClelland*, 9 Colo. 608; *Matthews v. Poythress*, 4 Ga. 287; *Comstock v. Hannah*, 76 Ill. 530; *Shreeves v. Allen*, 19 id. 553; *Murray v. Beekwith*, 81 id. 43; *Matson v. Alley*, 141 id. 281; *Spetler v. James*, 32 Ind. 202; *Tescher v. Merea*, 118 id. 586; *Gage v. Sharp*, 24 Iowa 15; *Lake v. Reed*, 29 id. 258; *Woodfolk v. Bank of America*, 10 Bush. (Ky.) 504; *Ellieott v. Martin*, 6 Md. 509; *Commercial Bank v. Nat. Bank*, 30 id. 11; *Maitland v. Citizens' Bank*, 10 id. 540; *Worcester Bank v. Dorchester Bank*, 10 Cush. 488; *Spooner v. Holmes*, 102 Mass. 503; *Smith v. Livingston*, 111 id. 312; *Miller v. Finley*, 26 Mich. 219; *Howry v. Eppinger*, 34 id. 29; *Fink v. Chambers*, 95 id. 598; *Horton v. Bayne*, 52 Mo. 531; *Merrick v. Phillips*, 58 id. 436; *Hamilton v. Marks*, 63 id. 167; *Kit-*

tle v. De Lamater, 3 Neb. 325; Crosby v. Grant, 36 N. H. 273; Merri-  
man v. Rockwood, 47 id. 81; Hamilton v. Vought, 34 N. J. L. 187;  
Hall v. Wilson, 16 Barb. 548; Steinhart v. Boker, 34 id. 436; Lord v.  
Wilkinson, 56 id. 593; Johnson v. Way, 27 Ohio St. 374; Phelan v.  
Moss, 67 Pa. St. 59; State Bank v. McCoy, 69 id. 204; Moorehead v.  
Gilmore, 17 id. 118; Greneaux v. Wheeler, 6 Tex. 515.

The title of a purchaser for value of stolen negotiable paper, includ-  
ing bonds payable to bearer, is not impaired by negligence. It will only  
be defeated by proof of fraud or bad faith. Notice of such facts, as  
would put a prudent man upon his guard, will not defeat his recovery  
thereon. Belmont v. Hoge, 35 N. Y. 67; Birdsall v. Russell, 29 id.  
249; Goodman v. Simonds, 20 How. (U. S.) 365; Murray v. Lardner,  
2 Wall. 121; Goodman v. Harvey, 4 Ad. & El. 870.

Plaintiff made advances upon coupon bonds, which originally were  
accompanied by, or had attached to them, certificates stating in sub-  
stance, that upon the surrender of the certificate and bond, the holder  
was entitled to full paid preferred stock. These certificates were re-  
ferred to in the body of the bond. When the bonds were transferred  
to plaintiff the certificates were not with them. Held, that while the  
absence of the certificates might be a circumstance of some weight in  
determining the question, yet of itself, it did not prove fraud or bad  
faith. *Welch v. Sage*, 47 N. Y. 143, aff'g judg't for pl'ff. See, *Bird-  
sall v. Russell*, 29 id. 220.

One who purchases negotiable paper before due for a valuable con-  
sideration, in good faith and without actual knowledge or notice of any  
defect of title, holds it by a title valid as against every other person.

Suspicion of a defect of title; knowledge of circumstances which  
would excite some suspicion in the mind of a prudent man; disregard  
of means of information, an examination of which would disclose such  
defect; in fine, gross negligence at the time of the purchase, will not  
alone defeat his title. It is evidence, but not conclusive, of bad faith,  
and that must be established by one seeking to impeach such title.

A dealer in United States bonds, payable to bearer, is not bound to  
make inquiry of one offering to sell, as to his right or title thereto, or  
to take any special precautionary measures to ascertain or protect the  
interests of others; and in case of the purchase by him of such bonds  
which have been stolen, the fact of an omission on his part to examine  
and regard notices of the theft at his place of business, will not, of itself  
without actual knowledge or notice, deprive him of the character of a  
*bona fide* purchaser. *Seybel v. National Currency Bank*, 54 N. Y. 288,  
aff'g 2 Daly 383, and judg't for pl'ff; following, *Goodman v. Harvey*,  
4 Ad. & El. 870, disproving *Gill v. Cubitt*, 3 Barnwall & Cresswell 466.

which was modified in *Crook v. Jadis*, 5 Barn. & Adol. 909. The rule of *Goodman v. Harvey* was followed in *Uther v. Rich*, 10 Adol. & Ell. 784; *Arbouin v. Anderson*, 1 Q. B. 498-504; Byles on Bills of Exchange, 119, is to the effect that, "It is now definitely settled that if a man takes, *honestly*, an instrument made or become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induced the jury to find fraud." *Hall v. Wilson*, 16 Barb. 546. See, *Steinhart v. Boker*, 34 id. 436; *Magee v. Badger*, 34 N. Y. 241; *Belmont Branch Bk. v. Hoge*, 35 id. 65; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 478; *Swift v. Tyson*, 16 Peters 1; *Bank of Pittsburgh v. Neal*, 22 How. 108; *Murray v. Lardner*, 2 Wall. (U. S.) 110.

Where bonds, reciting on their face that they were not valid *unless authenticated by trustees of mortgage securing them*, were stolen, the defendant was not negligent in failing to notify the public of the theft, and although the plaintiffs bought for a good consideration and in good faith, they got no title. *Maas v. M. H. & T. R. Co.*, 83 N. Y. 223.

See *Germania Savings Bank v. Village of Suspension Bridge*, 73 Hun. 590.

Gross carelessness alone cannot, as a matter of law, divest the title of a purchaser for the value of negotiable property, but may constitute evidence of bad faith. *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; *Goodman v. Harvey*, 4 Ad. & El. 870.

Plaintiff took note as collateral security for loan to the holder who was a note broker. It was held to be a *bona fide* purchase and that plaintiff was not chargeable with notice that the note had been diverted. *American Exchange Nat. Bank v. New York Belting, &c. Co.*, 148 N. Y. 698; aff'g s. c., 74 Hun. 446.

**From opinion.**—"While it is true that the Potter-Lovell Company was engaged in business as a broker in commercial paper, we do not think that that circumstance was enough to raise a doubt as to its authority to deal with commercial paper in its possession, which third persons were bound to entertain. It was necessary, in order to deprive the paper of its negotiable attributes, that it should appear that the plaintiff knew, or had reason to believe, that the Potter-Lovell Company was acting as agent for the maker and not as an owner."

Plaintiff advanced money on a corporate note, duly executed by the president of the corporation, payable to a third party and by him indorsed to a firm of which the president was a member. It was held that this was a *bona fide* purchase and the plaintiff was not put upon inquiry. *Cheever v. Pittsburgh &c. R. Co.*, 150 N. Y. 59; s. c., 34 L. R. A. 69; rev'g s. c., 72 Hun. 380.

**From opinion.**—"The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as

the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a *bona fide* holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence, or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *malu fide*, his title according to settled doctrine, will prevail. (Magee v. Badger, 34 N. Y. 249; Am. Ex. Nat. Bank v. N. Y. Belting, & Co., 148 N. Y. 705; Knox v. Eden Musee Am. Co., 148 N. Y. 454; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202; Vosburgh v. Diefendorf, 119 N. Y. 357; Jarvis v. Manhattan Beach Co., 148 N. Y. 652.)"

\* \* \* "The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. (Hoge v. Lansing, 35 N. Y. 136)." \* \* \* "The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. Where paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it. (Hanover Bank v. Am. Dock & T. Co., 148 N. Y. 612; Bank of N. Y. & C. v. Am. Dock & T. Co., 143 N. Y. 559; Wilson v. M. E. R. Co., 120 N. Y. 145; Gerona v. McCormick, 130 N. Y. 261). There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with the corporate notes payable to himself, but with notes that had been regularly issued, so far as appeared from their face, to a stranger and by him transferred to a firm of which the officer was a member and for which he acted as agent in procuring the loan from Brooks and pledging them as security. \* \* \* None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view. (Am. Ex. Nat. Bank v. N. Y. B. & P. Co., 148 N. Y. 698; Miller v. Consolidation Bank, 48 Pa. St. 514; Walker v. Kee, 14 S. C. 142.)"

A bank discounted for a customer a note running "we promise to pay," etc., and signed by parties in their individual names with the addition of the words "President," "Secretary." It was held that the bank was not obliged to inquire whether the note was intended as an individual or a corporate obligation and could sue the signers as a *bona fide* pur-

chaser. *First Nat. Bank v. Wallis*, 150 N. Y. 455; aff'g s. c., 80 Hun, 435.

**From opinion.**—"It appears that the bank discounted the note on the credit primarily of its customers, the payees, making no inquiry as to whether it was a corporate or individual obligation, and having no knowledge on the subject. In law it was the individual note of the defendants (*Caseo National Bank v. Clark*, 139 N. Y. 308; *Merchant's Nat. Bank v. Clark*, id. 315), and the form of the promise is quite consistent with an intention to create an individual liability."

Plaintiff, having taken, for value, from the payee a note made to him by his firm and indorsed by him and then by another firm, sued the latter as second indorsers. It was held that he was charged with knowledge that the firm indorsement was for accommodation and was bound to inquire into its validity. *Smith v. Weston*, 159 N. Y. 194; aff'g s. c., 88 Hun, 25.

See, also, *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; rev'g s. c., 12 App. Div. 624; *First Nat. Bank v. Weston*, 25 App. Div. 414; s. c., 49 N. Y. Supp. 542.

**From opinion.**—"While upon the production of the note by the plaintiff and proof of the signatures of the parties thereto and of presentment and notice of dishonor, a *prima facie* case was established in his favor, as soon as it appeared that the note was indorsed outside of the firm business and without the authority of all the members, the burden of proof shifted, and in order to recover it was necessary for the plaintiff to show that he was a *bona fide* purchaser, or that the indorsement was authorized. (*Joy v. Diefendorf*, 130 N. Y. 6; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Nickerson v. Ruger*, 76 N. Y. 279; *First Nat. Bank v. Green*, 43 N. Y. 298). It was not enough for him to prove simply that he paid value for the note before maturity, but it was necessary for him to go farther and show either that he had no knowledge or notice equivalent to knowledge that the indorsement was for the accommodation of the makers, or else that it was made with the authority of or was ratified by the other members of the firm. (*Vosburgh v. Diefendorf*, 119 N. Y. 357; *Bank of Rochester v. Bowen*, 7 Wend. 159; *Dob v. Halsey*, 16 Johns. 34; *Lavery v. Burr*, 1 Wend. 529.) As the note was transferred to the plaintiff by one of the makers, who was also the payee and first indorser, the presumption arose that the second indorsement was made for the accommodation of some prior party to the note and threw the burden on the holder of showing that it was authorized. (*National Park Bank v. German-American & Co.*, 116 N. Y. 281). The plaintiff knew he was dealing with one of the makers of the note when he took it from James K. Van Campen, and he knew also that Mr. Van Campen, either as maker or as first indorser, could not be expected to have possession of the note if it had passed through the firm of Weston Brothers in the ordinary course of business. He was, therefore, put upon inquiry, which, if made in the proper quarters, would, as it must be presumed, have disclosed the fact that the second indorsement was made without authority. (*Foot v. Sabin*, 19 Johns. 154; *Wilson v. Metropolitan El. Ry. Co.*, 120 N. Y. 145; *Stall v. Catskill Bank*, 18 Wend. 466; *Gansevoort v. Williams*, 14 Wend. 134; *Joice v. Williams*, id.; *Wilson v. Williams*, id. 146)."



But when the note is not presented by one prior in order of liability or possession to the indorser the rule does not apply and the purchaser is not chargeable with notice that the indorsement is not in the ordinary course of business and need not inquire into its validity. *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; rev'g s. c., 12 App. Div. 624.

Plaintiff discounted a note, made in the firm name by a member of the firm, of which defendant was also a member, for accommodation of the payee, presented and indorsed by him as first indorser and by a third party, another partnership, as second indorser. It was held that, as to defendant, the paper was on its face regular and in the holder's hands in the due course of business and plaintiff was not put upon inquiry. *Second National Bank v. Weston*, 161 N. Y. 520; rev'g s. c., 31 App. Div. 403.

**From opinion.**—"There is one feature, however, which distinguishes this case from the others against these defendants, that have been before us. (*Smith v. Weston*, 159 N. Y. 194; *Monongahela Valley Bank v. Weston*, 159 N. Y. 201). The notes formerly under consideration were presented to the purchaser, either by the maker or by a party who would not, in the ordinary course of business, have them in his possession unless they were accommodation paper. This fact, after evidence was given tending to show that the notes had been signed by William in the name of the firm without the consent of the other members, was held to involve such notice to the purchaser as to cast upon him the burden of showing that he was a *bona fide* purchaser, or that the use of the firm name by the one partner was authorized by his co-partners. In the case now before us, the note was presented to the plaintiff by the payee, to whom it had apparently been delivered by the Weston Brothers, as makers, in the usual course of business, and hence upon the face of the transaction, there was nothing to put the purchaser upon inquiry. The plaintiff had a right to assume, in the absence of actual notice of any defect, that the relation to the paper of every party whose name had been written upon it was precisely what it appeared to be. (*Cheever v. Pittsburgh &c. Co.*, 150 N. Y. 59). While the plaintiff may have had notice that the subsequent indorsers, who do not defend, had indorsed for the accommodation of some other party to the note, the presentation of the note by the payee cast no suspicion upon the capacity in which the Weston Brothers had signed it. As to them, it was apparently business paper, and there was nothing for the plaintiff to inquire about in that regard."

A note recited that it was given in purchase of land and stipulated for a lien thereon. Purchaser was put upon inquiry as to the consideration of the note having been paid. *Scott v. Scott*, 2 App. Div. 240.

Note of a firm payable to a member, indorsed by another firm and purchased from payee was notice that the indorsement was for accommodation and consequently not in the regular course of business. *First Nat. Bank v. Weston*, 25 App. Div. 414.

Signature "as trustee" put a purchaser upon inquiry as to the trus-

tee's right to use the trust funds is in his personal affairs; and an inquiry of the trustee only after the funds had been diverted did not discharge the duty to investigate. *Marshall v. De Cordova*, 26 App. Div. 615.

Parties dealing with firms are put upon inquiry as to the firm name. Signature "Iba & Green" to a note when the firm name was "Empire Garden." put the purchase upon inquiry as to the reason therefor. *Lucker v. Iba*, 54 App. Div. 566.

Knowledge of the accommodation character of a note did not charge an innocent purchaser with notice of a fraudulent diversion of the proceeds. *Beall v. General Electric Co.*, 16 Misc. 611.

On proof of diversion, the burden is on the holder to show that he was without notice. *McCammon v. Shantz*, 26 Misc. 476.

See, also, *McCammon v. Shantz*, 49 App. Div. 460.

The purchaser of a firm note, stated to have been taken for bicycles went to the maker's store, saw no bicycles but saw that his firm was in the transportation business and made no inquiries. It did not charge him with knowledge that the note was outside the partnership business. *Union Nut & Bolt Co. v. Doherty*, 32 Misc. Rep. 241; s. c. aff'd. id. 496.

The taker of a check several days past due with the letters "N. G." marked thereon, by a bank which had dishonored it, held not a *bona fide* purchaser. *Spero v. Holoschutz*, 36 Misc. 764.

Knowledge that one in possession of a note is a maker and that it is to be negotiated for his benefit is sufficient to notify a purchaser that the other makers signed for accommodation. *Evans v. Speer & Co.*, 65 Ark. 204.

A note payable to a firm or bearer in the hands of a partner did not charge a purchaser with knowledge of the rights of the partnership. Possession of such a note is *prima facie* evidence of ownership. *Bank of Paris v. Pearson*, 66 Ark. 310.

Note in payment of a patent right, which does not so state upon its face as required by statute, held void in the hands of a *bona fide* purchaser. *Wyatt v. Wallace*, 67 Ark. 575.

Knowledge that notes were given by stockholders for subscriptions to stock, in consideration of a promise to issue stock upon their payment, is not so out of the usual course as to charge holders with notice that the stock was not delivered. *Kinkel v. Harper*, 7 Colo. App. 45.

A letter of authority to agent to draw provided he is still in a certain place and "needs the money yet" was held to notify one cashing a draft drawn in pursuance thereof that the authority must be exercised within a reasonable time. Seventeen days held not unreasonable. *Posey v. Denver Nat. Bank*, 24 Colo. App. 199; aff'g s. c., 7 Colo. App. 108.

Fact that the same person is the president of both the maker and the

payee does not necessarily put one on inquiry. *St. Joe &c. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339.

Indorsement "without recourse" does not put one upon inquiry. *Beach v. Bennett*, (Colo. App.) 66 Pac. Rep. 567.

Letter to maker from payee of note with coupons secured by trust deed, in response to a remittance of interest, stating that he would send coupon as soon as received from holder, charged maker with notice that payee was not the owner and not entitled to interest. *Campbell v. Equitable Securities Co.*, (Colo. App.) 68 Pac. Rep. 788.

Knowledge that the consideration for the note was an agreement, which, by reason of the payee's insolvency, could not be carried out, was knowledge of a failure of consideration for the note. *Russ Lumber &c. Co. v. Muscupiabe Land &c. Co.*, 120 Cal. 521.

A note executed for the accommodation of a bank made payable to its cashier, and by him indorsed in blank, was negotiated by the president for his own benefit. Knowledge that he was president of the bank was not notice that his act was unauthorized. *Kaiser v. United States Nat. Bank*, 99 Ga. 258.

Knowledge of the consideration of a note expressed on its face was not sufficient to charge a purchaser with notice of the failure thereof. *Post v. Abbyville &c. R. Co.*, 99 Ga. 232.

Knowledge of the possession of a note by a firm of which one of the makers was a member did not charge a purchaser with notice of payment. *Haug v. Riley*, 101 Ga. 372; s. c., 40 L. R. A. 244.

Joint execution by a husband and wife did not give notice that the latter was surety for the former. *Southern &c. Assn. v. Perry*, 103 Ga. 800.

Knowledge that a guaranty was the consideration for a note did not charge a purchaser with notice that the payee might or did fail to fulfil his guaranty. *Hudson v. Best*, 104 Ga. 131.

The taker of a non-negotiable note is chargeable with notice of lack of consideration. *Ryals v. Johnson County Sav. Bank*, 106 Ga. 525.

A note stating that it was given for patent right was not void for failure to bear evidence of its character on its face, though it failed to designate the patent or state the amount of the consideration as required by statute. *Smith v. Wood*, 111 Ga. 221.

Knowledge that promoters had sold property to a corporation for more than they paid for it did not charge holders of corporate notes with knowledge that they had fraudulently represented to its stockholders that the company was getting it at cost. *Cranston v. Bank of State of Georgia*, 112 Ga. 617.

That notes were stated in an indorsement to be secured by an in-

terest in horses described in a certain agreement did not charge a purchaser with knowledge of the contents thereof. *Biegler v. Merchant Co.*, 164 Ill. 197; aff'g s. c., 62 Ill. App. 560.

Indorsement on a note and trust deed that certain property was "released by order of Joseph Brugger, holder of note secured by this trust deed" made purchaser negligent in making no inquiry except of the trustee himself. *Chicago Title &c. Co. v. Brugger*, 196 Ill. 96; aff'g s. c., 95 Ill. App. 405.

That a purchaser of a draft was suspicious, did not charge it with knowledge of defective title. *Lampson v. Illinois Trust &c. Bank*, 62 Ill. App. 371; *Weaver v. Leseure*, 89 id. 628.

The fact that notes were in the hands of one from whom they were taken when first seen and that he promised to get them indorsed, gave notice that an indorsement was for accommodation, and, being that of a corporation, imposed the duty of inquiry. *Pick v. Ellinger*, 66 Ill. App. 570.

A statement by a father, that his wife objected to his signing notes for his son, coupled with knowledge that the money went to the son, charged a purchaser with notice that the father signed only as surety for the son. *Peterson v. Stege*, 67 Ill. App. 147.

A purchaser of a note took it without any actual knowledge of defenses, though he failed to make inquiry under circumstances which would have raised a suspicion in the mind of an ordinary person. Held, that he could recover as a *bona fide* purchaser. *Gray v. Goode*, 72 Ill. App. 504.

Provided, he was not guilty of bad faith. *Kent v. Barnes*, 72 Ill. App. 617.

Knowledge that a holder was an agent was sufficient to impose duty of inquiry as to the extent of his authority. *Schneider v. Lebanon Dairy &c. Co.*, 73 Ill. App. 612.

A purchaser of a note was not charged with knowledge of notices published in newspapers. *Gehbach v. Carlinville Nat. Bank*, 83 Ill. App. 129.

That note bore on its face evidence of connection with a trust was sufficient to put a purchaser upon inquiry as to the trustee's right to dispose of it. *Lang v. Metzger*, 86 Ill. App. 117.

To defeat title of *bona fide* holder he must be chargeable with bad faith. Suspicion or knowledge of facts which would make it negligence not to inquire is insufficient. *Metcalf v. Draper*, 98 Ill. App. 399.

The maker of a note and his sons, who had been charged with murder and arrested were released through the efforts of an attorney. Knowledge of the facts gave notice of the unreasonableness of the fee for which the note was given. *Shirk v. Neible*, 156 Ind. 66.

A purchaser of a note is not put upon inquiry as to its consideration where no suspicious facts appear upon its face. *Pape v. Hartwig*, 23 Ind. App. 333; *National Exch. Bank v. Berry*, 21 Ind. App. 261.

Mere suspicion or carelessness was not sufficient to charge a purchaser with notice, but only such gross negligence or willful neglect as will amount to bad faith. *Lehman v. Press*, 106 Iowa, 389.

A purchaser of a note was not charged with notice where he made some inquiry though he was negligent in not going far enough. *Central State Bank v. Spurlin*, 111 Iowa, 187; s. c., 49 L. R. A. 661.

The statement in a note that it was executed for the purchase money in lots in which a lien was retained as security was not sufficient to put a purchaser upon notice as to any fraud connected therewith. *McCarty v. Louisville &c. Co.*, 100 Ky. 4.

Payee took a renewal of a note in smaller notes for the same amount with sureties. The character of the transaction was not sufficient to charge him with notice of the maker's intention to defraud or mislead the sureties. *Sebree Deposit Bank v. Clark*, (Ky.) 48 S. W. Rep. 1089.

Indorsement of notes "for collection" gives notice of lack of authority to dispose of them to the extent of the indorser's interest therein. *Gaskill v. Hufferaker*, (Ky.) 49 S. W. Rep. 170.

A cashier of a bank discounting notes of a corporation was also a stockholder of the latter. Not being an officer he was not chargeable with notice of fraud on the part of the corporation in obtaining the notes. *World Man. Co. v. Hamilton-Kenwood Cycle Co.*, 123 Mich. 620.

Purchase after protest did not charge one with notice of illegality as to consideration: even though taken under suspicious circumstances. *Wing v. Ford*, 89 Me. 140.

Knowledge that an indorsement is for accommodation will not charge a purchaser with notice that it is for any other purpose than for credit. *Tourtlot v. Reed*, 62 Minn. 384.

Purchase after maturity binds a purchaser as to facts which the circumstances reasonably put him on inquiry as to. *Fuller v. Quesnel*, 63 Minn. 302.

Knowledge that payee ran a "bucketshop," that the first indorser was interested therein and that the maker had dealings with the concern in "futures" was sufficient to suggest inquiry: and the purchaser was chargeable with knowledge that the note was given for a gambling debt, which inquiry would have revealed. *Merchant's Nat. Bank v. Sullivan*, 63 Minn. 468.

A purchaser will not be charged with knowledge of facts which inquiry would have revealed, unless the circumstances were so patent as to make a lack of inquiry a matter of bad faith. *Gale v. Birmingham*, 64 Minn. 555; *Collins v. McDowell*, 65 Minn. 110.

The words "as advised" on a draft do not import notice that there are no funds in the hands of drawee, where the purchasers knew that in previous transactions such drafts were promptly honored. *American &c. Bank v. Gluck*, 68 Minn. 129.

Pendency of proceedings to test the validity of a note are not notice to a purchaser before maturity. *Fulton v. Andrea*, 70 Minn. 445.

Delivery of check by mistake to wrong party did not prevent recovery by an innocent purchaser thereof. *Barrows v. Western &c. Teleg. Co.*, (Minn.) 90 N. W. Rep. 1111.

Suspicion which does not amount to bad faith will not charge a purchaser with knowledge of defects which an inquiry would have revealed. *Borgess Invest. Co. v. Vette*, 142 Mo. 560; *Schroeder v. Seittz*, 68 Mo. App. 233; *Brown v. Hoffelmeyer*, 74 Mo. App. 385.

Notice that a note is payable to a trustee, binds a purchaser to an inquiry as to the extent of his authority to deal with it. *Galloway v. Gleason*, 61 Mo. App. 21.

Lack of "credits" on an installment note for payments past due does not exclude the holder from the rights of a *bona fide* purchaser. *McCorkle v. Miller*, 64 Mo. App. 153.

Holder of past due paper is not bound to look behind the appearances of the paper, arising from transactions independent of the note against his assignor, for latent equities. *Mohr v. Byrne*, 135 Cal. 87; *Crawford v. Johnson*, 87 Mo. App. 418.

Purchase of a check under suspicious circumstances, that could have been cleared by mere asking a question, and were incompatible with ordinary business prudence or common honesty, does not entitle one to protection of a *bona fide* purchaser. *Harrington v. Butte &c. Min. Co.*, 19 Mont. 411; s. c., 36 L. R. A. 539.

Purchaser took a joint note from one of the makers as collateral for his individual note. He was not chargeable with knowledge of diversion of the proceeds. *American Exch. Nat. Bank v. Ulm*, 21 Mont. 440.

A purchaser after maturity whose vendor was an innocent purchaser without notice succeeds to his rights. *Jones v. Wiesen*, 50 Neb. 243.

That an officer of a corporation issued a note by it to himself as payee, put a purchaser upon inquiry as to his authority therefor. *Stough v. Ponca Mill Co.*, 54 Neb. 500.

A *bona fide* purchaser is not charged except with actual notice. Knowledge of circumstance such as would put an ordinary man upon inquiry is insufficient. *First Nat. Bank v. Pennington*, 57 Neb. 404.

The words "This note is secured by a contract on land \* \* \* described as," was not sufficient to put a purchaser upon inquiry. *Knight v. Finney*, 59 Neb. 274.

Duty of inquiry on the part of a purchaser depends on law of the place where the contract is to be performed and not upon the law of the forum, and where the place of performance is Vermont, the question must go to the jury upon evidence showing knowledge of facts sufficient to put a reasonable man on inquiry. *Limerick Nat. Bank v. Howard*, (N. H.) 51 Atl. Rep. 641.

Note was signed and left with payee's agent for delivery on condition of procuring signature of others. The conditions were not fulfilled and payee put it in circulation. Held no defense against an indorsee in due course. *Porter v. Andrus*, 10 N. D. 558.

The inscription "No. of Note 2821. No. of Policy 654,911" gives notice to an agent that it is a premium note and belongs to company. *Bresce v. Crumpton*, 121 N. C. 122.

Knowledge of the consideration for note does not put a purchaser upon inquiry to ascertain whether it has failed or not. *United States Nat. Bank v. Floss*, 38 Or. 68.

A purchaser of a check is not put upon inquiry as to its consideration simply by reason of its being dated ahead. *Rogers v. Duan*, 172 Pa. St. 151.

The signature "The Crowell and Class Cold-Storage Co., by Chas. N. Newell, Treas.," did not put a purchaser upon inquiry as to whether the firm had become a corporation. *New York Nat. Exch. Bank v. Crowell*, 171 Pa. St. 313.

The indorsement of the firm name to a partner's note, in his handwriting and discounted for his benefit was notice to the bank of the possibility of its being unauthorized. *Brown v. Pettit*, 178 Pa. St. 17; s. c., 34 L. R. A. 723.

Neglect to investigate suspicious circumstances will not charge a holder with notice unless they amount to bad faith upon his part. *Lancaster County Nat. Bank v. Garber*, 178 Pa. St. 91.

Plaintiffs before purchasing, asked the makers if the notes were all right and were told that he believed they were, that they had been given to answer for a specific object and would be paid when due. Plaintiffs were not charged with notice of the other person's failure to perform that specific object. *Snyder v. Hancock*, 9 Pa. Dist. R. 159.

Knowledge that a note was given for a patent right charged the taker with notice of a failure of consideration, though the statement was omitted from the face of the note. *Troxell v. Malin*, 9 Pa. Super. Ct. 483.

Purchaser of draft is bound to look at the terms of acceptance only. *Reverenswood Bank v. Rencker*, 18 Pa. Super. Ct. 192.

Evidence of fraud or duress in procuring a note throws upon subse-

quent holder burden of proving himself a *bona fide* holder for value. *Kirby v. Berquin*, (S. D.) 90 N. W. Rep. 856.

Bank accustomed to discount paper at from 12 to 25 per cent was not put upon inquiry by purchasing notes at 20 per cent discount from a stranger, where he knew the maker to be solvent. *Oppenheimer v. Farmer's &c. Bank*, 97 Tenn. 19. See 33 L. R. A. 767.

A manufacturer of furnaces sold them to a manufacturer of an attachment, taking notes directly to them upon the resale of both by the latter. Was not chargeable with representations made by the latter. *Blue Springs Min. Co. v. McIlvren*, 97 Tenn. 225.

Inquiry would have revealed that the word "trustee" was only descriptive; failure to make it did not charge the holder with notice of equities of the maker. *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278; s. c., 38 L. R. A. 837.

Mere knowledge of the consideration and that it might fail, did not put a purchaser upon inquiry to ascertain whether or not it had failed. *Merchant's &c. Bank v. Pennland*, 101 Tenn. 445.

A purchaser of a note relying on a letter, for the authority of an agent, was chargeable with knowledge as to ownership also contained therein. *Bristol Bank &c. Co. v. Jonesboro &c. Co.*, 101 Tenn. 545.

A purchaser of a draft in settlement of insurance was chargeable with notice of fraudulent overinsurance, where he had both policies in his possession. *Teutonia Ins. Co. v. Russell*, (Tenn.) 48 S. W. Rep. 703.

Taking a note payable to a certain person or bearer directly from one of the makers was sufficient to charge the purchaser with notice of equities in favor of sureties. *Battle v. Cushman*, (Tex. Civ. App.) 33 S. W. Rep. 1037.

A manufacturer having made arrangements with another for selling its machinery, whereby it had the right to see that notes turned over to it therefore had proper security, was not a purchaser without notice of such notes especially where it was notified of the terms of the contract of sale. *Hutches v. Case Threshing Machine Co.*, (Tex.) 35 S. W. Rep. 60.

The position of an indorsement of holder above the blank indorsement of a corporation to whom it had been indorsed specially was not notice of the latter's being an accommodation indorsement. *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640.

Mere knowledge of fact suggesting inquiry will not charge a purchaser with what inquiry would have revealed, where there is no bad faith. *Hynes v. Winston*, (Tex.) 40 S. W. Rep. 1025.

Knowledge that a note was the property of an estate puts a purchaser on inquiry as to the authority of the guardian to negotiate. *Gillespie v. Crawford*, (Tex. Civ. App.) 42 S. W. Rep. 621.



That a note was taken from payee under a blank indorsement and that the husband of the holder, who was a maker, had the possession of it, did not charge a purchaser with notice of an equity, the husband having held it as the wife's agent. *Bruinerd v. Bute*, (Tex. Civ. App.) 44 S. W. Rep. 575.

Mere negligence in failing to inquire into suspicious circumstances did not charge purchaser with the knowledge inquiry would have revealed. *Mulberger v. Morgan*, (Tex. Civ. App.) 47 S. W. Rep. 379. See s. c., 47 S. W. Rep. 738; *Rotan v. Mardgen*, (Tex.) 59 S. W. Rep. 585; *Turner v. Grobe*, (Tex. Civ. App.) 44 S. W. Rep. 898.

Continued occupation by vendor was not notice of a claim of ownership to a broker negotiating a note for the purchase price. *Stephens v. Summerfield*, 22 Tex. Civ. App. 182.

On default of the contractor, one of the two sureties on his bond, who was president of the bank that advanced the money to the contractor, induced the other to execute a note to raise money with the bank to complete the contract upon the assurance that he would not be held liable and the note was simply for the purpose of showing to the bank examiner. In the absence of actual knowledge of the president's representations on the part of the bank it was allowed to recover on the note. *Bank of Cleburne v. Carper*, (Tex. Civ. App.) 67 S. W. Rep. 188.

Purchaser was a *bona fide* holder, though the circumstances surrounding the transaction were sufficient to charge him with notice that it was for accommodation. *Israel v. Gale*, 77 Fed. Rep. 532.

Purchaser, who takes a note in good faith, though with knowledge of suspicious circumstances, is not guilty of such laches as will prevent his being a *bona fide* holder. *Doe v. Northwestern Coal &c. Co.*, 78 Fed. Rep. 627.

See, also, *Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489; *Germania Bank v. La Follette*, 72 id. 145.

Knowledge that a holder of notes was president of the bank which was an indorser in blank thereon was not notice to a purchaser that the holder was not the owner thereof. *Kaiser v. First Nat. Bank*, 78 Fed. Rep. 281.

Rediscounting without other special circumstances is not so far out of the usual course of business as to charge a purchaser with knowledge that the transaction was unauthorized. *United States Nat. Bank v. First Nat. Bank*, 79 Fed. Rep. 296.

A blank indorsement of a person neither a payee, indorsee nor assignee, being a guaranty, is presumed to be without consideration, and a purchaser is chargeable with notice accordingly. *Lyon &c. Co. v. First Nat. Bank*, 85 Fed. Rep. 120.

A purchaser of a draft drawn by an officer of a railroad company, is

negligent in failing to institute inquiry, where the latter asks for a certificate of deposit in his own name for the proceeds. *Farmer's Loan &c. Co. v. Fidelity Trust Co.*, 86 Fed. Rep. 541.

Purchaser of a note made by a corporation to and indorsed by the officer making it for his own benefit is chargeable with notice of lack of authority. *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. Rep. 742.

A purchaser is negligent in not making inquiry concerning circumstances which would put an ordinarily prudent man on inquiry and is chargeable with the knowledge inquiry would have revealed. *Limerick Nat. Bank v. Adams*, 70 Vt. 133.

See, also, *Roth v. Allen*, 32 Vt. 135.

Purchaser may recover, under a statute requiring proof of actual knowledge or evidence sufficient to show bad faith, to constitute notice of infirmity, where he made no inquiry as to the consideration except of payee, though he knew makers to be insolvent. *McNamara v. Jose*, (Wash.) 68 Pac. Rep. 903.

Knowledge that notes indorsed in blank by a corporation were given to it by the officer making the indorsement did not charge a purchaser with notice that it was accommodation paper. *Hiawatha Iron Co. v. John Strange Paper Co.*, 106 Wis. 111.

## COMMON CARRIER OF GOODS.

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### I. Who Are Common Carriers.\*

Persons, whose business it is to receive such goods as parties see fit to trust to their care for the purposes of transporting the same from one place to another for compensation, are common carriers. *Sweet v. Barney*, 23 N. Y. 335.

A common carrier exercises a *quasi* public employment, and has public duties to perform; he cannot reject a customer at pleasure, or charge any price that he chooses to demand; and if he refuses to carry goods according to the course of his employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his risk and services (Bae. Abr. Carriers [B]; 2 Kent 599; Story on Bail, 328; 2 Ld. Raymond, 917; Skin. 279; 1 Salk. 249; 2 Show. R. 332; 8 Mees. & Wells, 372; 1 Pick. 50; 15 Conn. R. 539); and an action will lie against him upon a tort, arising *ex delicto*, for a breach of duty. *Orange Co. Bank v. Brown*, 3 Wend. 158. *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 485.

Common carriers include those who for transportation receive bullion, coin, bank-notes, commercial paper. *Sweet v. Barney*, 23 N. Y. 335.

A common carrier was defined in *Gisburn v. Hurst*, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in *Dwight v. Brewster*, 1 Pick. 50, to be, "one who undertakes, for hire to transport the goods of such as choose to employ him, from place to place." In *Orange Bank v. Brown*, 3 Wend. 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with one private individual, to carry for hire." Story on Contracts, sec. 152a. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods

\* NOTE. That special circus cars, &c. are carried as special, not as common, carrier, see "Limitation of Liability," post p. 237.

of anyone who offers. "On the whole," says Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." 2 Pars. on Cont. (5th ed.) 166, note. *Allen v. Sackrider*, 37 N. Y. 341.

Express company is a common carrier. *Belger v. Dinsmore*, 51 N. Y. 166.

Ferry companies are common carriers, but not as to goods that passenger retains in his possession. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 34; disapproving of *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Mass. 691; *Wilson v. Hamilton*, 4 Ohio St. 722. *White v. Winnisinmet* 7 Cush. 155.

Defendants advertised themselves as general truckmen, their particular specialty being heavy machinery. They kept and maintained for this purpose a large number of trucks and horses and the necessary help for the prosecution of the business. They were employed to move heavy machinery and negligently injured it while unloading. It was held to be no legal error to refuse to instruct the jury that the defendants were not common carriers. *Jackson &c. Works v. Hurlbut*, 158 N. Y. 34; aff'g s. c., 15 Misc. 93.

**From opinion.**—"Truckman, wagoners, cartmen and porters who undertake to carry goods for hire as a common employment in a city or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying. Where a person whose principal pursuit is farming, solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him. The circumstances that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier. (*Bank of Orange v. Brown*, 3 Wend. 158; *Schouler on Bailments, and Carriers* [2nd Ed.], 351; *Story on Bailments*, Sections 495, and 496; 2 *Kent's Comm.* [4th Ed.], pp. 598, 599; 2 *Parsons on Contracts*, 165, 175; *Angell on Carriers*, 870; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271)."

A warehouseman, whose contract of storage had expired, agreed to deliver the goods for which he was paid a certain price. It was held that from the moment of accepting such employment he became a common

carrier and, the goods in the warehouse being in his possession as carrier, he was liable for their loss by fire as an insurer and not for negligence only. *Snelling v. Yetter*, 25 App. Div. 590.

Boatmen on canal employed in the transportation of property is a common carrier. *Arnold v. Halenbake*, 5 Wend. 33.

Also the owners of steamboats, railroads, canal boats, stage coaches, whose ordinary business is to carry goods. *Powell v. Myers*, 26 Wend. 591, 594; *Hollister v. Nowlen*, 19 id. 234.

An expressman soliciting the carriage of trunks and packages for hire. *Robinson v. Cornish*, 34 N. Y. St. R. 695.

(But, see, *People ex rel. Walker v. Babcock*, 16 Hun. 313, that express company will not be compelled by mandamus to carry goods subject to the common law liabilities of a common carrier. Relator should resort to an action for damages.)

A declaration alleging that defendant followed the occupation of master or owner of a steamboat plying on a navigable river sufficiently fixes the character of a common carrier upon him. *Bennett v. Filyow*, 1 Fla. 403.

The court will take notice that the owner of an omnibus line is a common carrier and liable as such for the loss of a passenger's trunk. *Parmelee v. McNulty*, 19 Ill. 556:

The mode of transporting is immaterial: the driver of a sled with an ox team, carrying sugar for hire, is a common carrier. *Robertson v. Kennedy*, 2 Dana. (Ky.) 430.

One who "hauled goods" as a common carrier within city limits under a license continued his liability by going beyond them. *Farley v. Lavary*, (Ky.) 54 S. W. Rep. 840.

One who engaged himself to any body who would employ him to deliver freight, packages, etc., was a common carrier. *Cayo v. Pool's Assignee*, (Ky.) 55 S. W. Rep. 887; s. c., 49 L. R. A. 251.

A transfer company contracting to remove plaintiff's trunk from depot. *Da Ponte v. N. O. Transp. Co.*, 42 La. Ann. 696.

Proof of custom of street railway company to carry merchandise for hire fixes common carrier's liability on it for loss of a box of merchandise delivered to it to be carried on front platform of a car. *Levi v. Lyon & Co.*, 11 Allen. 300.

An express company is a common carrier. *Brockway v. American Exp. Co.*, 168 Mass. 257.

The owner of a canal boat used for transportation of merchandise. *Humphreys v. Reed*, 6 Wharton. (Pa.) 185.

Where a storekeeper carried goods for hire in his wagon, he was liable

as common carrier for loss of them. *Gordon v. Hutchinson*, 1 Watts. & S. (Pa.) 285.

See "Ferry Companies," post p. 603.

The act of defendant's agent in receiving plaintiff's cotton on board defendant's boat, this boat being used for transporting of defendant's cotton, and sometimes that of others, fixed common carrier liability upon defendant. *McClure v. Richardson*, 1 Rice, (S. C.) 215.

A telephone company is a common carrier. *Kirby v. Western Union Teleg. Co.*, 1 S. D. 623; s. c., 30 L. R. A. 621.

A company having no means of transportation of its own, but contracting with other companies to transport its goods, is a common carrier. *Merchants' Despatch &c. Co. v. Bloch*, 86 Tenn. 392.

Where the character of a steamboat company extended to the carrying of all commodities usually carried upon Lake Champlain, and proof showed that the bank bills were usually carried by the water craft on that lake, it would be liable for the loss of a package of bank bills delivered to captain of the boat for transportation, payment of fifty cents being made to him. *Farmers &c. Bank v. Champlain Transp. Co.*, 23 Vt. 186.

Liability of defendants, owners of canal boats used in transporting lime for their own business but in the present instance carrying oats for the plaintiff under special contract, was that of a private carrier. *Beckwith v. Frisbie*, 32 Vt. 559.

The mere fact defendants were receivers under appointment of Court of Chancery was no defense to a suit for loss of goods delivered to them as common carriers, when they had voluntarily assumed the duties of that business. *Blumenthal v. Brainerd*, 38 Vt. 402.

See "Receivers," ante p. 89.

## II. Who Are Not Common Carriers.

The owners of a steamboat employed in the business of towing boats for hire are not common carriers. *Caton v. Rumney*, 13 Wend. 387, and *Alexander v. Greene*, 3 Hill, 9; *Wells v. The Steam Navigation Co.*, 2 N. Y. 204.

It is not sufficient to charge the defendant as a common carrier, to prove that he was the owner of a sloop and was specially employed by plaintiffs to make a trip for a load of grain for which he was to receive a certain sum of money.

Where a person is employed as a special carrier, he is bound only to the exercise of ordinary care, skill or foresight, in the execution of his contract. *Allen v. Sackrider*, 37 N. Y. 341.

See, to the same effect, *Fish v. Clark*, 49 N. Y. 122, aff'g 2 Lansing, 176; *Merritt v. Brainerd*, 38 Barb. 574; *Arctic Ins. Co. v. Austin*, 54 id. 559; *Woodin v. Austin*, 51 id. 9; aff'd in Court of Appeals, 4 Albany L. J. 113.

In action for an injury to cargo through negligence of the defendant while being towed by defendant's tug, Held,

(1) Contract for towing did not constitute defendants common carriers.

(2) Captain of tug was not master of crew or boats in tow, as to signals.

(3) Master of tow must use requisite care to guard against perils of navigation, and represents owner of freight.

(4) Where a canal boat in tow was run into and sunk by another tug owned by the same line, which owned the towing tug, that the owner of the cargo could not recover for its loss, it appearing that the omission to display proper lights upon the canal boat contributed to the injury.

(5) The rule might be different as to third and innocent persons. *The Arctic Fire Insurance Co. v. Austin*, 69 N. Y. 470; rev'g 3 Hun, 195.

"A," contracting with "B," owner of a scow, for transportation of cattle, cannot recover for negligence of "C," owner of a tug boat, employed by "B," without "A's" privity. *Baird v. Daly*, 4 Lansing, 426. But the judgment was reversed by the Court of Appeals and an action against "C" by "A" allowed on the ground that in an action founded on negligence either the bailee or bailor may sue for damage done by a third party. *Baird v. Daly*, 57 N. Y. 236.

The owner of a tug used for towing purposes is not a common carrier and is not liable as an insurer, but there is an implied warranty that the tug is seaworthy (*Putnam v. Wood*, 3 Mass. 481-485; *Kopitoff v. Wilson*, 1 Q. B. Div. 377-380; *Cohn v. Davidson*, 2 id. 455; *The Omoa Coal and Iron Co. v. Huntley*, 2 C. P. Div. 464; 1 Par. Mar. L. 238), and the master must exercise reasonable care and skill in its management (the "*Margaret*," 94 U. S. 494-496; *The Steamer "Webb"*, 14 Wall. 406; *Wells v. The Steam Navigation Co.*, 8 N. Y. 375); and whether he was negligent in not anchoring instead of proceeding by night, where the course lay between certain shoals, was a question of fact for a jury.

Vessel not commanded by competent officer is unseaworthy. *Walden v. Firemen's Ins. Co.*, 12 John. 128-134; *Draper v. Commercial Ins. Co.*, 1 Duer, 234; 2 Par. Mar. L. 135; *Teho v. Jordan*, 67 Hun, 392; s. c. 62 id. 571.

A vessel not commanded by competent officers is unseaworthy, but not because navigated by unlicensed pilot, although statute requires pilot to be licensed; but this puts burden on owner to show that when stranded



she was in command of a competent commander or pilot. *Tebo v. Jordan*, 73 Hun. 218; s. c. aff'd, 147 N. Y. 387.

An agreement to restore a vessel in as good condition as when taken with the exception of ordinary use and wear, does not make the bailee an insurer. *Ames v. Belden*, 17 Barb. 513; *Hyland v. Paul*, 33 id. 241.

The charterer or lessee of a canal boat is not liable to the owner for injuries to the boat which are the result of the negligence of those in command of tugs engaged by him to tow the boat from place to place, and which belong to a company engaged in the business of towing. The plaintiff could recover against the employees of those in command of the tugs. *The Steamer Webb*, 14 Wall. 406; *The Margaret*, 94 U. S. 494; *McLaughlin v. The New York Lighterage &c. Co.*, 7 Misc. 119. (New York Common Pleas).

Owner of a steamboat, though engaged in the business of towing, towed only for a single party. He was not a common carrier. *Knapp, &c. v. McCaffrey*, 178 Ill. 107; aff'g s. c., 74 Ill. App. 80.

Railroad carried express matter under a special agreement. Was a special carrier. *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; s. c., 38 L. R. A. 93.

Trucking for particular customers at special prices constituted one a special carrier. *Faucher v. Wilson*, 68 N. H. 338; s. c., 39 L. R. A. 431.

A tug is liable for the loss of a scow which it is towing caused by such adverse tide and winds as might have been reasonably expected. *Steamer America*, 8 Benedict, (U. S.) 122.

See *Hayes v. Millar*, 77 Pa. St. 238; *Rey v. Toney*, 24 Mo. 600.

If a scow was struck by something under the water whose presence could not be known by those in charge of the tug, the tug will not be liable. *Steamer America*, 6 Benedict, (U. S.) 122.

See *Hayes v. Millar*, 77 Pa. St. 238; *Rey v. Toney*, 24 Mo. 600.

A tug is liable for the loss of a scow which it is towing caused by such adverse tide and winds as might have been reasonably expected. *The Merrimac*, 2 Saw. (U. S.) 586.

An officer of a railroad, shipping his own freight over its lines, was not within a constitutional provision forbidding officers to do business as common carriers over its lines. *Bucksport &c. R. Co. v. Edinburgh &c. Redwood Co.*, 68 Fed. Rep. 972.

### III. Demise of a Vessel.

The owners of a line of canal boats engaged in the business of common carriers of passengers and goods, who charter a boat to another

transportation company for a single trip, retaining the charge of it and navigating it with their own master and crew, are liable to a passenger for the loss of his goods upon the passage. *Campbell v. Perkins*, 8 N. Y. 430.

See *Bissell v. Torrey*, 60 N. Y. 635.

Vessel owners chartered her for a voyage for a cargo, save room for crew, etc. Held, that the owners retained possession of the vessel and were liable for a delay. Action arose between parties to charter party.

(1) Unless charter party was demise of ship itself, as contra-distinguished from a right to have goods conveyed by the vessel, the owners are liable for negligence in its operation. 1 *Parsons on Shipping and Admiralty* 278; *Drinkwater v. Brigg Spartan*, 1 Ware, 145; *Eames v. Cararoe*, 1 Newb. 528; *Sherman v. Fram*, 30 Barb. 478.

(2) Presumption favors continuance of ownership, although there be express words of grant in formal parts of the instrument. *Donahue v. Kettell*, 1 Clifford 135; 2 *Pars. on Contracts* 437; *Certain Logs of Mahogany*, 2 Sum. 589; *The Aberfoyle*, 1 Abb. Ad. Rep. 242.

(3) The entire command and possession and control of a vessel must be surrendered to charterer before he becomes a special owner for the voyage. *McIntyre v. Bowne*, 1 J. R. 229; *Hoe v. Groverman*, 1 Cranch, 214; *Marcadier v. Chesapeake Ins. Co.*, 8 id. 49; *Clarkson v. Edes*, 4 Cow. 470; *Drinkwater v. Brigg Spartan*, 1 Ware, 149; *Donahue v. Kettell*, *supra*; *Leary v. U. S.* 14 Wall 611; *Hagar v. Clark*, 78 N. Y. 45; rev'g 12 Hun, 524.

When general owner retains possession, command and navigation of ship, and contracts to carry cargo for voyage, the charter party is mere affreightment sounding in covenant, and freighter is not clothed with character or legal responsibility of ownership. But delivery of goods, received from the charterer, to the consignees of the cargo at the port of destination absolves such shipowner from liability to the owner of the goods in absence of notice of ownership. *Robinson v. Chittenden*, 69 N. Y. 525; rev'g s. c., 7 Hun, 133.

See, also, *Campbell v. Perkins*, 8 N. Y. 432; *Parish v. Crawford*, 2 Strange Rep. 1251; *Clarkson v. Edes*, 4 Cow. (N. Y.) 470; *Mactaggert v. Henry*, 3 E. D. Smith, 398; *Marcadier v. The Chesapeake Ins. Co.*, 8 Cranch, 49.

The master, one of several owners, sailed vessel on shares, himself paying for manning, victualing, etc. This was not a demise and the owners were held liable for negligence in the case of a seaman. *Scarff v. Metcalf*, 107 N. Y. 211.

Where a manufacturing corporation acts as a common carrier, it, and not its officers, is liable upon contracts made by them for it, although

the right to act as a carrier is not within its chartered powers. *Linkhauf v. Lombard*, 137 N. Y. 117.

See "Landlord and Tenant," post p. 1316.

Owners of a steamboat, not in control thereof, are not liable for the negligence of those who are. *Gulzoni v. Tyler*, 64 Cal. 334.

Owner of a tug is not liable for injury to a scow where his manager, after being engaged to tow a scow load of hay, gave orders to a third person to get another tug, and tow the scow. *Bleecker v. Salsop R. Co.*, 4 Wash. 77.

#### IV. When Liability Begins.

The liability of a common carrier, as such, begins when goods are delivered to him, at the place appointed or provided for their reception, in a proper condition and ready for immediate transportation.

This rule applies to a railroad company to whom property has been delivered at one of its stations for immediate transportation although it may not be able promptly to transport it, and there may be long storage of the property until cars can be furnished, and this, although by agreement of the parties it is the duty of the shipper to load it on the cars when furnished.

Action was for the destruction by fire of hay, alleged to have been delivered to defendant. The hay was delivered in bales for immediate shipment, and placed in defendant's freight house, under the direction of its freight agent, where it was burned. It was the usage and regulation of defendant, assented to by the shippers, that they were to load such freight into defendant's cars. Unless a delay in the shipment was caused by some fault of the shippers in not shipping the hay on cars furnished, it was liable. *London and Lancashire Fire Insurance Co. v. Rome, Watertown and Ogdensburg Railroad Co.*, 144 N. Y. 200; aff'g s. c., 68 Hun, 598.

**From opinion.**—There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and that it cannot generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars. But we know from our own observation that as to hay, lumber, sawlogs, live animals and other bulky freight, the shipper usually loads the freight into the cars. We need not, however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railroad company takes on the character of a common carrier. The rule as to the responsibility of the carrier is laid down in varying

phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. The liability of a railroad company as a common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparation for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former while they are in his custody is only liable as warehouseman, and his only responsibility as carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. *The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (co instanti) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put in itinere.* Judson v. Western R. R. Co., 4 Allen, 520; Baron v. Eldridge, 100 Mass. 455; Grosvenor v. R. R. Co., 39 N. Y. 34; O'Neill v. R. R. Co., 60 id. 138; Redfield on Carriers, 80; Angell on Carriers, sec. 129. In Wilson v. Atlanta & Charlotte R. R. Co. (82 Ga. 386), a case somewhat relied on by defendant's counsel, a quantity of wood was piled along the line of the defendant's railroad for the purpose of having it transported thereon, and the shipper was to place the wood in the defendant's cars. There the action was brought to recover damages on account of unreasonable delay in transporting some of the wood, and, also, for the loss of some portion thereof. The plaintiff failed to recover on the ground that upon all the facts in that case

the wood had not been delivered to and accepted by the railroad company for immediate shipment; and no principle was laid down in that case which can be invoked for the protection of the defendant in this. Here the hay was delivered to the defendant for *immediate shipment*, and it was accepted by it and placed in its freight house.

There was evidence tending to show that the freight had been paid that horses were placed in a shed designated by the defendant's servants and were loaded under the superintendence of one of them, that the horse in question was restive and refused to enter the box used for loading them, and he was, therefore, backed in and went through the door at the other end, off the dock, and was drowned. Held, that this evidence justified a finding that the horses were in the possession of the defendant.

The liability of a common carrier attaches when the property is deposited with him for transportation; and where a party, who is both a common carrier and a warehouseman receives goods into his warehouse to be transported by him, his responsibility as a common carrier commences when they are received. *Giblin v. The National Steamship Co.*, 8 Misc. 22; s. c. aff'd, 152 N. Y. 633.

See 52 N. H. 355; 3 Sawyer, 176; 35 N. Y. Supr. Ct. 434; 45 How. Pr. 90. So as to baggage, *Woods v. Devlin*, 13 Ill. 746; *Blossom v. Griffin*, 13 N. Y. 569; *Ladue v. Griffith*, 25 id. 364; *Coyle v. W. R. R. Co.*, 47 Barb. 152; *Rogers v. Wheeler*, 6 Lans. 420; 52 N. Y. 262; *Wade v. Wheeler*, 3 Lans. 201; 47 N. Y. 658; *Edw. on Bail*, sec. 528; *Hutch. on Carriers*, sec. 89.

Goods were loaded upon a spur track of a railroad, but the owner having no scales, the cars were moved to the station for weight to fix the freight charges. There was no delivery before reaching the station, as something yet remained to be done by the shipper before he relinquished control. *Dixon v. Central &c. R. Co.*, 110 Ga. 173.

Carrier was liable for theft of goods left in its warehouse when wrongfully rejected by one whom it allowed to hold itself out as an authorized agent, where the shipper had not the opportunity to safeguard them. *Seasongood v. Tennessee &c. Transp. Co.*, (Ky.) 54 S. W. Rep. 193.

Carrier was liable for a trunk delivered to a sub-agent employed by it. *Hamil v. New York &c. Ex. Co.*, 117 Mass. 414.

Goods placed in a freight depot for immediate shipment, are in carrier's custody, from the moment of delivery, though it was agreed that they were to go the following morning. *Meloche v. Chicago &c. R. Co.*, 116 Mich. 69.

Goods were delivered for shipment and left at depot but were not shipped because of a personal dispute between the agent and the shipper. Carrier was liable. *Launing v. Sussex R. Co.*, 1 N. J. Law J. 21.

Loss of timber by fire, loaded on defendant's car not chargeable to defendant, when shipper did not notify the company that it was ready, nor give the name of consignee. *Basnigh v. Atlantic & C. R. Co.*, 111 N. C. 592.

Upon a delivery and acceptance of goods, under the circumstances stated, the common law liability of a common carrier immediately attaches, and if they are lost by fire, while awaiting shipment, the carrier is liable to the same extent as if the goods were in transit, unless his liability has been modified, limited or restricted with the consent of the shipper or owner of the goods. *Miriam v. Hartford & New Haven R. Co.*, 20 Conn. 354; *Trowbridge v. Chapin*, 23 Conn. 595; 2 *Redfield on Railways*, 63, sec. 174; *Ford v. Mitchell*, 21 Ind. 54; *Gleason v. Transportation Co.*, 32 Wis. 85; *O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. 34; *Illinois Central R. R. Co. v. Smyser*, 38 Ill. 354; *Burrell v. North*, 2 Car. & Kir. 680; *Schouler on Bailments*, 381, ch. 4.

But, if anything remained to be done to the goods by the shipper before they are ready for transportation, or if any orders, directions or instructions were to be given before they were to be forwarded, such liability does not attach. *Judson v. Western R. R. Co.*, 4 Allen, 520; *Moses v. Boston & Maine R. R.* 4 Foster (32 N. H.) 71; *Blossom v. Griffin*, 3 Kernan 513; *Michigan Southern R. R. v. Schurtz*, 7 Mich. 515; *St. Louis, etc. R. Co. v. Montgomery*, 39 Ill. 335; *Lawrence v. W. & St. P. Railway*, 15 Minn. 390; *Watts v. Boston & Lowell R. R.*, 106 Mass. 466; *Bannon v. Eldridge*, 100 Mass. 457; *Railroad Co. v. Barrett*, 36 Ohio St. 448.

The opening of an upper door of a warehouse of a railroad company after dark, when the place had been locked for the night, and putting goods therein, was not a delivery thereof to the carrier, though the agent a short distance away was notified and requested to ship them the following morning. *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.

Cotton, placed for shipment on a platform kept for that purpose, was held to be delivered to the company, though a bill of lading had not at the time been given. *St. Louis &c. R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. Rep. 28.

Property was received for immediate transportation after hours. It was held to have been delivered, though the bill of lading was not to be given till the next day. *Gulf &c. R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. Rep. 220.

The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is

not affected by the carriage in which it is transported, or the fact that the carriage is loaded by the owner. The common carrier is an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. *Hannibal Railroad v. Swift*, 12 Wall. Rep. 262, aff'g judgt for plff.

## V. From What Duty Springs.

**The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists, independent of the contract, having its foundation in the policy of the law; it is upon this legal obligation that he is charged as carrier for the loss of property intrusted to him.** *Merritt v. Earle*, 29 N. Y. 115.

*Edwards on Bail.*, 466; *Hollister v. Nowlen*, 19 Wend. 239; *Ansell v. Waterhouse*, 1 Chitty R. 1; *Hannibal R. Co. v. Swift*, 12 Wall. 262.

The obligations of a common carrier are imposed by law and not by contract. *Myuard v. Syracuse &c. R. Co.*, 41 N. Y. 180, 183.

A railroad company was forced by mandamus to furnish equal facilities to rival interests. *Cumberland &c. Telegraph Co. v. Texas &c. R. Co.*, 52 La. Ann. 1850.

But a carrier is under no duty to carry dangerous articles. *California Powder Works v. Atlantic, &c. R. Co.*, 113 Cal. 329.

Carrier is not bound to accept freight not properly prepared for shipment. *Elgin &c. R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

By basing recovery on negligence as a carrier at common law, recovery on contract is precluded. *Pennsylvania Co. v. Walker*, (Ind. App.) 64 N. E. Rep. 413.

## VI. Extent of Liability.

**A common carrier in the carriage and delivery of goods, insures against all losses, except those occasioned by the act of God or the public enemy.** *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 485, 493; *Merritt v. Earle*, 29 id. 115.

Neither destruction by fire nor robbery by armed men will excuse loss. *Hollister v. Nowlen*, 19 Wend. 238.

**From opinion.**—"This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing." In *Forward v. Pittard*, (1 T. R. 27) where the carrier was held liable for loss by fire, Lord Mansfield said, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." And in relation to a loss by robbery he said, "the true reason is, for fear it may

give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this state. *Colt v. McMeheen*, 6 Johns. R. 160; *Elliott v. Rossell*, 10 id. 1; *Kemp v. Coughtry*, 11 id. 107. In *Roberts v. Turner*, 12 id. 232, Spencer, J., said, the carrier "is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud."

A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part, the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. *Mynard v. Syracuse &c. R. Co.*, 71 N. Y. 180.

Loss of goods by a fire, unexplainable, unless caused by a driver's pipe, was not by act of God or the public enemy and the carrier was liable as insurer. *Farley v. Lavary*, (Ky.) 54 S. W. Rep. 840.

Carrier is not liable to an owner for accepting goods from the person in whose possession they are at the time. *Livestock &c. Co. v. Chicago &c. R. Co.*, 87 Mo. App. 330.

Goods were received in New York for delivery in Ohio. Law of Ohio governed as the place of performance. *Jacobson v. Adams Ex. Co.*, 1 Oh. C. D. 212.

A carrier owning capital stock of another is not liable for latter's negligence. *Gulf &c. R. Co. v. Lee*, (Tex. Civ. App.) 65 S. W. Rep. 54.

Carrier owes no duty to the sendee of package through the mails, though lost through negligence. *German State Bank v. Minneapolis &c. R. Co.*, 113 Fed. Rep. 414.

## VII. Delay in Transportation.

**A common carrier does not insure against delays, but is liable for injury from same, caused by his negligence.**

The law, upon well known motives of policy, has determined that a carrier shall be responsible for loss of property entrusted to him for transportation, though no actual negligence exist, unless it happen in consequence of the act of God, or the public enemy; but when the goods are actually delivered at the place of destination, and the complaint is only of a late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse him, unless he have expressly contracted to deliver the goods within a limited time. *Parsons v. Hardy*, 11 Wend. 215; *Harmony v. Bingham*, ante 99. If an unusual amount of freight be received, and the carrier has properly equipped its road and runs as many trains as safety permits, and forwards freight in the order of its receipts, it is not liable for delay caused by the accumula-



tion of freight, notwithstanding chapter 140, Laws 1850, sec. 36, which act contemplates that it may not always be in the power of a railroad company to dispatch either passengers or freight immediately upon their arrival at a station or junction, and it therefore allows the company a reasonable time after their arrival and the offer of property for transportation to set it in motion from such starting point or junction. *Wibert v. The N. Y. & Erie R. Co.*, 12 N. Y. 245; aff'g judg't for pl'ff.

Delay in transportation does not necessarily constitute conversion nor justify consignee in not accepting the goods, so far as the carrier is concerned. Carrier is bound to use all reasonable diligence. Verdict of two dollars for plaintiff sustained on plaintiff's appeal. *Scovill v. Griffith*, 12 N. Y. 509.

**From opinion.**—"This property was, for some cause, detained in Troy, some half dozen miles from Albany, about six weeks; and the defendant, during that time, made no effort to send it to its destination. This was inexcusable delay, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the natural consequences of the neglect. But it does not follow that the plaintiffs had a right to refuse and abandon the property and recover its full value. There is no evidence of a refusal to deliver, nor indeed that the plaintiffs ever demanded the property or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action. But the judge could not say to the jury, as a matter of law, that there had been a conversion; nor does it appear that the property had deteriorated in condition or had seriously depreciated in value, nor was it lost. Where there has been a deterioration and loss the carrier is liable. *Davis v. Garrett*, 6 Bing. 716; *Ellis v. Turner*, 8 T. R. 531; Story on Bail, § 608. In *Ellis v. Turner*, which was an action on the case, the carrier conveyed the goods beyond the place of destination, intending to deliver them on his return, but they were greatly damaged by the sinking of the vessel without any want of ordinary care or attention of the master or crew, and the carrier was held liable to make good the loss. Under the former system, to maintain trover against a carrier, there must have been an unjustifiable refusal to deliver or delivery to a wrong person, or sale or destruction, or some actual wrong or injurious conversion: something more than mere omission. *Packard v. Getman*, 4 Wend. 613; *Hawkins v. Hoffman*, 6 Hill, 586; 2 Saund. R. 49, i. k. m. It was not necessary that the wrong should be intentional; but, as a general rule, a mere non-feasance did not and does not work a conversion. And, indeed, every unauthorized intermeddling with the property of another is not a conversion. It was held by the Court of Exchequer in England that the act of the ferryman in putting the horses of the plaintiff on shore out of his ferry boat, though the jury should find it was done wrongfully, and not a conversion of the property, unless done with the intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or change its quality. *Fouldes v. Willoughby*, 8 M. & W. 540. If it had appeared in this case that the defendant, from gross negligence, evincing a disregard of his contract and the rights of the plaintiffs, had carried the property by and on to another port, and had, with the actual knowledge of all the facts, kept it several weeks, I am not prepared to say the jury might not have found that there was something more than omission, or that the evidence would not have sustained a verdict

that the defendant was guilty of conversion, if rendered under a proper charge from the court."

It has been repeatedly held, and may be taken as settled law, that a carrier is not under the same absolute obligation to carry the goods intrusted to him in the usual time, which he is to deliver them ultimately at their destination. *Conger v. The Hudson River R. R. Co.*, 6 Duer 375; *Wibert v. The N. Y. & Erie R. R. Co.*, 2 Kern. 245. But in the absence of a legal excuse, he is answerable for any delay to forward them in the time which is ordinarily required for transportation, by the kind of conveyance which he uses. *Blackstock v. N. Y. & E. R. R. Co.*, 29 N. Y. 50.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. *All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so it has been uniformly decided.* *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245; *Blackstock v. N. Y. & Erie R. R. Co.*, 20 id. 48.

In the absence of special contract *there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be reasonable time.* Not only storms and floods, and other natural causes, may excuse delay, but the conduct of men may also do so. *Geisner v. L. S. & M. S. R. R. Co.*, 102 N. Y. 563.

When cotton was to be taken by one of two boats, the first leaving October 27th, and is only delivered on the 26th, when freight sufficient for the first boat had previously been delivered, transportation by second boat is sufficient. *Fowler v. Liverpool & G. W. S. Co.*, 23 Hun. 196; s. c. aff'd, 87 N. Y. 190.

A delay in the unloading of stone is not unreasonable where the work did not proceed as fast as usual because of an unprecedented amount of freight to be handled. The carrier had proper facilities for its usual business and plaintiff was not neglected. There was no special agreement as to time. *Bouker v. Long Island R. Co.*, 89 Hun. 202.

Defendant was liable for a bicycle which it undertook to transport from New York to Sussex in Canada in June for use during vacation, where it failed to pay any attention to it until August, when it would have been useless. *Mitchell v. Weir*, 19 App. Div. 183; aff'g s. c., 19 Misc. 530.

Carrier was not liable for the freezing of plants, unless the delay was the proximate cause of the freezing. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615; aff'g s. c., 20 id. 130.

Bill of lading guaranteed through rates and specified no route. Carrier was liable for loss during a delay caused by holding the goods for shipment by the regular route, where they might have been shipped by another. *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523.

A bill of lading was issued to a consignor for a prospective shipment for the alleged accommodation of the consignee. Carrier was not liable for delay under the bill, notwithstanding a statute providing that loss resulting from issuing bills of lading without receipt of goods shall fall on the carrier, where the delay was the fault of the shipper. *Thompson v. Alabama Midland R. Co.*, 122 Ala. 378.

A carrier was liable for the consequences of a delay owing to the abandonment for lack of freight of the train for which the cattle were loaded. *Kansas &c. R. Co. v. Ayers*, 63 Ark. 331.

Delay in transporting stock by allowing train for which they were loaded to pass without taking them makes carrier liable for damage suffered. *Illinois Cent. R. R. Co. v. Waters*, 41 Ill. 73.

Delay was caused by lack of repairs of an engine. That the weather was very cold was no excuse for allowing water to freeze in the pipes thereof. It was not within an exemption of stress of weather as such weather was to be expected at that time of the year. *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47.

Delay was by the shipper's act, where he failed to comply with the regulation that a car must be loaded by a time certain to be forwarded on that day. *Stoner v. Chicago &c. R. Co.*, 109 Iowa, 551.

Carrier was liable for a loss by fire during an unnecessary delay. *Hernsheim v. Newport News &c. Co.*, (Ky.) 35 S. W. Rep. 1115.

Carrier was liable for a delay through scarcity of water on account of a drought, where the contract was made during a drought. *Cincinnati &c. R. Co. v. Webb*, (Ky.) 46 S. W. Rep. 11.

Defendant was liable for a delay in delivery to a connecting carrier, the result of changing stock from one car to another, when they were billed to go "through" in one car. *Felton v. McCreary &c. Stock Co.*, (Ky.) 59 S. W. Rep. 744.

Delay of a few hours in arrival of a corpse not needing immediate burial did not warrant a verdict of \$1,640. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

Service of a garnishee process was no excuse for delaying transportation, though to a destination out of the state. *Baldwin v. Great Northern R. Co.*, 81 Minn. 247; s. c., 51 L. R. A. 610.

A carrier of perishable goods was negligent, where, after an unavoidable delay, instead of shipping them direct to their destination over another line, it forwarded them to another place on its own line where they

were sold at a reduced price. *Alabama &c. R. Co. v. Brichetto*, 72 Miss. 891.

A carrier was not liable for loss by fire, during a delay which was not the proximate cause of the injury. *Yazoo &c. R. Co. v. Millsaps*, 76 Miss. 855.

Freedom from negligence as to a delay was no defense for failing to forward cattle at a time certain, as agreed. *Gann v. Chicago &c. R. Co.*, 72 Mo. App. 34.

Sudden snow storm held a sufficient excuse for delay. *Cunningham v. Wabash R. Co.*, 79 Mo. App. 524.

Temporary obstruction of a warehouse by freight, which could have been quickly disposed of, was not a sufficient excuse for a long delay. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

Carrier could not avail itself of a stipulation against liability for delay, where its agent falsely represented that its train would make connections. *Hamilton v. Wabash R. Co.*, 80 Mo. App. 597.

Frequent and unnecessary delays amounting to six hours in two hundred miles was unreasonable. *Minter v. Chicago &c. R. Co.*, 82 Mo. App. 130.

Twenty-four hours for transportation, where it usually took 13 to 15, raises a presumption of negligence. *Anderson v. Atchison &c. R. Co.*, (Mo. App.) 67 S. W. Rep. 707.

Negligence of delay was for the jury, where it appeared that the train on which cattle were shipped arrived at its destination at seven in the morning, but plaintiff's cars were delayed and did not arrive until ten. *Sloop v. Wabash R. Co.*, (Mo. App.) 67 S. W. Rep. 956.

Defendant consumed 84 hours in traveling 400 miles. Held not reasonably diligent. *Hinkle v. Southern R. Co.*, 126 N. C. 932.

Where no time is specified, a reasonable time for performance is allowed. A delay of 48 hours in the delivering of cattle, after the time, when by the usual and ordinary custom they should have arrived, was unreasonable. *Denman v. Chicago &c. R. Co.*, 52 Neb. 140.

It was no excuse for unreasonable delay on its own line that the cattle would not have reached their destination sooner had it connected with the other carrier on time. *Alexander v. Pennsylvania R. Co.*, 1 Pa. Super. Ct. 183.

The fact that the shipper was imprudent in failing to order the goods sooner, and his own lack of care after delivery, did not prevent his recovering such actual damages as he sustained by reason of the delay in transportation. *Belcher v. Missouri &c. R. Co.*, 92 Tex. 593; rev'g s. c., 17 S. W. Rep. 384, 1020.

Carrier was negligent in sending a corpse by a longer route than was

necessary. *Wells &c. Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610.

An extraordinary flood was no excuse for delay where the effects could have been avoided by the exercise of reasonable diligence. *St. Louis &c. R. Co. v. Bland*, (Tex. Civ. App.) 34 S. W. Rep. 675.

A wait of seven hours for train by which cattle can be forwarded after the rest, feed and water, required by statute, was not unreasonable, there being no specified time for transportation. *Galveston &c. R. Co. v. Warnken*, 12 Tex. Civ. App. 645.

Liability of a carrier for delay was not increased by failure to sell the goods, where it was not notified that their character required quick delivery. *St. Louis &c. R. Co. v. Cates*, 15 Tex. Civ. App. 135.

A written contract for the shipment of cattle specified no particular time for delivery. It was held that the carrier had a reasonable time and evidence as to an agent's promise to deliver for a particular market was inadmissible. *Gulf &c. R. Co. v. Baugh*, (Tex. Civ. App.) 42 S. W. Rep. 245.

Defendant was liable for a delay caused by the breaking down of an engine, where it agreed to carry within a given time. *Texas &c. R. Co. v. Davis*, (Tex. Civ. App.) 54 S. W. Rep. 381; s. c., reversed on another point, 55 S. W. Rep. 562.

Carrier's liability for delay cannot be increased by special damages, unless it have knowledge of the exceptional necessity for prompt delivery. *International &c. R. Co. v. Hutchell*, 22 Tex. Civ. App. 498.

A carrier, contracting to carry by a given route, was liable for damage due to a diversion though made from necessity. *Missouri &c. R. Co. v. Liebold*, (Tex. Civ. App.) 55 S. W. Rep. 368.

Plaintiff shipped cattle to a point which ordinarily took three days. They did not arrive until Saturday and too late for sale on that day. The delay was unreasonable. *Missouri &c. R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Defendant's agent had knowledge of plaintiff's illness, that she had worked for a relative, and that a package carried by it directed to the relative contained medicine. It was held insufficient to constitute notice to defendant that the medicine was for plaintiff, so as to increase its liability for delay by special damages. *Pacific Exp. Co. v. Redman*, (Tex. Civ. App.) 60 S. W. Rep. 677.

Carrier was liable for results of delay though it had not notice that special damage would occur. *Texas &c. R. Co. v. Bigham*, (Tex. Civ. App.) 67 S. W. Rep. 522.

The reasonable time within which a carrier must deliver goods was dependent upon peculiar circumstances connected with the consignor's

contract of sale and delivery, of which the carrier had notice. Though not expressed in the bill of lading, evidence thereof was admitted on the measure of damages. *Central Trust Co. v. Savannah &c. R. Co.*, 69 Fed. Rep. 683.

Leave reserved in contract of affreightment to tow and assist vessels in all situations is no excuse for a vessel going 200 miles out of the way for her own convenience. *Schwarzkild v. National Steamship Co.*, 74 Fed. Rep. 257.

Delay of a river transport company, which a carrier employed in transferring cattle over a portion of the route, was no defense in an action for the delay of the carrier. *St. Louis &c. R. Co. v. Edwards*, 78 Fed. Rep. 745.

Heavy dew was not a sufficient excuse for delay as it was the carrier's duty to provide against it. *Missouri &c. R. Co. v. Truskett*, 104 Fed. Rep. 728.

Carrier was not liable for delay in delivery of goods refused clearance as contraband of war, especially where the bill of lading stipulated "subject to delay." *Farmers' &c. T. Co. v. Northern P. R. Co.*, 112 Fed. Rep. 829.

Notice subsequent to shipment of a special necessity for prompt delivery did not increase a carrier's liability for a delay. *Bradley v. Chicago &c. R. Co.*, 94 Wis. 44.

Shipper of stock over different lines of railway must be held to contemplate the delays which appear from the time table to be necessary to make connections. *Burns v. Chicago &c. R. Co.*, 104 Wis. 646.

#### (a) STRIKES OF EMPLOYÉS.

**Strikes of employés may excuse delays, if they be accompanied by violence impeding operation of trains.**

Mere cessation of labor by employés will not excuse failure to operate.

A railroad corporation is responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a great number of its servants suddenly and wrongfully refusing to work.

Of 168 engineers in the employ of a railroad company, 140 suddenly and by concert abandoned their engines for the purpose of compelling the company to rescind a reasonable regulation. Held, although the superior officers were without the slightest fault, the corporation was responsible for the damages caused by a delay in transporting property which resulted from the strike. *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48.

Live stock was stopped and delayed by strike of the men who violently prevented its going forward. Although the strike was organized by the

defendant's servants, they ceased to be such when they refused to obey orders, and the defendant was not liable. *Geismer v. L. S. & M. S. R. R. Co.*, 102 N. Y. 563; rev'g 34 Hun. 50.

This case distinguishes *Weed v. Panama R. Co.*, 17 N. Y. 362, where it was held that it is no defense to an action against a railroad corporation for its failure to transport a passenger with proper dispatch, that the detention was the willful act of a conductor in charge of the train.

**From opinion.**—"Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employes who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. *Pittsburg & C. R. R. Co. v. Hogen*, 84 Ill. 36; *Pittsburg C. W. L. R. Co. v. Hollowell*, 65 Ind. 188; *Bennett v. L. S. & M. S. R. R. Co.*, 6 Am. & Eng. R. Cas. 301; *I. & W. L. R. R. Co. v. Juntzen*, 10 Bardwell, 295.

The cases of *Weed v. Panama R. R. Co.*, 17 N. Y. 362, and *Blackstock v. N. Y. & E. R. R. Co.*, 1 Bosw. 77; aff'd 20 N. Y. 48, do not sustain the plaintiff's contention here. If, in this case, the employes of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions of those cases."

On account of a strike defendant was justified in changing the route by which it was transporting plaintiff's stock, although through failure of plaintiff to learn of the change, he was unable to properly care for the stock. Defendant was not liable. *Steiger v. Erie R. Co.*, 5 Hun. 345.

In an action brought by the people, by their attorney-general, a railroad corporation may be compelled by *mandamus* to exercise its duties as a carrier of freight and passengers.

The power to so compel it rests upon the ground:

1st. That the duty is a public trust, which, having been conferred by the state and accepted by the corporation, may be enforced for the public benefit.

2nd. Upon the contract between the corporation and the state, expressed in its charter or implied by the acceptance of the franchise.

3rd. Upon the ground that the common right of all the people to travel and carry upon every public highway of the state has been changed in this special instance by the legislature, for adequate reasons, into a corporate franchise, to be exercised solely by a corporate body, for the public benefit, to the exclusion of all other persons; whereby it has become the duty of the state to see to it that the franchise so put in trust be faithfully administered by the trustee.

It is no excuse for the non-performance of its duties by the company that its skilled freight handlers, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours) refused to work unless twenty cents per hour (or two dollars per day, of ten hours) was paid. *It was not alleged that the workmen committed any unlawful act; and no violence, riot or unlawful interference with the other employes of the respondent was shown.*

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held unlawful control of their actions, and sought through them to enforce its will upon the respondent, and that the respondent in resisting such unlawful efforts had refused to obey unjust and illegal dictation; and had used all the means in its power to employ other men in sufficient numbers to do the work; and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. *People v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 543.

The defendant claimed that it was prevented from transporting the property to the place of destination within the usual time, by riotous and tumultuous assemblages of persons, who by force and violence detained and delayed the transportation without its fault, and that the delivery of the goods was made as soon, and in as good condition, as it was able to make it. The evidence tended to prove that the goods arrived at Englewood, a freight yard near the city of Chicago, on April 13th, were taken to the city on May 3rd, and delivered to the connecting carrier on May 16th; that the Lake Shore & Michigan Central Railway Company encountered difficulties in moving its trains into and through the city, which were occasioned by a combination of persons, composed of switchmen of that and other railroads and others, to obstruct the movement of the trains; that there was a strike of this class of employes, which commenced on May 2nd, and continued until May 16th, which quite effectually interrupted the business of the road, that although the company employed other men, and had an adequate force to operate its trains, they were prevented by this organized opposition from proceeding with the business; that the trouble was mostly within the city, but that it also extended to the Englewood yard.

Held, that while the defendant was liable for the failure of the agencies, employed by it to carry the property, to exercise proper care and diligence, yet as the evidence given upon the trial would have authorized the jury to conclude that the company used all reasonable means and effort to move its trains, and that the delay in the time oc-



cupied in so doing was without negligence or fault on its part, it was error for the court to refuse to submit the case to the jury and to direct a verdict in favor of the plaintiff. *Little v. Fargo*, 43 Hun, 233.

Strike among carrier's employes does not relieve it from necessity of shipping flour consigned for transportation, unless violence from the strikers renders it impossible. *Haas v. Kansas &c. R. Co.*, 81 Ga. 792.

No liability for delay in transportation of goods, when the same is caused by strikes accompanied with violence. *L. & N. R. Co. v. Bell*, 13 Ky. L. R. 393.

A carrier was excused from supplying coal cars during a strike, where it was accustomed to supply itself with coal in that region and, by reason of the strike, had to use all its cars to haul its coal down from another district. *Louisville &c. R. Co. v. Queen City Coal Co.*, 99 Ky. 217.

A carrier is not relieved by the unavoidable consequences of a strike from getting directions as to the disposition of goods from the shipper under the changed circumstances, where that is possible. *Alabama &c. R. Co. v. Brichetto*, 72 Miss. 891.

A contract of shipment being unconditional, the carrier was liable for a delay caused by a strike in another company. The case is otherwise where there is no express contract. *Shelby v. Missouri P. R. Co.*, 77 Mo. App. 205.

Evidence of a strike on defendant's road is admissible to excuse defendant from transporting stock according to contract. *International &c. R. Co. v. Tisdale*, 74 Tex. 8.

Deterioration in a consignment of lemons when the delay was caused by mobs and strikes not chargeable to the carrier. *Gulf &c. R. Co. v. Levi*, 76 Tex. 337.

Delay in forwarding a shipment of cattle is excused if caused by a strike on the line. *Gulf &c. R. Co. v. Gatewood*, 79 Tex. 89.

Carrier accepting cattle with knowledge of a washout on its line, held not negligent *per se* nor liable for delay. *St. Louis &c. R. Co. v. Bland*. (Tex. Civ. App.) 34 S. W. Rep. 675.

### VIII. Carriage of Animals.

The liability of a common carrier of animals is not, in all respects, the same as that of a carrier of inanimate property.

But the liability of a railroad company, engaged as a common carrier of animals, is not limited to the careful and safe conveyance of the car containing them.

In the absence of a special agreement, the company is responsible for any injury which can be prevented by foresight, vigilance and care, although arising from the conduct of the animals.

The carrier is not an insurer against injuries arising from the nature and propensities of animals, and which diligent care cannot prevent. As to damage arising from other causes, the liability is the same as that of a carrier of other property. *Clarke v. Rochester and Syracuse R. Co.*, 14 N. Y. 570, aff'g judg't for pl'ffs.

From opinion.—“The plaintiffs contended for the rule that the carrier is bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused, while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of the opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not therefore unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge them with the loss. The reasons stated by Chief Justice Marshall, in pronouncing the judgment of the Supreme Court of the United States, in *Boyce v. Anderson*, (2 Peters 150) have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was only liable for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he had over inanimate matter. Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. *Palmer v. The Grand Junction Railway Company*, (4 Mees & Wells, 749) was the case of an action against a railway company for negligence in carrying horses, by which one was killed and others injured, but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not been given and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no question why it should not, in all cases of accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and, considering the laws of carriers to be established

upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause of the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties, in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law."

In the transportation of living animals carriers are relieved from responsibility for such injuries as occur in consequence of the vitality of the freight, so far as such injury could not, by the exercise of diligence and care be prevented; in other respects, their responsibility in regard to stock is the same which rests upon them in regard to goods. *Clark v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 445, rev'g judg't for pl'ff. and new trial ordered.

Defendant contracted to transport a lot of hogs for plaintiffs from Buffalo to Albany. By the contract, in consideration of a reduced rate of freight, plaintiffs assumed the risks of injuries from heat, etc. Forty-three of the hogs died from the effects of the heat, the result of the negligence of defendant's employes in not watering and cooling the hogs by wetting. In an action to recover damages, held, that as the common law liability of carriers did not apply to live stock, but in the transportation thereof they were only liable for negligence, to give effect to the stipulation in the contract, it must be construed as exempting the defendant from injuries by heat, the result of negligence, and that therefore defendant was not liable. *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61, rev'g judg't for pl'ff.

**From opinion.**—"The rule of the common law makes a common carrier responsible for the safe carriage and delivery of property intrusted to his care, unless he be prevented by the acts of God or of the public enemy. But this rule is not applied in its full extent to the carriage of live stock. Angell on Car. sec. 214; *Clark v. The Rochester and Syracuse R. R. Co.*, 14 N. Y. 570; *Bissell v. New York Central R. R. Co.*, 25 id. 442; *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen, 531. In the transportation of such stock in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore in this case it was not sufficient to establish the common-law liability of the defendant to show that the

hogs died from heat; but it was incumbent on the plaintiff to show further, that there was some negligence or omission of duty on the part of the defendant."

The common-law liabilities of carriers attach to the carriers of animals, modified only so far as the cause of damage for which recompense is sought, is a consequence of the conduct or propensities of the animals undertaken to be carried. *Mynard v. Syracuse, Binghamton & New York R. R. Co.*, 71 N. Y. 180; rev'g 7 Hun. 399, and aff'g judg't for p'ff.

**From opinion.**—"The carrier is excused from liability for loss caused by inherent infirmity or tendency to decay. It has been held that a carrier is not responsible for the evaporation of liquids, nor for the diminution of molasses, caused by the oozing through vent holes necessary to prevent the bursting of barrels, (Angell on Carriers, sec. 211, and cases cited): and exemptions from liability for loss by inherent qualities of animals, rests upon the same principle. Beyond this the common-law liabilities exist against the carrier of animals the same as the carrier of other property, and the clause in the contract can, therefore, operate in many cases where negligence cannot be imputed.

In Massachusetts, in *Smith v. R. R. Co.*, 12 Allen, 531, the court says: 'The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation, he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property.'

As to leakage, breakage, etc., see Wharton on Negligence, sec. 568.

Where a carrier receives horses for transportation it becomes an insurer against all loss, and can be relieved from liability in case of loss only where the loss could be attributed to the viciousness, unruliness or restiveness of the animal and the carrier has been guilty of no contributory negligence. *Giblin v. Nat. Steamship Co.*, 8 Misc. 22; s. c. aff'd, 152 N. Y. 633.

A horse was tied in a stall in a car, constructed of joists, one of which was placed cross wise in front of it. By a sudden stoppage of the train the horse was thrown against the joist so violently as to break it and the ropes by which it was tied and cause the horse to fall so as to break its back. The facts raised a presumption of negligence. *Newman v. Pennsylvania R. Co.*, 33 App. Div. 171.

Though a carrier ships by an earlier train than agreed and no one was present to receive them and they were returned, plaintiff was negligent in failing to care for the animals during their reshipment. *Harrison v. Wier*, 15 N. Y. Supp. 909.

Where a horse, whose owner had agreed to load and unload at his own risk, was unloaded by the carrier for feeding, in compliance with statute and slipped on the bridge while being reloaded, a direction to find for plaintiff, if the horse was unloaded without his consent, was error, as disregarding the question of propriety of unloading at that point and the facilities therefor. *Nashville &c. R. Co. v. Parker*, 123 Ala. 683.

The duty of a carrier of a dog is not discharged by giving some attention to its necessities, but the supply of food must be adequate. *Southern Exp. Co. v. Ashford*, 126 Ala. 591.

The gate of a receiving pen sagged and had to be lifted in closing to latch it. The shipper's agents upon driving the cattle in made no effort to raise the gate so as to properly close it. No recovery was allowed for escape of cattle as it occurred through shipper's negligence. *St. Louis &c. R. Co. v. Law*, 68 Ark. 218.

A horse, received at defendant's wharf for transportation, fell overboard. Carrier, liable as an insurer. *Reed v. Wilmington &c. Co.*, 1 Marv. (Del.) 193.

It was held error to refuse to submit the question of negligence to the jury, where a carrier drove cattle into an unsheltered pen on a cold night after getting out an injured animal instead of returning them to the car. *Cooper v. Raleigh &c. R. Co.*, 105 Ga. 83.

Where a mule, by kicking, caught its leg in the grating of a car and broke it, the railroad company was held free from liability on the ground that a carrier is not an insurer against the inherent defects and vices of animals. *Cooper v. Raleigh &c. R. Co.*, 110 Ga. 659.

Carrier was not liable for damage to live stock by reason of lack of attention, where the shipper assumed that duty. *Central &c. R. Co.*, 111 Ga. 865.

Shipper agreed to load and unload and accompany the shipment relieving carrier from damage except by gross negligence. Shipper could not complain where he did not accompany the stock which was sealed in transit. *Susong v. Florida &c. R. Co.*, (Ga.) 41 S. E. Rep. 566.

Carrier is not bound to feed and water cattle where the contract of carriage imposes that duty upon the shipper. *Seaboard &c. R. Co. v. Cauthen*, (Ga.) 41 S. E. Rep. 653.

Carrier of cattle was liable for furnishing cars infected with a contagious disease. *Illinois C. R. Co. v. Harris*, 184 Ill. 57; s. c., 48 L. R. A. 175; aff'g s. c., 84 Ill. App. 462.

Carrier of a hog was liable for the refusal of an agent to place it where it could get sufficient air. *United States Ex. Co. v. Coffman*, 84 Ill. App. 491.

It was held error to charge that a carrier is liable for want of ordinary care, the true rule being that proof of injury or loss while in the possession of the carrier makes a *prima facie* case, which may be rebutted by evidence that it provided all suitable means of transportation and exercised that degree of care which the property required. *Burke v. United States Ex. Co.*, 87 Ill. App. 505.

It was held gross negligence "to kick" a car violently against an-

other containing horses. *Chicago &c. R. Co. v. Calumet Stock Farm*, 96 Ill. App. 337; s. c. aff'd, 194 Ill. 9.

A carrier was negligent in putting latticed cattle cars, bedded with straw near a defective engine, where they were liable to be set afire by sparks from it. *Parrill v. Cleveland &c. R. Co.*, 23 Ind. App. 638.

Carrier was liable for loss of cattle which escaped from insecure shipping pens. *Missouri &c. R. Co. v. Bryne*, (Ind. Terr.) 49 S. W. Rep. 41.

It was for the jury to say whether carrier was negligent in carrying a horse in a car in which it had recently carried fresh lime and in exposing him to the elements during transit. *Galliers v. Chicago &c. R. Co.*, (Iowa) 89 N. W. Rep. 1109.

A shipper who actually attempted to care for stock in transit cannot recover, where damage was owing to his neglect, though the contract compelling him to do so was invalid. *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659; *Burgher v. Chicago &c. R. Co.*, 105 id. 335.

Common carriers transporting stock are liable as insurers for damage to the same. *Kan. Pac. R. Co. v. Nichols*, 9 Kan. 235.

Carrier of stock is not liable for injuries attributable to the inherent nature of the animal shipped. *St. Louis &c. R. Co. v. Clark*, 48 Kan. 321.

That the shipper accompanied his cattle and attended to their care, did not relieve a carrier from liability for bumping the cars together so violently as to throw the cattle about the cars, nor from preventing their having food or water for more than fifty hours. *Atchison &c. R. Co. v. Ditmars*, 3 Kan. App. 459.

Carrier is not liable for damage due to the restiveness or viciousness of animals carried. *Hall v. Renfro*, 3 Mete. (Ky.) 51.

Weight of cattle broke the floor of a car which was in such condition it was apparently not safe for the transportation of cattle. Burden on carrier to show injury was not caused by the break. *Ohio &c. R. Co. v. Tabor*, (Ky.) 32 S. W. Rep. 168; s. c., 34 L. R. A. 685; s. c. aff'd, 36 S. W. Rep. 18; s. c., 34 L. R. A. 688.

It is the duty of an initial carrier to ascertain whether a connecting carrier can complete the transit and if not to forward it by another line or notify the shipper, and it is negligent in failing to do so. *Louisville &c. R. Co. v. Farmer's &c. Firm*, (Ky.) 52 S. W. Rep. 972.

Carrier of live stock is not an insurer. *Louisville &c. R. Co. v. Harned*, (Ky.) 66 S. W. Rep. 25.

Horses injured in such a way as to subject them to attack of pneumonia. They all died of pneumonia. Defendant was liable. *Louisville &c. R. Co. v. Wathen*, (Ky.) 66 S. W. Rep. 714.

Horses shipped on a special express car provided with food, water and space to rest need not be unloaded every twenty-eight hours under U. S. R. S. sec. 4388. *Regan v. Adams Exp. Co.*, 49 La. Ann. 1579.

The carrier is not liable for refusing to delay a scheduled passenger train to unload a sick horse, where it offered to cut out the car containing the horse and leave it until the next train. *Id.*

Injuries to horses flowing from their own bad temper is not chargeable to carrier. *Erans v. Fitchburg R. Co.*, 111 Mass. 142.

Carrier was negligent in refusing to unload stock for rest, food and drink, especially when the train was delayed several hours by misconnections, and they could have been attended to conveniently, where it resulted in keeping them without such necessities for more than the limit of time prescribed by U. S. R. S. sec. 4386-90. *Brockway v. American Ex. Co.*, 168 Mass. 257.

A connecting carrier must at its peril ascertain whether it can continue the carriage of stock to their destination without violating a statute, limiting the time for keeping them loaded and it must not receive them if it has not the proper facilities for complying therewith. *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44.

*Quare*, as to whether live pigeons would or would not be regarded as common-law freight for express company conducting as common carrier. *American Merchants &c. Ex. Co. v. Phillips*, 29 Mich. 515.

It being the custom in Michigan to send a caretaker with stock, the shipper is negligent in failing to do so. The carrier does not assume the common law liability where none is sent, nor where one is sent but fails to do his duty. *Heller v. Chicago &c. R. Co.*, 109 Mich. 53.

Although a carrier may not limit his liability for loss by negligence, he is not answerable for loss from inherent nature of animal shipped. *Boehl v. Chicago &c. R. Co.*, 44 Minn. 191.

A carrier is not liable to the owner of a mule whose hoof was torn off during transportation, it being shown that equipments were in good condition. *L. N. &c. R. Co. v. Bigger*, 66 Miss. 319.

A carrier was held liable for injury to cattle by "kicking" one car against another, under a statute making a railroad company liable for injuries resulting from that method of switching, without regard to contributory negligence. *Illinois C. R. Co. v. Kerl*, 77 Miss. 736.

Where different kinds of hogs were shipped in the same car as permitted by statute, the presumption arose that any loss or injury was caused by the mixed shipment and such presumption was not rebutted by showing merely a failure to comply with a statute requiring trap doors in the car, without showing that such failure caused the injury. *Paddock v. Missouri P. R. Co.*, 155 Mo. 524.

Carrier was not negligent in failing to care for stock where the shipper had assumed the duty. *Holloway v. Wabash R. Co.*, 62 Mo. App. 53.

Carrier was negligent in allowing ice to remain on the floor of a cattle chute, and the shipper was not contributorily negligent in not sanding it before use. *Kincaid v. Kansas City &c. R. Co.*, 62 Mo. App. 365.

Shipper, who, having stock in excess of the capacity of the cars demanded, crowded cattle in a close box car instead of waiting for other cars, could not hold the carrier for neglect to provide suitable accommodation. *Huston Bros. v. Wabash R. Co.*, 63 Mo. App. 671.

Carrier was liable for the insecurity of stock pens provided for stock awaiting shipment. *Tracy v. Chicago &c. R. Co.*, 80 Mo. App. 389.

The duty of a carrier of live stock is the same as that of carriers of other goods, except that they are not insurers against the inherent natures, propensities, and habits of such animals. *Cash v. Wabash R. Co.*, 81 Mo. App. 109.

Cattle train was delayed frequently and unnecessarily to the extent of six hours in 200 miles, and in positions where the stock was deprived of the breeze. Some of the cattle died of the heat. Held negligence on the part of the railroad company. *Minter v. Chicago &c. R. Co.*, 82 Mo. App. 130.

That shipper was to care for stock in yards awaiting shipment and on the road, did not relieve a carrier of the care of part of the shipment detained on account of the breaking of a car in which they had been shipped. *Union P. R. Co. v. Langan*, 52 Neb. 105.

The responsibility for animals is that of a common carrier except as to injuries due to their peculiar character and propensities. *Bamberg v. South Carolina R. Co.*, 9 S. C. 61.

Carrier was negligent in failing to provide facilities to enable a shipper to care for his stock and it is chargeable with knowledge of time spent on a connecting line in exceeding the statutory limit of time for its confinement without food, rest, &c. *Comer v. Columbia &c. R. Co.*, 52 S. C. 36.

Carrier was not relieved of the duty of care in assisting the loading of cattle by a stipulation that loading should be at shipper's risk, as it thereby exempted the carrier from negligence in its assistance and so was void. *Crawford v. Southern R. Co.*, 56 S. C. 136.

Although not insurers against injuries from inherent nature of stock intrusted to them, carriers are liable for injuries to it as if it were goods consigned. *R. Co. v. Wynn*, 88 Tenn. 320.

The law does not recognize shipping condition of cattle apart from



their general or ordinary condition. *Felton v. Clarkson*, 103 Tenn. 457.

A carrier allowed a gate to a stock pen to get out of repair. While the shipper was attempting to fasten it the stock took fright at a passing train and stampeded through it, injuring themselves and him. The carrier was held liable for injury to the stock but not the injury to the shipper. *Texas &c. R. Co. v. Bigham*, 90 Tex. 223; rev'g s. c., 36 S. W. Rep. 1111.

The fact that an unusual number of cattle were being shipped over a railroad at the time did not excuse the carrier for failure to provide cars for the shipment of cattle offered under a statute requiring railroad companies to furnish cars within a reasonable time after stock is offered for shipment. *Davis v. Texas &c. R. Co.*, 91 Tex. 505.

Carrier was liable for loss by withholding cattle till payment of excessive freight. *St. Louis &c. R. Co. v. Williams*, (Tex. Civ. App.) 32 S. W. Rep. 225.

Carrier was liable for defective condition of receiving pens and lack of facilities therein for feeding and watering. *International &c. R. Co. v. Startz*, (Tex. Civ. App.) 33 S. W. Rep. 515.

That shipper was to care for stock did not relieve a carrier from liability for improper care, where, owing to a delay, it attempted to care for them, locking out the shipper. *Gulf &c. R. Co. v. Frost*, (Tex. Civ. App.) 34 S. W. Rep. 167, 169.

It was held that a shipper could not deliver cattle half starved and famished to a carrier for a five or six hours' journey and compel the carrier to feed them en route. In determining the statutory length of time between feedings, it was presumed that they had been fed before starting; and the carrier was not negligent in refusing to hold them for feed before delivering them to a connecting carrier. *Texas &c. R. Co. v. Stribling*, (Tex. Civ. App.) 34 S. W. Rep. 1002.

Carrier was liable for an unreasonable delay at a switch, though the inherent propensities of the animals carried contributed to their injury. *Galveston &c. R. Co. v. Herring*, (Tex. Civ. App.) 36 S. W. Rep. 129.

Shipper's knowledge of the unsafe condition of the stock pen was not contributory negligence, where the carrier undertook to give immediate facility for transportation. *Galveston &c. R. Co. v. Jackson*, (Tex. Civ. App.) 37 S. W. Rep. 255.

Though a carrier was not negligent in permitting a horse to break out of a stock pen, it was liable for its injuries, being an insurer. *Texas &c. R. Co. v. Turner*, (Tex. Civ. App.) 31 S. W. Rep. 643.

A shipper undertaking the care of his cattle was not relieved of that duty by reason of an unnecessary delay by the carrier, especially where

he continues to accept the benefits of his free passage. *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74.

A carrier assuming the duty of unloading was liable for its negligent performance. *Mexican &c. R. Co. v. Savage*, (Tex. Civ. App.) 41 S. W. Rep. 663.

The negligence of a carrier in allowing a mud hole in its stock pen whereby the cattle became sleek and wet, did not render it liable where the shipper overloaded the cattle to begin with and then, being in his charge, he abandoned the train while they were down. *Missouri &c. R. Co. v. Belcher*, (Tex. Civ. App.) 41 S. W. Rep. 706.

A carrier of mares with foal was not allowed to set up the defense of inherent defect beyond what ought to have been anticipated from that cause, especially where others, not mares, were also injured. *Gulf &c. R. Co. v. Staton*, (Tex. Civ. App.) 49 S. W. Rep. 277.

A carrier cannot relieve itself of the statutory duty to feed and water stock by tendering them to a connecting carrier which refused to accept them. *Texas &c. R. Co. v. Berchfield*, 19 Tex. Civ. App. 228.

In the absence of a special agreement the duty to unload, feed, water and rest cattle under U. S. R. S. sec. 4386, is the carrier's. *Texas &c. R. Co. v. Avery*, 19 Tex. Civ. App. 235.

That water tanks leaked upon the floor of the car during transit, was not sufficient evidence of horses having contracted catarrhal fever and pneumonia by reason of the carrier's negligence. *Weed v. International &c. R. Co.*, 21 Tex. Civ. App. 689.

Shipper loaded cattle and horses into the same car; the cattle were unloaded into "southern pens" and thus exposed to Texas fever by the initial carrier, on account of which the connecting carrier refused to take them, though it agreed to take the horses. Shipper could not recover for the delay as to the horses, when he refused to allow one to be taken without the other. *Missouri &c. R. Co. v. Wells*, 22 Tex. Civ. App. 255.

It is a carrier's duty to furnish stock pens that are sufficient to accommodate ordinary shipments. *Texas &c. R. Co. v. Fambrough*, (Tex. Civ. App.) 55 S. W. Rep. 188.

Cattle injured each other while the train was standing, but it was not shown that it occurred by reason of an unusual delay in standing. The carrier, held free from liability. *Texas &c. R. Co. v. Fambrough*, *supra*.

Carrier was liable for refusal without excuse to allow shipper to water and feed his cattle. *Missouri &c. R. Co. v. Leibold*, (Tex. Civ. App.) 55 S. W. Rep. 368.

Shipper complained of negligent handling of his cattle. It was error to charge that he could not recover if defendant used due care and the

injury was by reason of weakness in the stock. *St. Louis &c. R. Co. v. Dickens*, (Tex. Civ. App.) 56 S. W. Rep. 124.

Failure to furnish cattle cars for eight days after time agreed upon, was unreasonable and the carrier was responsible for "shrinkage." *Texas &c. R. Co. v. Jones*, 23 Tex. Civ. App. 551.

Shipper under contract to load and unload at his own risk was not barred from recovery for damage from overloading cars, where the carrier failed to furnish enough cars and the shipper several times requested before and during the transit that the stock be reloaded. *International &c. R. Co. v. Pool*, 24 Tex. Civ. App. 575.

Shipper's negligence in overloading cattle did not preclude his recovery for injuries which were the direct result of handling of the cars and unnecessary delay in transportation. *Missouri &c. R. Co. v. Chittim*, 24 Tex. Civ. App. 599.

Carrier is bound to use such care, prudence and caution in transportation of horses as "an ordinarily careful, prudent and cautious man would have exercised under like circumstances." *Texas &c. R. Co. v. Tribble*, (Tex. Civ. App.) 67 S. W. Rep. 890.

Horses are included within a statute requiring the unloading of "cattle" to feed, water, rest, etc. "Other accidental causes" in U. S. R. S. section 4386 means inevitable accident causes, and not results traceable to negligence of the carrier. *Chesapeake &c. R. Co. v. American Exch. Bank*, 92 Va. 495.

That the shipper was to water and feed and that his drover receives free passage for the purpose did not relieve the carrier from the duty, under U. S. R. S. sec. 4386, to unload, feeding upon the cars being impossible. *Burns v. Chicago &c. R. Co.*, 104 Wis. 646.

Negligence is not imputable to a carrier from the mere fact that an unusual number of cattle died in transit to Europe, from no apparent cause, as against the fact that inspectors pronounced the accommodations and ventilation sufficient. *Montgomery v. Furness*, 56 Fed. Rep. 268.

A carrier of live stock was not liable for failure to feed, etc., where shipper assumed that duty and failed to perform it. *The Oranmore*, 92 Fed. Rep. 396; *aff'g s. c.*, 24 Fed. Rep. 922.

Yards, constructed to facilitate loading and unloading, were used by a shipper as a place of detention awaiting shipment. The carrier was not held to the duty of a carrier, but only for ordinary care. *Missouri &c. R. Co. v. Byrne*, 100 Fed. Rep. 359.

## IX. Perishable Goods.

**A carrier does not insure against the destruction of perishable goods, even though the decay of the same was hastened by a delay through stress of**

weather, in the absence of negligence. Wharton on Negligence, sec. 567; Story on Bailments, sec. 492a; Brig Collinberg, 1 Black, 156; Clark v. Barnard, 12 How. (U. S.) 292; Powell v. Mills, 37 Miss. 691.

Property accepted as perishable should be forwarded in the first train, unless the previous accumulation of the same kind of freight prevented such immediate action. Receipting for freight in good order does not conclude owner. *Tierney v. N. Y. C. & H. R. R. Co.*, 10 Hun, 568.

A carrier was not liable for the freezing of plants delayed during transportation as the delay was not the proximate cause thereof. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615; aff'g s. c., 20 id. 730.

Railroad by which orange trees were shipped, which runs through a warm section, shipped them without notice by a northern route because of the impassable condition of its own road. It was held liable for damage to the plants by cold. *Pierce v. Southern P. Co.*, 120 Cal. 156.

Fruit was shipped in old cars necessitating their transfer by the connecting carrier, but, having no ventilator cars, they were transferred to an ordinary box car and thereby damaged. Consignee refused to accept them. He was not warranted in refusing to receive them at all, instead of accepting them and holding the carrier for the difference in value caused by its act. *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286.

A carrier of goods did not fulfill his duty of protecting perishable goods by simply following the custom in vicinity under similar circumstances. *Hinton v. Eastern R. Co.*, 72 Minn. 339.

Where consignors directed vent in car to be left open during season when freezing is liable to occur, they cannot complain of loss caused thereby. *Gillett v. Missouri &c. R. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 61.

Shipper of apples, knowing of the lack of facility for ventilation in the cars, assumed the risk of their decay. *Densmore Commission Co. v. Duluth &c. R. Co.*, 101 Wis. 563.

It was negligence to allow strawberries to remain without refilling ice-boxes for seven hours, where a full ice box was necessary for proper refrigeration. *Lamb v. Chicago &c. R. Co.*, 101 Wis. 138.

## X. Inherent Defects—Undisclosed Dangers in Goods.

Common carriers of goods do not insure against injury to goods arising from inherent defects or undisclosed dangers or destructive quality. Wharton on Negligence, secs. 563, 564.

Citing *Blower v. R. R.*, L. R. 7 C. P. 662, and the cases there cited; Story on Bailments, sec. 492a; Smith's Mercantile Law, (8th ed.) 354. See, also, *Rohl v. Parr*, 1 Esp. 445; *Hunter v. Potts*, 4 Camp. 403; *Rixford v. Smith*, 52 N. H. 355; *Ship Invincible*, 3 Sawyer, 176.

*Brass v. Maitland*, 6 E. & B. 470; *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Talley v. R. R.*, L. R. 6 C. P. 44, 51; *Gorham Man. Co. v. Fargo*, 35 N. Y. Supr. 434; 45 How. Pr. 90.

Carrier was not liable for the bursting of a hogshead of molasses by reason of the fermentation resulting from natural causes. *Faucher v. Wilson*, 68 N. H. 338; s. c., 39 L. R. A. 431.

Where carriers undertake the transportation of articles which they know or should know to be dangerous to property or health, they assume the risk of their proper handling. *Rouee v. Youard*, 1 Kan. App. 270.

## XI. Inevitable Accident and Vis Major

Acts of God herein termed "inevitable accident," or Vis Major will excuse safe carriage and delivery.

### (a) INEVITABLE ACCIDENT.

In an action for negligent failure to deliver goods by water, a carrier may show that navigation was closed by the weather. The question is when navigation *did actually* close and not when it *usually* closes, and evidence of latter is inadmissible. *McCotter v. Hooker*, 8 N. Y. 497.

Destruction by an accidental fire, not caused by lightning, is not the act of God, so as to excuse a carrier, although the proximate cause of the burning of the goods in his charge was a sudden gust of wind diverting the course of a distant fire so as to drive the flames in the direction of and upon them.

There was no evidence in this case to show how the fire, by which the property in question was destroyed, originated. *The presumption, therefore, was that it arose from some act of man.* Angell on Carriers, sec. 156. A loss arising from an accidental fire, or conflagration of a city, without any default whatever on the part of the carrier, it is well settled, furnishes no excuse for the carrier, for it does not fall within the exception. 2 Kent's Com. 602; Story on Bailments, sees. 507, 511, 528; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Gatliff v. Bourne*, 4 Bing. N. C. 314; *Hollister v. Nowlen*, 19 Wend. 234; *Miller v. Steam Navigation Co.*, 10 N. Y. 437.

Although an act of God makes precise performance impossible, yet, if it can be substantially carried out, it must be done.

A carrier's agreement to transport passengers between two points by a particular boat is incidental. If that boat be stayed by act of God, the carrier should use the diligence of a prudent and careful man in his own business in procuring another. *Williams v. Vanderbilt*, 28 N. Y. 217; overruling contrary doctrine in *Briggs v. Vanderbilt*, 19 Barb. 222; *Bonsteel v. The Same*, 21 id. 26.

“By the act of God” is meant something which operates without any act of interference from man. A steamboat came in contact with the mast of a sloop which had been sunk two days before, and was visible. The squall which sunk the sloop was not the proximate cause of the accident. *Merritt v. Earle*, 29 N. Y. 115.

**From opinion.**—“The expressions ‘act of God’ and ‘inevitable accident’ have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an ‘inevitable accident’ which no foresight or precaution of the carrier could prevent; but the phrase ‘act of God’ denotes natural accidents that could not happen by the intervention of man—as storms, lightning, and tempest. The expression excludes all human agency. In the case of the *Trent Proprietors v. Wood* (4 Douglass, 287), Lord Mansfield said: ‘The general principle is clear. The act of God is natural necessity—as winds and storms—which arises from natural causes, and is distinct from inevitable accident.’ The same judge, in *Forward v. Pittard* (1 Term Rep. 27), defined the ‘act of God,’ to be something in opposition to the act of man—adding ‘that the law presumes against the carrier, unless he shows it was done by such an act as could not happen by the intervention of man—as storms, lightning and tempest.’” \* \* \*

“To excuse the carrier the act of God must be the sole and immediate cause of the loss. That it is the remote cause is not enough. This is illustrated in the case of *Smith v. Shepherd* reported in *Abbott on Shipping* (part 3, ch. 4, sec. 1); and *McArthur v. Sears* (21 Wend. 190.) In *Smith v. Shepherd* the vessel was lost by striking a floating mast which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate occasion of the misfortune; but it was held to be too remote. The vessel had not been forced on the bank by winds or other extraordinary violence of nature, or without human interference. The immediate cause of the loss was the coming in collision with a floating mast which some person had attached to the sunken vessel. In *McArthur v. Sears*, the vessel was lost in attempting to enter port by mistaking a light on board of a steamer for one of two beacon lights of the port. One of the beacon lights, through some neglect, was not burning, and the light on board of the wrecked steamer was easily mistaken for it. It was a dark night, the snow was falling, and there was a considerable wind. The mistake occasioned the loss of the vessel without any fault of her master or crew, yet it was held that the carrier was not excused.”

It was charged that tug boats became loosed and floated against the plaintiff's boat and injured it. It was proper to charge that the defendant was only liable for the negligence, and not at all, if ice forced the boats away in spite of suitable care. There was no claim that defendant was a common carrier, as it was employed to tow plaintiff's boat. *Carpenter v. Eastern Trans. Co.*, 11 N. Y. 514.

As to delay in delivery the carrier is responsible only for ordinary care. Accident or misfortune will excuse delay, though it is not inevitable. *Parsons v. Hardy*, 14 Wend. 215.

Damage to oranges delayed in transportation by an unprecedented flood not attributable to the carrier. *Norris v. Savannah &c. R. Co.*, 23 Fla. 182.

Extraordinary snow storm will excuse delay in transporting stock. *Pruitt v. Hannibal &c. R. Co.*, 62 Mo. 527.

High water, when the same is not shown to be unanticipated is not an act of God, and delay in transporting trees caused thereby is chargeable to the carrier. *Chicago &c. R. Co. v. Manning*, 23 Neb. 552.

A snow and rain storm severe enough to block a train is an act of God, and no liability attaches for the death of hogs killed thereby. *Black v. Chicago &c. R. Co.*, 30 Neb. 197.

Stock delayed by snow storm and in part killed or injured by the cold, may be recovered for. *Feinberg v. D. L. & W. R. Co.*, 52 N. J. L. 451.

Live stock: no liability for delay from extraordinary snow storm. *Ritz v. Penn. R. Co.*, 3 Phila. 82.

Wagon placed on a platform for loading was blown over by a whirlwind, sudden, severe and unprecedented. Carrier was not liable for delay in shipment resulting therefrom. *Gulf &c. R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. Rep. 220.

An extraordinary rainfall or flood, unless unprecedented, was held to be within dangers which a carrier must provide against. *Missouri &c. R. Co. v. Davidson*, (Tex. Civ. App.) 60 S. W. Rep. 278.

Carrier was held not liable for loss, by an unprecedented storm, of goods stored in a reasonably safe place, prompt delivery of which was delayed by bad weather. *International &c. R. Co. v. Bergman*, (Tex. Civ. App.) 64 S. W. Rep. 999.

Fact that carrier through delay was still in possession of the goods was held not to make it liable for conversion where loss occurred by an unusual storm. *Gulf &c. R. Co. v. Darby*, (Tex. Civ. App.) 67 S. W. Rep. 129.

Damage to a cargo of grain by water flowing in through a hole in vessel's side made by breaking away of cap from one of the bilge-pump holes, is not damage caused by peril of the sea, and is chargeable to the owner of the vessel. *The Edwin I. Morrison*, 153 U. S. 199.

#### (b) VIS MAJOR.

**The carrier is not liable if, without his fault, goods be taken from him or injured by an irresistible force, as by a public enemy or governmental authorities.** *Hubbard v. Harnden's Ex. Co.*, 10 R. I. 244; *Nashville &c. R. Co. v. Estes*, 7 Heisk. 622; *Wharton on Negligence*, sec. 560.

That property was taken under legal process was no defense, where the

consignee or his pledgee had not been notified. *Spiegel v. Pacific Mail S. S. Co.*, 26 Misc. 414.

This rule does not apply to goods stolen. *Schieffelin v. Harvey*, 6 Johns. 170.

But if goods are delivered on mere presentation of a telegram from the sheriff, liability attaches, although, thereafter, sheriff appears with actual attachment.

The measure of recovery against a carrier for the loss of money delivered to it is the value named in the receipt or bill of lading. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311.

A carrier is not liable where goods are taken from his possession by legal process. *Savannah & C. R. Co. v. Wilcox*, 48 Ga. 432.

If bailee uses due diligence to escape or repel attack of public enemy it is a defense that goods were taken from him. *Watkins v. Roberts*, 28 Ind. 167.

Riots along carrier's line excused delay in transporting hogs. *Bartlett v. Pittsburg & C. R. Co.*, 94 Ind. 281.

Seizure under legal process was a defense in a suit for failure to deliver, although the owner and consignee was not the attachment defendant. *Indiana & C. R. Co. v. Doremeyer*, 20 Ind. App. 605.

Seizure by a game warden was no defense, where he did not have even apparent authority. *Merriman v. Great Northern Ex. Co.*, 63 Minn. 543.

Carrier must show that process under which goods were seized was valid on its face and must give notice of the proceedings to the shipper. *Merz v. Chicago & C. R. Co.*, (Minn.) 90 N. W. Rep. 7.

Refusal to deliver to the owner and consignee goods attached as the property of the consignor, on the ground that they were in the custody of the law, was held not to constitute a conversion of them. *Hett v. Boston & C. R. Co.*, 69 N. H. 139.

A carrier is not liable for goods seized under legal process against the owner. *Jewett v. Olsen*, 18 Or. 419.

Goods in a carrier's possession as a warehouseman were seized under process as the property of the consignee, and, while in the custody of the law, were stolen. Consignor subsequently proved ownership and demanded the goods. He was allowed to recover only for the goods the carrier refused to deliver which were not stolen. *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129.

The seizure of goods in the hands of a carrier for non-payment of duties by the Confederate Government, of which the consignee had notice, was held an act of the public enemy relieving the carrier. *Hubbard v. Harnden Ex. Co.*, 10 R. I. 244.



The Confederate army was not regarded as a public enemy in *some courts*. *Nashville &c. R. R. Co. v. Estes*, 7 Heisk. (Tenn.) 622; *Weakley v. Pearce*, 5 id. 401.

A carrier of goods is liable to the consignee for goods stopped *in transit* by the seller if the right of stoppage did not exist at the time. *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195.

(c). CONCURRING NEGLIGENCE OF CARRIER.

**If carrier's negligence contribute to the injury, doctrine of inevitable accident and vis major does not apply.**

A common carrier, to exempt himself from liability for injuries happening to goods while he is engaged in transporting them for hire, must show that he was free from fault at the time the injury or damage occurred, and that no act or neglect of his concurred in or contributed to the injury.

If he has departed from the line of duty, and has violated his contract, and, while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. *Michaels v. N. Y. Central R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, id. 630.

**From opinion.**—"What is precisely meant by the expression, 'act of God,' as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'act of God,' or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God. *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 31 Barb. 38; affirmed in this court; *Smith v. Shepherd*, cited in *Abbott on Shipping*; *The Trent Navigation Co. v. Wood*, 3 Esp. R. 127; *Forward v. Pittard*, 1 Term. R. 27; *Campbell v. Moore*, 1 Harp. Law Rep. 468; *McHenry v. Railroad Co.*, 4 Harrington R. 448; *Sierdett v. Hale*, 4 Bing. R. 607; *New Brunswick St. Boat Company v. Tiers*, 4 Zabriskie, 697; *Edwards on Bailments*, 454; *Angell on Carriers*, sec. 156."

When goods were delayed by negligence at terminus, before delivery to next carrier, and then injured by act of God, the first carrier was liable. Mistake in name of connecting carrier corrected, and first carrier agreed to send them on but was negligent in doing so. *Dennison v. N. Y. C. R. R. Co.*, 3 Lansing 265.

If the act of God intervene to injure goods, while common carrier is himself in default, or by his negligent delay, carrier is liable. *Heyl v. Inman S. Line*, 14 Hun, 564.

A common carrier is bound to exercise ordinary care in the shipment and transportation of fruit or other perishable property.

Plaintiffs delivered a quantity of lemons to defendant for transportation, and tendered a shipping receipt stamped with the words "refrigerator car," which words were erased by defendant's agent, who stamped on the receipt the words "not to be loaded in refrigerator car." The lemons were shipped in an ordinary box car, although the temperature was below freezing point, and they became frozen and deteriorated in value. Held, that the fact that the agent erased the words "refrigerator car" did not operate to exempt the defendant from liability for loss occasioned by its own negligence. *Tucker v. The Pennsylvania Railroad Co.*, 10 Misc. 35. On appeal the judgment was reversed on the ground that, as the plaintiff had selected the time of shipment, the defendant was not chargeable with negligence, because it failed to store the goods till the weather was more favorable. *Id.* 11 Misc. 366.

Carrier liable for freezing of potatoes if diligence would have prevented it. *Wing v. N. Y. & C. R. Co.*, 1 Hilt. (N. Y.) 235.

By reason of customary course being frozen up another was taken, and cotton shipped was lost on the voyage; carrier was liable. *Crosby v. Fitch*, 12 Conn. 410.

Loss of goods by an unprecedented flood does not excuse the carrier when, but for his negligent delay, the goods would have been removed by consignor before the time of said flood. *Richmond & C. R. Co. v. Benson*, 86 Ga. 203.

The jury decided the question of defendant's negligence where a carload of wheat was destroyed by floods while standing on siding of defendant's track. *Balt. & C. R. Co. v. Keedy*, 15 Md. 320.

If a carrier contracts to deliver apples to another carrier by a certain day so as to insure their not freezing, he is liable to the shipper if he fails to deliver them as stipulated and they freeze on the second carrier's hands. *For v. Boston & C. R. Co.*, 148 Mass. 220.

Lameness of a canal horse causing a delay that subjected goods to loss by flood, does not render carrier liable. *Morrison v. Davis*, 20 Pa. St. 111.

The fact of a washout on defendant's road is no defense to an action for damages where the carrier had contracted to receive cattle on May 19th, but did not take them until May 23d. *Gulf & C. R. Co. v. McCorquodale*, 11 Tex. 41.

Failure to send tobacco by one train rather than another does not

make carrier liable for its loss in a freshet. *R. Co. v. Reeves*, 10 Wall. (U. S.) 116.

Ordinary negligence renders carrier liable when goods are taken by public enemy. *Holladay v. Kennard*, 12 Wall. 254.

Where the standing of a vessel is due to the negligence in not taking safe courses, it is liable for loss of goods. *Liverpool &c. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

Damage to a cargo caused by a tidal wave is not chargeable to carrier; but if he refuse to deliver it to the owner and damage occur through want of proper drying, he is responsible for such damage. *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106.

Delay in transporting a carload of potatoes so that they froze, when they otherwise would not have done so renders carrier liable. *Blodgett v. Abbot*, 12 Wis. 516.

## XII. Limitation of Liability.\*

(a) VALIDITY AND CONSTRUCTION OF CONTRACTS LIMITING LIABILITY.

1. CARRIER OF GOODS, P. 237.

2. CARRIER OF PASSENGERS, P. 259.

A common carrier may usually by contract, but not by notice, exempt himself from his liability as an insurer, and in several, but not the majority of the states, he may by specific and unequivocal agreement therefor also exempt himself from liability for injury caused by negligence; and there is, even in some states not allowing this exemption, a disposition to permit the shipper and carrier to modify the latter's liability even in respect to injuries arising from negligence, especially as to the amount to be paid in case of liability, loading, etc.

### 1. CARRIER OF GOODS.

A shipping contract will not exempt a carrier from his own negligence, unless the intent is so plainly and distinctly expressed, that it cannot be misunderstood; and the exemption will not be inferred from the general words. The words "damage occasioned by delays from any cause or from change of the weather" do not include shipper's negligence. *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 379; 4 Hun, 327.

A carrier may, by express contract, restrict his common law liability. It is so understood in England (*Allevyn v. 93; 1 Vent. 190, 238; Peake's N. P. C. 150; 4 Burr. 2301; 1 Starkie's R. 186; 2 Taunt. 211; 8 Mees.*

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\* Note.—As to the benefit of stipulations for exemption among connecting carriers see "Connecting Carriers," *post*, p. 258.

As to who may make and what constitute valid stipulations for exemption see "Contracts of Shipment," *post*, p. 272.

As to limitation of liability for care of animals see also "Carriage of Animals," *ante* p. 219

& Welsby 443; 4 Co. 84), and in Pennsylvania (16 Penn. R. 67; 5 Rawle 179; 6 Watts. & Serg. 495). In other states, where the question has arisen whether notice would excuse the liability of the carrier, it seems to have been taken for granted that a special acceptance would do so; and in *N. J. Steam Nav. Co. v. Merchants' Bank* (6 How. 382), it was so held by the supreme court of the United States. For the concurrent opinions of elementary writers in favor of this doctrine, see, Story on Bail, sec. 549; Chitty on Cont. 152; 2 Kent. Com. 606; Angell on Carriers, secs. 59, 220, 221. *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 492.\*

*Mynard v. S. & B. & N. Y. R. Co.*, 71 N. Y. 180.

A stipulation that the towing of boats should be "at the risk of the master and owners" of such boats, covers the perils of navigation, but not the gross negligence of servants of the owner of the towing boat. Stipulation in a contract to exempt from gross negligence must be specific and distinct. It will not be implied from a clause containing a general expression which might otherwise be so construed. *Wells v. Steam Navigation Co.*, 8 N. Y. 375.

*Alexander v. Green*, 7 Hill 544, approved.

Release "from any act, neglect or default of the pilot, master or mariners" does not relieve from gross negligence of mate, as where the mate delivered goods to unauthorized carman. *Guillaume v. The Hamburgh & Am. P. Co.*, 42 N. Y. 212.

See *Spinette v. Atlas S. Co.*, 14 Hun. 110.

A clause in a bill of lading releasing the carrier "from damage or loss to any article from or by fire" does not cover loss from such cause occasioned by the defendant's negligence. *Steinweg v. Erie Railway Co.*, 43 N. Y. 123.

Citing *York v. Central R. Co.*, 3 Wallace (U. S.) 107.

Release from loss, injury, damages, and other contingencies in loading, unloading, conveyance, and otherwise, or from failure by any particular train, or delivery, at any particular time, etc., does not cover switching cattle on a side track and leaving there for three days, where they could not be unloaded, fed or watered, which was not negligence, but an abandonment of effort to carry. *Keeney v. G. T. R. Co.*, 47 N. Y. 525.

\*Note Chap. 565, L. N. Y. 1890. "Sec. 13. Rights and liabilities as common carriers. Every railroad corporation doing business in this state shall be a common carrier. Any one of two or more corporations owning or operating connecting roads, within this state, or partly within and partly without the state shall be liable as a common carrier, for the transportation of passengers or delivery of freight received by it to be transported to any place on the line of a connecting road; and if it shall become liable to pay any sum by reason of the neglect or misconduct of any other corporation it may collect the same of the corporation by reason, of whose neglect or misconduct it became so liable."

A hidden stump, a recent obstruction in the Hudson river, causing an obstruction, is within the clause "dangers of the sea." *Redpath v. Vaughan*, 48 N. Y. 655.

An assumption by the shipper of the risk of injury from the heat covers the risk of such injury through the defendant's negligence. As the common law liability of carriers did not apply to live stock, but as they were only liable for negligence, the exemption must be deemed to relate to such negligence.

Defendant's servants neglected to water and cool hogs by wetting while in transit. *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61.

Plaintiff shipped goods of the value of about \$1,500, receiving a receipt therefor containing this clause: "The Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them and so specified in this receipt; which insurance shall constitute the limits of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss, or detention or damage to the property." No value was fixed by plaintiffs at the time. *Held*, that the first portion of the clause excluded all liability resulting from damages enumerated, save in the case of insurance; that the latter part related to other grounds of claim not included in the first, but that it did not include losses occurring through defendant's negligence; and to such losses the fifty dollars' limitation did not apply. *Maguin v. Dinsmore*, 56 N. Y. 168.

A release from negligence of pilot or mariners relates to the time of the voyage, and not to the time after the goods are unloaded and awaiting delivery. The agreement of the consignee to take them from alongside, or that the carrier might land at the consignee's risk, would not relieve the defendant from negligence, and the consignee was entitled to notice of arrival and a reasonable time for the removal of the goods. *Gleadell v. Thompson*, 56 N. Y. 194.

A stipulation that the carrier should not be liable for any loss of damage of any box, etc., for over fifty dollars, unless the *just and true value be given*, does not cover loss from negligence.

A receipt that the company would not be liable for loss or damage unless claim therefor was made in writing "within thirty days from the accruing of the cause of action," was not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but was in the nature of a limitation

and could not be availed of upon trial unless set up in the answer. *Quare* as to whether such time was reasonable. See *Adams Express Company v. Reagan*, 29 Ind. 21; *Southern Express Co. v. Caperton*, 44 Ala. 101; *Westcott v. Fargo*, 61 N. Y. 542; 6 Lansing. 319; aff'g 63 Barb. 349.\*

A carrier may exempt itself from liability from negligence, but the language for that purpose must be unequivocal; so a release from any damages or injury "from whatsoever cause arising," does not include carrier's negligence. *Myard v. S. & B. & N. Y. R. R. Co.*, 71 N. Y. 180; rev'g 1 Hun. 399, and distinguishing *Cragin v. N. Y. Central R. Co.* 51 N. Y. 61; and citing, *N. J. Steam. & Co. v. Merchants' Bank*, 6 How. U. S. Rep. 344; *Alexander v. Greene*, 7 Hill, 533; *Wells v. Steam Nav. Co.*, 8 N. Y. 315; *Steinweg v. Erie R. Co.*, 43 id. 123.

However broad the contract of release, if it does not specifically and in express terms release the carrier from his own negligence, there is no release, if the general words may operate without including negligence. Release from injuries "caused by the burning of hay, straw or other feeding material" does not cover burning through the defendant's negligence. *Holsapple v. R. W. & O. R. R. Co.*, 86 N. Y. 275.

Distinguishing *Cragin v. N. Y. Central R. R. Co.*, 51 N. Y. 61, and citing *Angell on Carriers*, 214; *Pratt v. Ogdensburgh. & c. R. R. Co.*, 102 Mass. 557; *Powell v. Penn. R. R. Co.*, 32 Penn. 414.

The plaintiff shipped various lots of cotton for transportation from Memphis to Liverpool via Jersey City, under contracts with dispatch companies of whose route the defendant's road formed a part, and a portion of the cotton was burned in its freight-house in Jersey City. The

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\*Note. - Validity of stipulations requiring written notice of claim or injury within a specified time as a condition of liability: *North British & c. Ins. Co. v. Central Vermont R. Co.*, 9 App. Div. 4; *Baxter v. Louisville & c. R. Co.*, 165 Ill. 78; *Cleveland & c. R. Co. v. Newlin*, 74 Ill. App. 638; *Chicago & c. R. Co. v. Bozarth*, 91 Ill. App. 68; *Baltimore & c. R. Co. v. Ragsdale*, 14 Ind. App. 496; *Kramer v. Chicago & c. R. Co.*, 101 Iowa, 178; *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659; *Ohio & c. R. Co. v. Tabor*, 98 Ky. 503; *Brown v. Illinois C. R. Co.*, 100 Ky. 525; *Engesether v. Great Northern R. Co.*, 65 Minn. 168; *Carpenter v. Eastern R. Co.*, 67 Minn. 188; *Richardson v. Chicago & c. R. Co.*, 149 Mo. 311; *Klass & c. Co. v. Wabash R. Co.*, 80 Mo. App. 161; *Dixie Cigar Co. v. Southern Ex. Co.*, 120 N. C. 348; *United States Watch Co. v. Southern Ex. Co.*, 120 N. C. 351; *Gulf & c. R. Co. v. Stanley*, 89 Tex. 42; *Norfolk & c. R. Co. v. Reeves*, 97 Va. 284; *Southern R. Co. v. Adams (Ga.)* 42 S. E. Rep. 35.

Time specified held reasonable: *American Grocery Co. v. Staten Island & c. R. Co.*, 23 Misc. 356; *Kansas & c. R. Co. v. Ayres*, 63 Ark. 331; *St. Louis & c. R. Co. v. Hurst*, 67 Ark. 407; *Gulf & c. R. Co. v. White*, Tex. Civ. App., 32 S. W. Rep. 322; *Ginn v. Ogdensburg Transit Co.*, 85 Fed. Rep. 985.

Time specified held unreasonable: *Osterhondt v. Southern P. R. Co.*, 47 App. Div. 146; *Southern Ex. Co. v. Bank of Tupelo*, 108 Ala. 517; *Cox v. Central Vermont R. Co.*, 170 Mass. 129; *Popham v. Banard*, 77 Mo. App. 619; *Gulf & c. R. Co. v. Stanley*, 89 Tex. 42; *Texas & c. R. Co. v. Reeves*, 90 Tex. 499.

Waiver: *Osterhondt v. Southern P. R. Co.*, 47 App. Div. 146; *Falkenburg v. Erie R. Co.*, 28 Misc. 165; *Marrus v. New Haven Steamboat Co.*, 10 Misc. 421; *St. Louis & c. R. Co. v. Jacobs*, (Ark.), 68 S. W. Rep. 248; *Chicago & c. R. Co. v. Grimes*, 71 Ill. App. 295; *Cleveland & c. R. Co. v. Hearth*, 22 Ind. App. 47; *Wichita & c. R. Co. v. Koch*, 8 Kan. App. 642; *Sopér v. Pontiac & c. R. Co.*, 113 Mich. 443; *Ward v. Missouri & c. R. Co.*, 158 Mo. 226; *Richardson v. Chicago & c. R. Co.*, 149 Mo. 311; *Hamilton v. Wabash R. Co.*, 80 Mo. App. 597; *Wood v. Southern R. Co.*, 118 N. C. 1056; *United States Watch Co. v. Southern Ex. Co.*, 120 N. C. 351.

bill of lading stipulated that none of the companies and their connections should be liable for loss by fire in transit, in deposit, or places of trans-shipment, depots, &c. Held, that the plaintiff could not recover unless he showed that the fire came from the defendant's negligence, which was not shown. *Whitworth v. Erie Railway Co.*, 87 N. Y. 413.

*Lamb v. Camden, &c. R. Co.*, 46 N. Y. 271; *Caldwell v. N. J. S. Co.*, 47 id. 282; *Cochran v. Dinsmore*, 49 id. 252.

The bills of lading contained a general exemption from liability for loss by fire, and the loss having occurred from this cause, it was incumbent upon the plaintiff, in order to avoid the effect of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the defendant's duty. The burden was upon the plaintiff to show facts taking the case out of the operation of the exemption clause. (*Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282; *Cochran v. Dinsmore*, 49 id. 252.) *Whitworth v. Erie Railway Co.*, 87 id. N. Y. 419.

A stipulation that the carrier shall not be liable while the goods are at "any of their stations awaiting delivery," and that they must be removed "during business hours" means "awaiting delivery" after notice of arrival and adequate time for delivery. The goods arrived too late for removal on Saturday and were removed on Monday, and meanwhile injured by a mob. Defendant was liable as carrier. Liability remained until either the property transported was actually delivered at its destination, or until notice was given to the consignee and the expiration of a reasonable time for its removal. *Fenner v. B. & State Line R. R. Co.*, 44 N. Y. 511; 4 Am. Rep. 709; *Zinn v. N. J. Steamboat Co.*, 49 N. Y. 442; 10 Am. Rep. 402; *McAndrew v. Whitlock*, 52 N. Y. 40; 11 Am. Rep. 657; *Gleadell v. Thomson*, 56 N. Y. 194. Had he not been liable as carrier he would have been responsible as warehouseman for negligence. *McKinney v. Jewett*, Receiver, 90 N. Y. 267; 24 Hun, 19.

A shipper was released from the negligence of the carrier's servants for insecurity of the car. A defective car was used, although it did not appear but that other sound cars were provided, so that injury might have been caused by defendant's servants. Held, that no proof of defendant's negligence was proven and that injury was from negligence of the carrier's servants, and plaintiff did not recover. *Wilson v. N. Y. C. &c. R. R. Co.*, 97 N. Y. 87; 27 Hun, 149.

Proof of usage was held not to contradict the bill of lading, but simply to explain it. (*Hostetter v. Troy*, 11 Fed. Rep. 181; *Lowery v. Russell*, 8 Pick. 360; *Phillips on Ins.* 5th ed. 980.)

Usage of trade is always presumed to be within the knowledge of the

parties, and their contracts are supposed to be made with reference to it. *Robertson v. N. S. Co.*, 139 N. Y. 416.

A stipulation that the carrier shall not be liable for loss to an amount greater than \$50, unless expressed therein, or specially insured, was held not to apply to a negligent failure to stop goods *in transitu* at the order of shipper. *Rosenthal v. Weir*, 170 N. Y. 149; aff'g s. c., 54 App. Div. 275.

Limitation of liability to a certain amount for loss and damage does not cover damages for negligence for failure to deliver in time. It was also held (1), that, as the action was for negligence in delivering, and not for loss of or damage to the goods, the amount of the recovery was not limited by the stipulation in the receipt; (2), that, as it appeared that the goods had no market value at Chicago, the place of manufacture was properly resorted to for the purpose of determining their value. *Froman v. Am. Merchants' Union Ex. Co.*, 2 Hun. 512.

Under contract to carry meat in refrigerator of steamboat, the plaintiff shipped beef and mutton, both of which were put in the refrigerator although the mutton was omitted from the bill of lading. Defendant liable to carry both safely. Stipulation relieving from decay of property does not refer to decay from the defendant's negligent acts. When the propeller shaft broke it was properly left to the jury to say whether the captain of the boat was negligent or reckless in continuing the voyage instead of turning back, whereby the meat was destroyed. *Sherman v. Inman S. Line*, 26 Hun. 107.

Stipulation in bill of lading relieving defendant for delays of goods to be carried beyond its route will not relieve from delays caused by negligence of its own servants, nor from failure to deliver goods to connecting carrier. It is the duty of the first carrier to use reasonable diligence to discover facilities for forwarding.

On the question of such negligence evidence, showing that the custom was to ship to an intermediate port the goods received for the port to which those in question were destined, and that these goods might have been shipped at an earlier date to this intermediate port, is admissible. No presumption to carry beyond its own route arose from the consignment address put upon the goods before their shipment at Buffalo. (*Root v. G. W. R. R. Co.*, 45 N. Y. 524; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 491; *Rawson v. Holland*, 59 id. 611.) *McKay v. N. Y. C. & H. R. R. Co.*, 50 Hun. 562.

Bill of lading containing exemptions from loss by sweating, rain, spray, or inherent deterioration, or damage done while not actually in defendant's possession, held valid. *Robertson v. National S. S. Co.*, 1 App. Div. 61.



Under a stipulation that glass should be at shipper's risk, and relieving carrier from loss by breakage or improper package, carrier was not liable where a demijohn was negligently placed in a claret case without anything to indicate its contents. *Morris v. Wier*, 20 Misc. 586.

See, also, *Toy v. Long Island R. Co.*, 26 Misc. 792.

Under a restriction of liability to losses from gross negligence, proof that a violin case strong enough for ordinary traveling, without packing was additionally crated and was injured, was held *prima facie* evidence of gross negligence. *Campe v. Weir*, 28 Misc. 243.

A stipulation against liability above a specified amount, or in any event, above the true value of the article injured, did not operate to relieve the carrier from liability for negligence. *Marquis v. Wood*, 29 Misc. 590.

Exemption from liability for "loss or breakage" was held not an exemption from liability for negligence. *Hutkoff v. Pennsylvania R. Co.*, 29 Misc. Rep. 170.

Exemption from liability for loss of goods by breakage not allowed unless such loss was due to other causes than carrier's negligence. *Steele v. Townsend*, 37 Ala. 247.

Carrier cannot by special agreement, limit his liability for loss of luggage of free passenger from negligence, even as to value. *Mobile &c. R. Co. v. Hopkins*, 41 Ala. 486.

Carrier of goods may limit liability as common carrier but not that for loss from negligence. *South &c. R. Co. v. Henlein*, 52 Ala. 606.

Under special contract carrier will not be liable for damage to stock from their inherent nature; reduced rates in consideration of certain value agreed upon will determine carrier's limit of liability. *South &c. R. Co. v. Henlein*, 52 Ala. 606.

A limitation to twenty dollars per barrel of alcohol in consideration of reduced rates will not be enforced, when loss of the same is due to carrier's want of care, skill or diligence. *Ala. &c. R. Co. v. Little*, 71 Ala. 611.

Contract relieving carrier from liability for all but "gross or wanton negligence," will not be enforced. *Ala. &c. R. Co. v. Thomas*, 83 Ala. 343.

Where limitation as to value of furniture was in consideration of a reduced rate of freight, such limitation is a valid release from carrier's liability for negligence. *Louisville &c. R. Co. v. Sherrod*, 84 Ala. 178.

A clause limiting carrier's liability to \$5 per 100 lbs. without regard to the value of the goods not binding on the shipper. *Georgia Pac. R. Co. v. Hugbart*, 90 Ala. 36.

A stipulation for exemption from liability for loss by fire relieves

carrier of absolute common law liability but leaves it with the duty to exercise due care. *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523.

Notwithstanding a provision that liability as a carrier should cease immediately upon the goods reaching their destination, such liability continued a reasonable time thereafter for their removal. *Tallassee &c. Co. v. Western R. Co.*, 128 Ala. 167.

Where the value to which liability is limited is greatly below the true value, the stipulation is void, though founded on a reduced rate and the carrier is not informed as to the true value. *Southern R. Co. v. Jones*, (Ala.) 31 South. Rep. 501.

Carrier of goods may limit liability as common carrier, but not that for loss from negligence. *Little Rock &c. R. Co. v. Talbot*, 39 Ark. 523.

The fact that a contract limiting the carrier's liability was signed under a mistake as to its contents, will not avail the consignor after it has been acted upon by both parties. *St. Louis &c. R. Co. v. Weakly*, 50 Ark. 397.

May restrict its liability to its own line. *Little Rock &c. R. Co. v. Odum*, 63 Ark. 326.

Carrier's receipt restricting its liability to that of forwarder; held not to relieve it of liability for negligence of employes of a boat owned by others but used by it in its business. *Hooper v. Wells*, 27 Cal. 11.

A carrier, being under no duty to carry dangerous articles can not make any stipulation concerning the carriage of blasting powder it pleases; e. g. an exemption from loss by fire from any cause whatsoever. *California Powder Works v. Atlantic &c. R. Co.*, 113 Cal. 329.

Limitation of liability to \$50 unless value is stated, held reasonable in cases not involving gross negligence. *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683.

A stipulation for exemption "from responsibility as master over its agents or servants" construed to apply to negligence of servants and not to cover a compliance by them with its orders. *Pierce v. Southern P. Co.*, 120 Cal. 156; s. c., 40 L. R. A. 354; aff'g s. c., 47 Pac. Rep. 844; s. c., 40 L. R. A. 350.

A stipulation confining liability for loss of goods to their value at the place of shipment held valid. *Id.*

No exemption from liability for loss of goods from negligence is allowed in Colorado. *Milton v. Denver &c. R. Co.*, 1 Colo. App. 307.

See *Merchants' Despatch, &c. Co. v. Comfort*, 3 Colo. 280; *Carr v. Schafer*, 15 Colo. 48; nor in the federal courts. *Monroe v. The Iowa*, 50 Fed. R. 561.

Carrier of goods may limit liability as common carrier but not that for loss from negligence; but limitation as to value to be recovered was binding. *Hale v. N. Y. S. Nav. Co.*, 15 Conn. 539.

*Lawrence v. N. Y. R. Co.*, 36 Conn. 63; *Peck v. Weeks*, 34 id. 145.

The breaking of the leg of a mare, is not covered by limitation of liability for damage to stock from "breaking" and "chafing." *Coupland v. Housatonic R. Co.*, 61 Conn. 531.

Holder of stock pass containing exemption from liability allowed to recover for negligence. *Flinn v. Phila. &c. R. Co.*, 1 Houst. 469.

The spoiling of fish for lack of ice, when, during a gale, the steamer's steering apparatus became so damaged that it had to put into port for some time, and, being unable to restock, the ice gave out, held within an exemption from "perils of the sea." *Clyde Steamship Co. v. Burrows*, 36 Fla. 121.

No limitation of liability for injury to goods from negligence allowed. *Berry v. Cooper*, 28 Ga. 543.

In an action to recover the value of some cotton destroyed by the burning of defendant's boat, the defense was a special contract exempting from liability in case of fire. The burden of proof was on the defendants to show that they were not negligent. *Berry v. Cooper*, 28 Ga. 543.

For a consideration limitation allowed where damage occurred from overloading, suffocation, etc., of stock, i. e., things apart from conduct of train. *Mitchell v. Georgie R. Co.*, 68 Ga. 644.

Shipper can exempt from liability for damage to machinery caused by weather or rust, but if unreasonable delay result in damage from weather or rust, liability attaches. *Western &c. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522.

Carrier of live stock may limit his liability, except for gross negligence. *Copper v. Raleigh &c. R. Co.*, 110 Ga. 659.

Assent by the shipper to a condition in a bill of lading made as receipt by the carrier, and limiting its liability, is a question of fact for the jury; but limitation in a contract signed by the shipper is to be construed by the court. *Coles v. Louisville &c. R. Co.*, 41 Ill. App. 607.

Contract exempting from liability for all but gross negligence is valid. *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Arnold v. Ill. Cent. R. Co.*, 83 Ill. 213.

Carrier cannot contract against gross negligence; but if loss of stock was due to ordinary negligence liability may be limited to \$100 a head as stated in the receipt. *Chicago &c. R. Co. v. Chapman*, 133 Ill. 96.

A receipt given by the railroad company for goods shipped is not a contract of shipment; and the shipper is not bound unsigned by conditions on its back limiting the carrier's liability. *Merchants' Despatch &c. Co. v. Furthman*, 149 Ill. 66.

Limitation of liability for "decay of perishable articles, or injury by heat or frost" construed not to cover loss of hams from defective refrigerator car. *Chicago &c. R. Co. v. Davis*, 159 Ill. 53.

A carrier who failed to transfer a load of hogs within a reasonable time to a connecting carrier is liable for damage to them although it had stipulated against liability for ordinary negligence. *Rock Island &c. R. Co. v. Potter*, 36 Ill. App. 590.

Restriction of the amount of recovery for loss of a horse not permitted to cover loss from negligence. *Chicago &c. R. Co. v. Grimes*, 71 Ill. App. 397.

Carrier not permitted to limit his liability for negligence. *Cleveland &c. R. Co. v. Newlin*, 74 Ill. App. 638; *United States Ex. Co. v. Coffman*, 84 id. 491.

Carrier may limit his liability to injuries on his own line. *Chicago &c. R. Co. v. Smith*, 81 Ill. App. 364.

Where no reduction in rate of freight is made limitation of liability for loss by negligence is not allowed. *Adams Express Company v. Harris*, 120 Ind. 73.

Limitation of damages for loss, through negligence, of fruit trees, not allowed unless in consideration of reduced rates. *Adams Exp. Co. v. Harris*, 120 Ind. 73.

Stipulation for exemption from loss by fire, held valid to the extent that it did not include negligence. Railroad company not negligent in failing to put cars under fire and police protection. *Insurance Co. of North America v. Lake Erie &c. R. Co.*, 152 Ind. 333.

Carrier not permitted to exonerate itself by stipulation from liability for negligence, nor to limit amount of recovery; but may agree with shipper as to value. *Baltimore &c. R. Co. v. Ragsdale*, 14 Ind. App. 406.

That water froze in the pipe of an engine was not within an exemption of "stress of weather," where, though very cold, such weather was to be expected at that time of the year. *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47.

Limitation of liability for loss by fire did not limit liability through loss by negligence in placing open spaced cattle cars, bedded with straw near an engine liable to emit sparks. *Parrill v. Cleveland &c. R. Co.*, 23 Ind. App. 638.

Company may limit its liability to the agreed value of the article based on a valuable consideration and a sufficient understanding of the matter. *Adams Exp. Co. v. Carnahan*, (Ind. App.) 63 N. E. Rep. 245.

A phrase "contents and value unknown" did not restrict the effect of knowledge gained from manner of shipment, which was such that the goods were visible and open to inspection. *Gulf &c. R. Co. v. Jones*, (Ind. Terr. App.) 37 S. W. Rep. 208.

Limitation as to value was void under a statute prohibiting exemptions in cases where there was any common law liability aside from contract, and fraudulent representations by the shipper to get cheaper freight rates did not prevent proof of full value. *Lucas v. Burlington &c. R. Co.*, 112 Iowa 594.

See, also, *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659; *Burgher v. Chicago &c. R. Co.* 105 id. 335.

Special contract in this particular case (shipper accepted it after having shipped according to general notice); did not restrict liability. *Kansas P. R. Co. v. Reynolds*, 17 Kan. 251.

Carrier cannot limit his liability by a contract signed by shipper, when no other alternative was given shipper. *Atchison &c. Tr. Co. v. Dill*, 48 Kan. 210.

A shipper must have the alternative of shipping under the common law liability or under liability for restricted value in consideration of reduced rates. *Atchison &c. R. Co. v. Dill*, 48 Kan. 321.

See, also, *St. Louis & R. Co. v. Piper*, 13 Kan. 505.

Stipulation against loss without permission or the order of board of railroad commissioners, as prescribed by statute, was void. *St. Louis &c. R. Co. v. Sherlock*, 59 Kan. 23; *St. Louis &c. R. Co. v. Tribbey*, 6 Kan. App. 467.

A stipulation requiring a shipper of stock injured to give notice of same before removal of the stock from place of delivery, is waived when the fact of the injury was known to the company. *Owen v. L. & N. &c. Co.*, 10 Ky. L. J. 554.

Damages for loss of goods destroyed by carrier's negligence not confined to the value given in the contract; the full value of such goods is recoverable. *Baughman v. L. E. &c. R. Co.*, 14 Ky. L. R. 775.

A stipulation against loss by "heat, water, dirt or fire" was not effective, where loss by fire was through negligence. *Louisville &c. R. Co. v. Plummer*, (Ky.) 35 S. W. Rep. 1113.

A stipulation in a through contract containing an exemption from loss on a connecting line was invalid as an attempt to avoid liability for acts of agents and not an attempt to limit its common law liability under Const. sec. 196. *Ireland v. Mobile &c. R. Co.*, (Ky.) 49 S. W. Rep. 188, 453.

A carrier cannot by a limitation as to value limit its liability for negligence. *Cincinnati &c. R. Co. v. Graves*, (Ky.) 52 S. W. Rep. 961.

Kentucky Constitution, sec. 196, prohibiting stipulations against a carrier's common law liability, does not apply to a corporation doing business outside of the state. *Tecumseh Mills v. Louisville &c. R. Co.*, (Ky.) 57 S. W. Rep. 9; s. c., 49 L. R. A. 557.

Nor prevent an initial carrier on a through contract from limiting its liability to its own line. *Pittsburg &c. R. Co. v. Viers*, (Ky.) 68 S. W. Rep. 469; *Louisville &c. R. Co. v. Tarter*, 39 id. 698.

No liability for damage from rain, as per stipulation, when shippers were present at the loading of cotton, during a rain storm. *Newman v. Smoker*, 25 La. Ann. 303.

Stipulation against loss of cotton by fire did not limit carrier's liability for lack of care in preventing discharge of fireworks in the vicinity. *Maxwell v. Southern P. R. Co.*, 48 La. Ann. 385.

Liability may be limited as to value, but no limitation allowed for negligence. *Sager v. P. I. & P. R. Co.*, 31 Me. 228.

Carrier is liable for deficiency in weight of corn notwithstanding bill of lading stipulating against such liability, the action being based on carrier's negligence. *Willis v. Grand Trunk R. Co.*, 62 Me. 488.

Limitation as to value recoverable binding. *Brekme v. Dunsmore*, 25 Md. 328.

Stock; contract exempting from liability for loss, delay &c., valid. *Balt. &c. S. Co. v. Brady*, 32 Md. 333.

In consideration of reduced rates a common carrier of stock could limit the owner's recovery to \$200 a head; owner to take risk from heat &c., and manner of loading. *Squire v. N. Y. &c. R. Co.*, 98 Mass. 239.

Carrier cannot by special contract exempt itself from liability for destruction through their negligence of "iron furnace cone." *School District &c. v. Boston &c. R. Co.*, 102 Mass 552.

Delay, but for which goods would not have been injured, excused by special contract although due to negligence. *Hadley v. No. Trans. &c. Co.*, 115 Mass. 304; and see as to value, *Hill v. Boston &c. R. Co.*, 144 Mass. 284.

A stipulation in a bill of lading against liability unless written claim is presented within 30 days, held invalid, but a provision that suit shall be brought within three months held valid. *Cox v. Central Vt. R. Co.*, 110 Mass. 129.

Railroad company makes "delivery" within a stipulation relieving it from liability after delivery to a connecting carrier, by giving notice by letter to the steamship company in which the latter apparently acquiesces, that the goods are ready on the railroad company's dock. *Washburn-Crosby Co. v. Boston &c. R. Co.*, 180 Mass. 252.

Exemption from liability for damage "in loading, unloading, conveyance or otherwise," does not extend to the furnishing of unsuitable cars. *Harkins v. Great Western R. Co.*, 11 Mich. 51.

When defendant company took its charter, live-stock was not one of the kinds of property transported and therefore it could not become a

common carrier of stock, unless by special contract, or by holding itself out as doing such business. *Michigan &c. R. Co. v. McDonough*, 21 Mich. 165.

*Lake Shore &c. R. Co. v. Perkins*, 25 Mich. 329.

A carrier may stipulate that the corporation will be liable as warehousemen only, for property when in their storehouse. *Feige v. Michigan C. R. Co.*, 62 Mich. 1.

A contract which states that "corporation will be liable as warehousemen only, for property when in their storehouse" concludes the owner suing for loss of goods by fire. *Feige v. Michigan C. R. Co.*, 62 Mich. 1.

Limitation of liability in a receipt to \$50, unless value is otherwise stated therein for loss by fire not due to its negligence, and while on contracting carrier's own line, held valid. *Smith v. American Express Co.*, 108 Mich. 572.

Carrier receiving goods billed through with limitation of liability to its own line, held not liable for delay due to negligent change of way bill by connecting carrier. *Hope v. Delaware &c. Canal Co.*, 111 Mich. 209.

Proof of delivery in good condition to a connecting carrier and injury through its neglect to promptly forward, throws upon it the burden to show contract limiting its common law liability. *Bonfiglio v. Lake Shore &c. R. Co.*, 125 Mich. 476.

Carrier cannot limit his liability for loss from negligence by special contract either for the whole or a part of the stock shipped. *Moulton v. St. Paul &c. R. Co.*, 31 Minn. 85.

Under a limitation in a contract for carrying a horse, of liability for loss "by jumping from the cars," if plaintiff left the horse tied in a car near an open door he cannot recover. *Hutchinson v. Chicago &c. R. Co.*, 37 Minn. 524.

To secure a reduced rate it was agreed in case of loss that the goods should be valued at a sum below the real value, at which the rate would have been much higher. The goods having been lost through negligence, the shipper was bound by the agreement. *Douglas Co. v. Minnesota &c. R. Co.*, 62 Minn. 288.

See, also, *Blair v. Northern &c. R. Co.*, 53 Minn. 160.

Stipulation fixing value as that at the place of shipment without reduction for freight received, was held unreasonable and void. *Shea v. Minneapolis &c. R. Co.*, 63 Minn. 228.

But it was valid, where the stipulation did not exclude from computation such freight charges. *Davis v. New York R. Co.*, 70 Minn. 37.

Carrier may limit its common law liability to a reasonable extent.

making the limit the basis of its right to compensation. *O'Malley v. Great Northern R. Co.*, (Minn.) 90 N. W. Rep. 974.

Notwithstanding contract of exemption, defendant liable for loss of barrel of whiskey. *So. Expr. v. Moon*, 39 Miss. 822.

Stock; common carrier's liability may be limited; *no* limitation for negligence allowed. *Chicago &c. R. Co. v. Abel*, 60 Miss. 1017.

Limitation as to value was valid when loss was not due carrier's negligence. *So. Exp. Co. v. Seide*, 67 Miss. 609.

Insufficient ventilation of a stock car is not a risk assumed by a shipper under a contract relieving company from injuries to the animals in consequence of heat, suffocation, or other ill effects of being crowded in the cars. *Kansas City &c. R. Co. v. Holland*, 68 Miss. 351.

Exemption from liability for injuries caused by animals being wild or weak or maiming one another may be contracted for. *Illinois C. R. Co. v. Scruggs*, 69 Miss. 418.

But it may by a fair and reasonable contract limit its common law liability as insurer. *Newberger Cotton Co. v. Illinois C. R. Co.*, 75 Miss. 303.

A carrier cannot limit its liability for negligence. A limitation of liability to the value at the place of shipment, held invalid. *Illinois C. R. Co. v. Bogard*, 78 Miss. 11.

No exoneration from liability for the negligence of carrier's servants. *Doan v. St. Louis &c. R. Co.*, 38 Mo. App. 408.

Liability as insurer may be limited, but not for negligence. *Levering v. Union Transp. Co.*, 42 Mo. 88.

Special contract will not avoid liability for negligence. *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440.

Carrier cannot, under a statute imposing liability on a carrier for negligence of a connecting carrier to whom the goods are delivered, limit its liability to its own line, where it makes a "through shipment" over the route of a connecting carrier; but it may limit its duty and obligation to transport over its own line. *McCann v. Eddy*, 133 Mo. 59; s. c., 35 L. R. A. 110; *State Nat. Bank v. Chicago &c. R. Co.*, 72 Mo. App. 82.

A stipulation restricting liability to a stipulated valuation is not binding in absence of consideration. *Kellerman v. Kansas City &c. R. Co.*, 136 Mo. 117; aff'g s. c., 68 Mo. App. 255.

A constitutional provision "that the liability of railroad corporations as common carriers shall never be limited" construed not to prevent limitation of liability of a carrier to loss on its own line in case of shipment over the lines of connecting carrier. *Miller Grain &c. Co. v. Union P. R. Co.*, 138 Mo. 658.



Limitations as to value in consideration of special rates were not effective, where the regular rate was actually charged. *Ward v. Missouri P. R. Co.*, 158 Mo. 226.

Limitation of liability to actual expenses for food and water during a delay in transportation of animals from any cause whatever, held unreasonable and void as to delays caused by negligence. *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461.

Valid limitation of liability to its own line does not prevent recovery for loss on connecting line due to negligence of initial carrier. *Popham v. Barnard*, 11 Mo. App. 619; *Willock v. Missouri P. R. Co.*, 79 id. 76 (failure to stop *in transitu* resulted from delay of initial carrier); *Hall v. Wabash R. Co.*, 80 id. 463 (delay due to failure to give connecting carrier address of consignee and order to notify him on arrival).

Limitation as to value was valid where the carrier was sued on his common law liability. *Goodman v. Missouri &c. R. Co.*, 71 Mo. App. 469.

Limitation as to value was valid where it did not operate as a limitation of liability for negligence. *Wyrick v. Missouri &c. R. Co.*, 74 Mo. App. 406.

Provision that loss shall be computed at the place of shipment construed to refer to injury in carriage and not to delay therein. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

Special contract will not relieve carrier of stock from liability for damage to it through its own negligence. *Atchison &c. R. Co. v. Washburn*, 5 Neb. 117. By constitution, liability may not be limited.

Limitation of liability from loss "howsoever occurring, by fire or otherwise, or whether by negligence of said railway or transportation companies or of their officers, agents," &c., held void under a constitutional provision that "the liability of railroad corporations as common carriers shall never be limited." *Pennsylvania Co. v. Kennard Glass &c. Co.*, 59 Neb. 435.

No question of limitation by contract. *Hall v. Cheney*, 36 N. H. 26.

Person engaged in towing boats cannot exempt himself for liability for his own or his servant's negligence. *Ashmore v. Penn. Transf. Co.*, 4 Dutch. (N. J.) 180.

Exemption from loss during transportation or by delay after transportation was construed not to cover negligence. *Taylor v. Pennsylvania R. Co.*, 8 N. J. Law. J. 149.

Limitation as insurer valid, but liable for want of ordinary care, notwithstanding. *Smith v. R. Co.*, 64 N. C. 235.

Unreasonable delay is not contracted against by "at the convenience of the company." *Branch v. Wilmington &c. R. Co.*, 88 N. C. 573.

A regulation requiring notice to carrier of owner's claim for damage to stock before the removal of the same is reasonable. *Selby v. Wilmington &c. R. Co.*, 113 N. C. 588.

A carrier can not relieve itself from gross negligence by contracting for exemption therefrom. *Wood v. Southern R. Co.*, 118 N. C. 1056.

The word "released" in stipulation limiting liability, construed to mean exemption from the common law liability as insurer and held valid so far as it did not involve exemption from negligence. *Morganton Man. Co. v. Ohio River &c. R. Co.*, 121 N. C. 514.

A carrier cannot relieve itself of liability for negligence *pro tanto* by limiting the amount for which it is liable unless the agreement therefor is reasonable. Fixing the value of property worth \$218 at \$46.60 held not reasonable. *Gardner v. Southern R. Co.*, 127 N. C. 293.

Negligence cannot be contracted against. *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *N. S. Ex. Co. v. Bachman*, 28 Ohio St. 144; *Cincinnati &c. R. Co. v. Berdan*, 22 Oh. C. C. 326.

Stipulation "that in case of any loss or danger, the liability of said company and of any connecting line shall not exceed \$100 per head," involved a limitation of liability from negligence which was invalid. *Pittsburgh &c. R. Co. v. Sheppard*, 56 Ohio St. 68.

Limitation of liability to an agreed valuation, as distinguished from a limitation of liability regardless of value, was held valid though applicable to loss by negligence. *Cleveland &c. R. Co. v. Simon*, 15 Oh. C. C. 123.

Limitation of liability by a carrier to its own line was held valid. *Stevens v. Lake Shore &c. R. Co.*, 20 Oh. C. C. 41.

Mere recitation of words "not accountable for contents in a receipt, accepted by a shipper do not, in the absence of express assent, constitute an agreement to limit the carrier's liability. See *Seller v. Pacific &c. R. Co.*, 1 Ore. 409.

No exemption from liability for gross negligence. *Penn. R. Co. v. McCloskey*, 11 Harris (Pa.) 526.

Goods: liability may be restricted to that of bailee for hire, when ordinary care only is required. *Cotton v. C. & P. Co.*, 67 Penn. St. 211.

A receiving carrier can limit his liability for loss of goods while in connecting carrier's hands to that of forwarder, i. e., reasonable care and diligence. *American Express Co. v. Second Nat. Bank*, 69 Pa. St. 394.

Loss of goods from negligence is not avoided by special contract exempting carrier. *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523.

Stipulation that goods unloaded on a platform where the carrier maintains no building or agent shall be at shipper's risk, was valid. *Allam v. Pennsylvania R. Co.*, 183 Pa. St. 174; s. c., 39 L. R. A. 535.

A horse, shipped from New York to Pennsylvania under a bill of lading limiting liability to \$100, was negligently injured in the latter state. The contract was construed according to the laws of Pennsylvania and held void, though it was valid in New York. *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222.

Exemption from loss by "breakage" or "leakage" construed not to include loss occasioned by the head coming out of a barrel. *Menner v. Delaware &c. Canal Co.*, 7 Pa. Super. Ct. 135.

Carrier was not liable for the negligence of a connecting carrier, where it limited its liability to its own line. *Keller v. Baltimore &c. R. Co.*, 16 Pa. Super. Ct. 240.

Carrier was relieved of common law liability, where it limited its liability to the negligence of its servants or agents. *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47.

See, also, *Davenport Co. v. Pennsylvania R. Co.*, 173 Pa. St. 398.

Loss from cars, placed on tracks assigned for further transportation, but, before actual delivery to the connecting carrier, relieves the latter within an exemption from loss not occurring on its own line. *Adler v. Pittsburgh &c. R. Co.*, 29 Pitts. L. J. (N. S.) 409.

Stipulation that "all articles of freight, on arrival at place of destination, are at the risk and expense of the owner" did not exempt carrier from negligence. *Springs v. South Bound R. Co.*, 46 S. C. 104.

A provision that loading, unloading and transferring cattle shall be done by the shipper, with the assistance of the railroad employes, and at his own risk was held invalid as exempting the carrier for negligence as to its part therein. *Crawford v. Southern R. Co.*, 56 S. C. 136.

Where liability is limited to its own line, a carrier is not liable for loss on a connecting line. *Dunbar v. Charleston &c. R. Co.*, (S. C.) 40 S. E. Rep. 884.

Goods at "owner's risk" does not exempt from liability &c., from negligence. *Nashville &c. R. Co. v. Johnson*, 6 Heisk. 211.

Under a stipulation that the carrier should not be liable for loss of money unless a claim therefor was made within a certain time, plaintiff's action was not defeated if good ground for not making such claim was shown to exist. *Glenn v. Southern Exp. Co.*, 86 Tenn. 594.

No exemption allowed in whole or in part from liability for injuries to stock for negligence. *R. Co. v. Wynn*, 88 Tenn. 320.

Limitation of liability for loss of cotton by accidental fire held not valid for want of a *bona fide* consideration. *Railroad v. Gilbert*, 88 Tenn. 430; *Railway v. Manchester Mills*, id. 653.

Exemption from liability for loss by negligence cannot be stipulated for; but, for a consideration as, for lower rates, limitation as to value

of live stock shipped, although such value be less than that proved, is valid. *Railway Co. v. Sowell*, 90 Tenn. 17.

Bills of lading exempting from liability must be strictly construed; and loss of cotton, while in warehouse of express company, will be laid at carrier's door, although the contract exempted liability for burning of cotton while in depots or in transit. *Deming v. Merchants' Cotton-Press Co.*, 90 Tenn. 306.

A stipulation that "in case of loss, damage, detriment or delay, that shall alone be responsible" did not relieve a carrier of goods on a through road, in whose actual custody the goods were at the time of such loss etc., contract from the negligence of a connecting carrier employed by it resulting in delay. *Bird v. Railroads*, 99 Tenn. 719.

Initial carrier was liable for a delay caused by its misdirecting the goods, notwithstanding it stipulated against liability for loss occurring on other lines. *Illinois C. R. Co. v. Southern &c. Cabinet Co.*, 104 Tenn. 568.

Stipulation in contract exempting from liability for delay in transportation of bees does not avail when negligence caused the delay. *Missouri P. R. Co. v. Cornwall*, 70 Tex. 611; *R. Co. v. Harris*, 67 id. 166.

Giving the value of goods consigned affords the carrier an opportunity to fix compensation for the labor and risk involved but it does not limit his liability for loss through negligence. *Southern Pacific Co. v. Maddox*, 75 Tex. 300.

A stipulation restricting carrier's liability for loss of cattle shipped to their value at the time and place of shipment is void. *Missouri P. R. Co. v. Edwards*, 78 Tex. 307.

See *Galveston &c. R. Co. v. Ball*, 80 Tex. 602.

Limitation of liability by contract in transportation of live stock cannot be for less than the value of the property injured. *Fort Worth &c. R. Co. v. Greathouse*, 82 Tex. 104.

A limitation, in the contract of a carrier receiving goods to be transported beyond its own terminus, exempting from liability except for damages received on its own line, is valid. *Nines v. St. Louis &c. R. Co.*, 107 Mo. 475; *McCarn v. International &c. R. Co.*, 84 Tex. 352.

Upon the principle of strict construction against the carrier, it was held that a stipulation against liability for loss while "in transit or while in depot or place of transshipment, or of landing at place of delivery," did not cover loss on the platform of a compress company awaiting shipment. *Amory Man. Co. v. Gulf &c. R. Co.*, 89 Tex. 419.

A statutory prohibition against limitation of common law liability held not to prevent stipulation against liability for injuries by over-

loading by owner, or inherent character in shipment of animals. *Texas &c. R. Co. v. Stribling*, (Tex. Civ. App.) 34 S. W. Rep. 1002.

Limitation by a carrier of its liability to its own line in case of an interstate shipment held valid. *Gulf &c. R. Co. v. Crossman*, 11 Tex. Civ. App. 622.

An exemption from loss by fire or dangers of the seas in an interstate shipment is valid to the extent that it does not cover negligence, and the amount may be limited to value at the place of shipment: but a provision that no presumption of negligence should arise from non-delivery is invalid. *Southern P. R. Co. v. Phillipson*, (Tex. Civ. App.) 39 S. W. Rep. 958.

Stipulation that shipper shall feed and water cattle carried, being recognized by statute, was valid, and not repugnant to a statutory provision forbidding limitation of common law liability. *Texas &c. R. Co. v. Davis*, (Tex. Civ. App.) 40 S. W. Rep. 167.

Limitation of liability by a carrier to loss on its own line was valid, though, in a through contract, it held itself out as partner of the connecting carrier. *Galveston &c. R. Co. v. Houston*, (Tex. Civ. App.) 40 S. W. Rep. 842.

Limitation as to value in shipment within the state was invalid under a statute prohibiting carriers in the state to limit their common law liability. *Pacific Ex. Co. v. Hertzberg*, 17 Tex. Civ. App. 100.

Limitation of liability to value at the place of shipment and exemption from loss by overloading held invalid under same statute. *International &c. R. Co. v. Parish*, 18 Tex. Civ. App. 130.

Limitation of liability to value at place of shipment, though beyond the state, is void as against public policy. *Southern P. R. Co. v. D'Arcais*, (Tex. Civ. App.) 64 S. W. Rep. 813.

Limitation of liability to value stated in an interstate contract made in Illinois where it was prohibited by statute, held void in Texas through which the goods were also transported. *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595.

Loss of goods; limitation of liability as common carrier allowed, but no exception of same for loss from *gross negligence*. *New Jersey S. Nav. Co. v. Bank*, 6 How. (U. S.) 344.

Carrier of goods liable for loss by fire from negligence notwithstanding limitation. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

Recovery for loss of valuable race horses through negligence was limited to the value set upon them in contract between shipper and company. *Hart v. Penn. R. Co.*, 112 U. S. 331.

But the insurance company may not maintain an action against the carrier inconsistent with an agreement in a bill of lading giving carrier

the benefit of any insurance effected. *Phoenix &c. Co. v. Erie &c. Transp. Co.*, 117 U. S. 312.

Liability for loss of cotton by fire is not limited by bill of lading stipulating that "company shall have the benefit of any insurance which may have been effected upon said cotton," when action is brought before insurance is paid according to the agreement between the consignor and the insurance company. *Inman v. South Car. &c. R. Co.*, 129 U. S. 128.

An exemption from "accident to or mortality of animals from whatever cause arising" or "accidents of navigation of whatever kind even when occasioned by the negligence or default or error in judgment of the pilot, master or mariners," etc., did not cover a wrongful jettison of sound cattle, through a misapprehension of danger of perils of the sea. Nor was such negligence excused under the stipulation "on deck at owner's risk." *Compania de Navigacion la Flecha v. Brauer*, 168 U. S. 104.

Goods do not "await further conveyance" within a stipulation limiting liability under such circumstances to that of a warehouseman, where the connecting carrier unloads them upon its pier without notifying the next carrier. *Texas &c. R. Co. v. Reiss*, 183 U. S. 621; aff'g s. c., 99 Fed. Rep. 1006.

Nor was mere notice available, where according to custom, the latter did not take possession until a ship was sent to the pier for the purpose. *Texas &c. R. Co. v. Cullender*, 183 U. S. 632; aff'g s. c., 98 Fed. Rep. 538.

Liability resulting from defective machinery cannot be limited by a clause in a bill of lading inserted in the midst of a long list of limitations, relating to matters likely to happen after the beginning of the voyage. *The Caledonia*, 43 Fed. Rep. 681.

Extraordinary damage to a cargo of beans from rats is chargeable to carrier, notwithstanding the bill of lading exempted from liability for damage by vermin. *Nordlinger v. Nelson*, 46 Fed. Rep. 859.

Provision in a bill of lading that notice of damage to goods shall be given carrier before removal from the ship is reasonable. *Angel v. Cunard S. Co.*, 55 Fed. Rep. 1005.

Accident to train due to negligence will not relieve carrier for loss through failure to unload stock for more than twenty-eight consecutive hours. *Newport &c. Co. v. U. S.*, 61 Fed. Rep. 488.

Limitation of liability to one pound sterling for each animal shipped was not an agreed valuation nor a stipulation in liquidation of damages and did not prevent recovery for negligence or unjustifiable deviation. *Schwarzchild v. National Steamship Co.*, 74 Fed. Rep. 257.

Independent parts of a car such as axles, etc., unconnected with the operation of the locomotive are not within the term "accidents to boilers or machinery," stipulations limiting liability being strictly construed against the carrier. *Fairbank & Co. v. Cincinnati &c. R. Co.*, 81 Fed. Rep. 289; s. c., 38 L. R. A. 271.

A carrier cannot exempt itself from loss by fire through negligence. *Liverpool &c. Ins. Co. v. McNeill*, 89 Fed. Rep. 131.

Exemptions from defects in a refrigerating apparatus covered a loss, where a washer was inadvertently left in the pipes by the constructors, though a proper test had failed to reveal the defect. *The Prussia*, 93 Fed. Rep. 837; aff'd s. c., 88 id. 531.

Provision limiting liability upon delivery upon wharf from boats does not violate a statutory prohibition against limitation of liability of a carrier for loss by fire on board the vessel. *The City of Clarksville*, 94 Fed. Rep. 201.

Provision of a bill of lading that "cotton is excepted from any clause herein on the subject of fire and the carrier shall be liable as at common law," was construed to make the common law applicable to all provisions of the contract and not to those only which relate to fire. *Texas &c. R. Co. v. Callender*, 98 Fed. Rep. 538; s. c. aff'd, 183 U. S. 632.

Limitation of liability to an agreed value, held valid and not within a statute prohibiting a carrier from limiting its liability for safe delivery, etc. *Jennings v. Smith*, 99 Fed. Rep. 189. See, also, *Jennings v. Smith*, 106 Fed. Rep. 139.

Under a stipulation containing an exemption from loss by fire without its negligence and a provision that it should not be bound to carry beyond the convenient conduct of the business, a carrier was not liable for loss from fire, not due to its fault, where the goods were not transported by the first vessel on account of lack of room and they would not have been destroyed if so transported. *The Nutmeg State*, 103 Fed. Rep. 797.

Shipper is bound by an exemption from loss by fire without negligence, where he was chargeable with notice of the clause in the bill of lading. *Caw v. Texas &c. R. Co.*, 113 Fed. Rep. 91.

By contract a common carrier may limit its liability to that of private carrier in the transportation of stock. *Kimball v. Rutland &c. R. Co.*, 28 Vt. 247.

Goods: printed notices do not exempt, etc., for failure to use ordinary care. *Maine v. Birchard*, 40 Vt. 326.

Common carrier's liability may be limited; no limitation for *negligence* allowed. *Va. &c. R. Co. v. Sayers*, 26 Gratt. 328.

A stipulation containing an exemption from losses from "loading, unloading," etc., and requiring shipper to load and unload, did not exempt

a carrier from liability for failure to provide proper facilities therefor under a statute imposing that duty on the carrier. *Chesapeake &c. R. Co. v. American Exch. Bank*, 92 Va. 495.

Limitation of liability by a carrier to its own line was permitted under a statute providing for such exemption by a contract in writing and requiring proof of proper delivery to connecting carrier within reasonable time after demand therefor by consignor. *Norfolk &c. Co. v. Reeves*, 97 Va. 284.

A shipper who has had the benefit of lower rates by reason of a low valuation of his goods is estopped from claiming a higher value than he gave. *Zouch v. Ches. &c. R. Co.*, 36 W. Va. 524.

Cannot contract against negligence, but may against common law liability. *Berry v. West Va. &c. R. Co.*, 44 W. Va. 538.

Under a contract providing for the discharge of liability upon delivery to a connecting steamship company or on its pier, the putting of goods on its own wharf was not a sufficient delivery. *Lewis v. Chesapeake &c. R. Co.*, 47 W. Va. 656.

Carrier may contract against all risk of damage to live stock from whatever cause, it being a kind of carrying not known when railways originated. *Betts v. Farmers' &c. Trust Co.*, 21 Wis. 80.

Carrier cannot contract against gross negligence. *Annas v. Milwaukee R. Co.*, 67 Wis. 46.

Limitation of liability as insurer, but not for negligence, allowed. *Scholler v. Chicago &c. R. Co.*, 97 Wis. 31.

Exemption from liability for injuries to animals by each other and in loading and unloading, construed not to cover injuries from the driving them loose into a pen instead of leading them separately. Limitation to an agreed value, held valid. *Loeser v. Chicago &c. R. Co.*, 94 Wis. 571; *Uhlman v. Chicago &c. R. Co.*, 112 id. 108.

Stipulation that shipper was to assume risk of insecurity of floors, did not cover defects patent to an experienced inspector but latent as to an ordinary person. *Leonard v. Whitcomb*, 95 Wis. 646.

Exemption from liability from loss due to changes in weather, heat or decay, construed not to cover loss of strawberries from delay in icing them during transportation. *Lamb v. Chicago &c. R. Co.*, 101 Wis. 138.

An exemption as to causes beyond its control as heat, etc., relieved a carrier, where loss by heat was not shown to have occurred by reason of its negligence. *Densmore Commission Co. v. Duluth &c. R.*, 101 Wis. 563.

Carrier, on valid consideration, may curtail its liability except for negligence. *Ullman v. Chicago &c. R. Co.*, 112 Wis. 150, 168.



## 2. CARRIERS OF PASSENGERS.

Unless there be an express agreement exempting it, the carrier of passengers, with or without compensation, is liable for negligence; yet, the compensation may have bearing on the degree of negligence, which will make the carrier liable. Plaintiff was a mail agent and claimed that contract made with the government inured to his benefit, whereby the defendant became obligated to carry him for a consideration; the court held otherwise; yet, although a gratuitous passenger, the carrier owed him such care at least as would be due from a gratuitous bailee, and would be liable for culpable neglect. *Nolton v. Western R. Co.*, 15 N. Y. 444, overruling demurrer to complaint.

Notwithstanding the disability attached to general notices, not only posted notices, but also the statement on the ticket were regarded as important as *against* the carrier in *Quimby v. Vanderbilt*, 17 N. Y. 306.

The contract between the defendant and a gratuitous passenger, exempting the defendant from liability for negligence slight or gross, is valid. The plaintiff paid no fare, but was carried under a free ticket, on which was printed the following words: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees, that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181, aff'g judg't for pl'ff. *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 id. 80.

**From opinion.**—"It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of negligence, in respect to the liability of common carriers, is discarded as illusory and impracticable. See *Steamboat New World v. King*, 16 How. 474; *Wilson v. Brett*, 11 Mees. & Wels. 113; *Hintin v. Dibbin*, 2 Ad. & Ell. (N. S.) 646, 661; *Blyth v. Water Works*, 36 Eng. L. & Eq. 506; s. c., 11 Exch. 781; *Angell on Carriers* (3d ed.), secs. 22, 23."

A railroad company cannot exempt itself from liability to a passenger for an injury resulting from its own misconduct or recklessness, but as to a gratuitous passenger it may stipulate for exemption on account of even the gross negligence of its servants others than the board of directors and managers representing the company, for general purposes. As to the case of a trackmaster using rotten material on track. (*Quere.*)

Passenger had a pass with a condition. "NOTICE.—The person accepting this free ticket assumes all risks of accidents, and expressly

\* NOTE.—As to the form, validity and effect of stipulations for exemptions from liability for baggage, see "Contracts of Shipment," post p. 272.

As to who is a passenger, see also "Carriers of Passengers," post p. 368.

agrees that the company shall not be liable, under any circumstances whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket. \* \* \* Had the passenger been riding on the pass alone the carrier would be obliged to carry him carefully, but the exemption on pass relieved carrier from this responsibility. *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196, rev'g judg't for pl'ff.

The owner of cattle was transported on a railroad under contract that, "Persons riding free to take charge of stock do so at their own risk of personal injury from whatever cause."

It seems that the owner of cattle, transported for hire on a railroad, and who goes along in charge of them, under a contract that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause," is not to be regarded as a gratuitous passenger.

The owner was injured by the *gross* negligence of an agent of the carrier in using an unfit and dangerous car. The carrier was held liable by a divided court, four of the judges going on the ground, that the contract for exemption from liability was void, as against public policy; and the fifth, that the negligence, as it respected the machinery of transportation, is imputable to the *carrier* himself. *Smith v. N. Y. C. R. Co.*, 24 N. Y. 222, aff'g judg't for pl'ff.

A common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract that the passenger will take the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable.

If he paid, as passenger, the usual fare, without reduction on account of his engagement to assume such risk, the contract would, it seems, not be binding, as without consideration.

The provisions of the general railroad law (ch. 140 of 1850, sec. 36) do not add to the general responsibility as carriers, of the corporations subject to it, nor deprive them of the power to make contracts in regard to such responsibility. Its object was to bring them within the general principle of common carriers.

Plaintiff's intestate was furnished with a ticket headed, "Cattle Dealer's Ticket on Passenger Train," by which the defendant directed its conductors to "pass Taylor & Bissell, owners of two ears of live stock, from Buffalo to Albany." On the back of this ticket was printed: "NOTICE.—The owner of stock receiving this ticket assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the stock

of said owners shipped by stock or freight trains." *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 442, rev'g judg't for pl'ff.

See *Illinois Central R. Co. v. Reed*, 37 Ill. 484; *Kinney v. R. Co.*, 34 N. J. L. 513, s. c., 32 id. 407; *Central R. Co. v. Mundy*, 21 Ind. 48.

The plaintiff contracted for the transportation of sheep and that some one should go with them "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." He had a drover's pass and intended to go. After the sheep were loaded, the plaintiff was hit by wood from the engine which he was passing. The defendant was not liable. *Poucher v. N. Y. C. R. Co.*, 49 N. Y. 263, rev'g judg't for pl'ff.

Distinguishing *Stinson v. N. Y. Cent. R. Co.*, 32 N. Y. 333; and following *Northrup v. R. R. Pass. Assurance Co.*, 43 id. 516.

The settled doctrine in this state is that a carrier of persons as well as of property, and known as a common carrier, may, by contract, have protection against liability for injury caused by its negligence. *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; 10 Am. Rep. 364. The carrier of express matter is not exempt from liability for the death of an express messenger, because of a contract to that effect made with the express company, without the consent of the messenger. Such messenger takes the hazards incident to his business, but not such as arise from the negligence of the carrier. *Brewer v. N. Y., L. E. & W. R. R. Co.*, 124 N. Y. 59, aff'g judg't for pl'ff.

Distinguishing *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562.

The general words of the contract of a common carrier of persons, limiting its liability, will not be considered as exempting it from liability for negligence. A contract between an express company and a railroad company provided that the defendant should be "expressly relieved from, and guaranteed against, any liability for any damage done to the agent of" the express company "whether in their employ as messenger, or otherwise."

A messenger was killed through the negligence of the defendant. The contract *might* be read not necessarily as releasing or preventing an action by the employes of the express company for damages or injuries received while on the road, but to indemnify the defendant in the event of such an action. *Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422, aff'g 54 Hun, 143, and judg't for pl'ff.

Exemption from liability for negligence in stock pass, covering transportation for both, issued to one of two persons in charge of the stock, held not to bind the other who was ignorant of it. *Coppock v. Long Island R. Co.*, 89 Hun, 186.

Exemption from liability for negligence in pass made out by foreman and given to conductor for transportation of his men after their day's work, held not to bind one ignorant of it. *Pendergast v. Union R. Co.*, 10 App. Div. 201.

Plaintiff's passage ticket was never delivered to him. Not having had an opportunity to read it, he was not bound by the terms therein contained: e. g., a limitation of liability to £10 in the case of loss of his baggage. *Wamsley v. Atlas S. S. Co.*, 50 App. Div. 199.

An assent by a passenger to limitation of the carrier's liability will not be implied when such limitation is communicated to the passenger for the first time after he has paid his fare.

The contract of carriage is consummated when the passenger pays and the carrier accepts the fare; if no special agreement be then made the conditions of carriage are prescribed by law; and any subsequent assent by the passenger, without a separate consideration, to a limitation of the carrier's liability is void. *Lechowitzer v. The Hamburg American Packet Co.*, 8 Misc. 213. (New York Common Pleas.)

Limitation of doubtful import should be construed against the company making it. *Georgia R. & Co. v. Clarke*, 97 Ga. 706.

Carrier of passenger cannot limit its liability for negligence by contract. Ga. Civ. Co., sec. 2216, applies to goods only. *Southern R. Co. v. Watson*, 110 Ga. 681.

Nor can such liability be waived. *Central & Co. R. Co. v. Lippman*, 110 Ga. 665.

Contract in free pass exempting from liability for all but gross negligence held valid. *I. C. R. Co. v. Read*, 37 Ill. 484.

Carrier cannot, by allowing shipper transportation with his goods, require that it be relieved of liability for all acts except gross negligence. *Illinois & Co. R. Co. v. Beebe*, 174 Ill. 13; aff'g s. c., 69 Ill. App. 363; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294; aff'g s. c., 81 Ill. App. 137; *Pennsylvania R. Co. v. Greso*, 79 Ill. App. 127.

Exemption from liability for negligence to express messengers, riding for the purpose of handling packages of an express company, held valid. *Blank v. Illinois C. R. Co.*, 182 Ill. 332; aff'g s. c., 80 Ill. App. 475.

Limitation of liability for all but gross negligence is binding on one using a free pass stipulating for it. *Chicago & Co. R. Co. v. Hawk*, 36 Ill. App. 327.

Not a question of contract: carrier liable to free passenger for negligence. *Gillenwater v. Madison & Co. R. Co.*, 5 Ind. 339.

So where drover traveled on stock pass, he could recover although pass stipulated against liability. *Ohio & Co. R. Co. v. Selby*, 17 Ind. 471.

Free pass stipulating that passenger assumes all risks, does not re-

lieve carrier from liability for injury through gross negligence, nor *it seems*, through slight negligence. *Indiana C. R. Co. v. Mundy*, 21 Ind. 48.

No limitation for liability for loss from carrier's own ordinary negligence is allowed. *Indianapolis &c. R. Co. v. Allen*, 31 Ind. 394.

Drover's pass. Limitation of liability not allowed; drover was a passenger for hire. *Ohio &c. R. Co. v. Selby*, 47 Ind. 471.

Free pass passenger has an action for injury through negligence notwithstanding endorsement on pass exempting carrier from liability for the same. *Louisville &c. R. Co. v. Taylor*, 126 Ind. 126.

Exemption from liability for negligence, held valid as to express messengers. *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; s. c., 38 L. R. A. 93.

And employés on sleeper. *Russell v. Pittsburg &c. R. Co.*, 157 Ind. 305; s. c., 55 L. R. A. 253.

Question of limitation, etc., for negligence, seems to be an open one California, Delaware, Florida, Nevada, Oregon and Rhode Island. *Louisville &c. R. Co. v. Nicholai*, 45 Alb. L. J. (Ind. App.) 412.

A limitation to \$100 for personal baggage did not relieve the carrier from liability where contract did not state \$100 to be the value of the baggage, nor that it was thus set in consideration of reduced rates. *Id.*

Liability for negligence may not be limited; notwithstanding free pass. *Rose v. Des Moines &c. R. Co.*, 29 Iowa, 246.

Exemptions from liability cannot cover gross and culpable negligence. *St. Louis &c. R. Co. v. Tribbey*, 6 Kan. App. 467.

Limitation of liability in a stock pass was held not to abridge right to recover for death from negligence granted by statute to next of kin. *Chicago &c. R. Co. v. Martin*, 59 Kan. 437.

Such a limitation in pass issued without consent of Railroad Commission held invalid under Gen. Stat. 1891, ch. 69, sec. 17. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

Shipper traveling on stock pass is passenger for hire and liability for injury to him cannot be limited. *Louisville &c. R. Co. v. Bell*, 100 Ky. 203.

Indictment lies for injury to passenger for gross negligence (killing passenger), notwithstanding indorsement, etc., on ticket. *Commonwealth v. R. R. Co.*, 108 Mass. 7.

A ticket containing writing and headed "Passengers' Contract Ticket" accepted by passenger on ocean steamship binds him to its provisions. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553.

Exemption from liability for negligence in employé's pass, void. *Doyle v. Fitchburg &c. R. Co.*, 166 Mass. 492; s. c., 63 L. R. A. 844.

Free pass, no limitation etc., for *gross negligence*. *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125.

That a news agent may not have been a passenger does not validate an exemption from liability for negligence consisting of violation of statute. *Starr v. Great Northern R. Co.*, 67 Minn. 18.

Where the ticket stated that defendant acted only as agent beyond its own line, the omission to sign did not relieve holder of the effect of the condition, where the ticket was issued at a reduced rate and he had used it. *St. Clair v. Kansas City &c. R. Co.*, 17 Miss. 189.

Where the limitations are plainly printed on the face of the ticket, the passenger will be presumed to have read and assented to them. *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

Exemption from liability for negligence in stock pass, void. *Missouri &c. R. Co. v. Tietken*, 49 Neb. 130.

Liability may be modified, but exemption, etc., for negligence "ought not" to be allowed. *Ashmore v. Pa. R. Co.*, 28 N. J. L. 180.

Traveler on a free pass, exempting from liability for injury due to negligence, is held to the stipulation. *Kinney v. Cent. R. Co. of N. J.*, 34 N. J. L. 513.

Restriction as to amount and kind of baggage allowed, with limitation as to amount of value per pound in case of loss in a ticket, is not binding as to baggage carried by passenger. *Rumyan v. Central R. Co.*, 61 N. J. L. 537; s. c., 43 L. R. A. 284.

Stipulation on drover's pass exempting from liability for negligence was not valid. *Cleveland &c. R. Co. v. Curran*, 19 Oh. St. 1.

The rules as to invalidity of stipulations exempting carriers from liability are not changed by the fact that the conveyance of passengers is upon a freight train. *Richmond v. Southern P. R. Co.*, (Or.) 67 Pac. Rep. 947.

**From opinion.**—Defendant's counsel "concede that the rule is general in the state and federal courts, except in Illinois and New York, that a common carrier cannot escape liability from the consequences of its negligence in carrying passengers on trains provided for that purpose; but they maintain that a railway company, not being obliged to carry passengers on a freight train, may contract in relation thereto as a private carrier and that an agreement of that character is not violative of public policy." \* \* \* "Public policy forbids a railway company from relying upon the terms of a contract entered into with a passenger, whereby he releases it from liability resulting from its negligence while performing a duty it owes the public as a common carrier; but it may become a private carrier and escape such liability by contract, when, as a matter of convenience to, or by special agreement with a passenger, it undertakes to carry him by means not designated to accommodate the traveling public. *Railway Co. v. Keefer*, 146 Ind. 21. Thus an agreement of an express agent to assume all risks of accident, in consideration of being carried in a baggage

car, to facilitate his own business, releases a railroad company from liability for injury resulting from a casualty, because the agent is not a passenger, and the carrier is under no obligation to transport him in such car. *Blank v. Railroad Co.*, 182 Ill. 332; *Railway Co. v. Maloney*, 148 Ind. 196; *Bates v. Railroad Co.*, 156 Mass. 506; *Railroad Co. v. Voight*, 176 U. S. 498." \* \* \*

"Where railroad companies, furnishing trackage and motive power, haul the cars of circus and managerie companies over their lines of railway, in consideration of the latter assuming the risk of injuries incident to the journey, it has been held that such companies and their employés, sustaining damages or injury, could not recover therefor from the railroad companies. *Railroad Co. v. Wallace*, 66 Fed. Rep. 506; *Robertson v. Railroad Co.*, 156 Mass. 525; *Coup v. Railroad Co.*, 56 Mich. 111; *Forepaugh v. Railroad Co.*, 128 Pa. 217. The reason assigned in these cases for enforcing the contracts of exemption from liability is that, as the railroad companies were under no legal obligation to haul such cars, they might lawfully enter into any contract to do so, and as a condition precedent therefor were authorized to limit their liability in case of accident, thus becoming private carriers in respect to such cars." \* \* \*

"The defendant was under no legal obligation to carry passengers on its freight trains, but, having notified the public that it would do so between the stations indicated, the train, as long as it was used for that purpose, was a mixed freight and passenger train, thereby imposing upon the defendant all the duties of a common carrier in respect to any passenger riding thereon. The train in question was designated by the defendant to accommodate the traveling public generally, and was not provided for plaintiff's advantage alone, nor did he enjoy any special privileges thereon that were not extended to others."

Drover's pass: limitation of liability not allowed. drover was a passenger for hire. *Penn. R. Co. v. Henderson*, 51 Pa. St. 315.

But special contract will relieve carrier from liability for all loss except that caused by its own negligence. *Farnham v. Camden & C. R. Co.*, 55 Pa. St. 53.

Passengers not allowed to contract against negligence. *Penn. R. Co. v. Butler*, 57 Penn. St. 335.

Liability may be limited except for negligence. (Telegraph Co.) *Wolf v. West. U. Tel. Co.*, 62 Penn. St. 83.

By signing and using a ticket, one of ordinary intelligence is held to have assented to its terms. *Daniels v. Florida & C. R. Co.*, 62 S. C. 1.

Reduced rate is notice that the ticket is sold subject to special conditions. *Watson v. Louisville & C. R. Co.*, 104 Tenn. 194; s. c., 49 L. R. A. 454.

Exemption from liability unless shipper accompanying his goods rides in the caboose, was inapplicable, where he rode in the car with the goods with carrier's consent. *Missouri & C. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Cannot contract against negligence. *Fl. Worth & C. R. Co. v. Rogers*, 21 Tex. Civ. App. 605.

Where the condition, permitting only two persons to accompany ship-

ment, was printed on the back of the pass with no reference to it on the face, plaintiff was not chargeable with notice of the agent's excess of authority in issuing it to three. *San Antonio &c. R. Co. v. Newman*, 17 Tex. Civ. App. 606.

Recovery was allowed where plaintiff was a stockholder and riding at invitation of president. *Phila. &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

Drover riding on free pass; no limitation allowed for negligence of carrier or servants. *Quære* is to whether the rule was same in case of one riding as a strictly free passenger. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Baltimore &c. R. Co. v. McLaughlin*, 73 Fed. Rep. 519.

Requirement in a drover's pass that he shall remain in the caboose while the train is in "motion" does not apply to injury in a cattle car caused by a sudden jolt while the train is standing still, though he may previously have been in the cattle car while the train was in motion. *Texas &c. R. Co. v. Reeder*, 110 U. S. 530; aff'g s. c., 76 Fed. Rep. 550.

Express agent in special car, held bound by stipulations in an agreement between the express company and the carrier ratified and adopted in his contract of employment, relieving the railroad company from liability for negligence. *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 498; rev'g s. c., 79 Fed. Rep. 561.

*Citing* *Bates v. Old Colony R. Co.*, 147 Mass. 255; *Hosmer v. id.*, 156 id. 506; *Robertson v. id.*, id. 526; *Griswold v. New York &c. R. Co.*, 53 Conn. 371; *Coup v. Wabash R. Co.*, 56 Mich. 111; *Pittsburg &c. R. Co. v. Mahoney*, 148 Ind. 196; *Blank v. Illinois C. R. Co.*, 80 Ill. App. 475; s. c. aff'd, 182 Ill. 332.

*Distinguishing* *Brewer v. New York &c. R. Co.*, 124 N. Y. 59; *Kenney v. New York &c. R. Co.*, 125 id. 422.

**From opinion.**—"The Circuit Judge thought the case could not be distinguished from the case of *Railroad Co. v. Lockwood*, 17 Wall 357." \* \* \* "This court held that a drover traveling on a pass for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Railway Co. v. Stevens*, 95 U. S. 655; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397." \* \* \* "We think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notice or special contract, to escape from liability for loss to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but contrary to a sound public policy, and therefore invalid. But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case? We have here to consider, not the case of an individual shipper or passenger, dealing at a disadvantage with a powerful corporation,



but that of a permanent agreement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country." \* \* \* "The relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension to the doctrine of public policy than was justified by the facts and reasoning in the Lockwood case." After citing state court cases as above to the effect that, when contracting as private carrier, public policy does not forbid exemption of liability for negligence, the court proceeds: "The same doctrine prevails in New York. *Bissell v. New York & E. R. Co.*, 25 N. Y. 442; *Poucher v. New York Central R. Co.*, 49 N. Y. 263. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *Railroad Co. v. Lockwood* to its fullest extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the Government, and who pay no fare, are entitled to the rights of ordinary passengers for hire, and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith v. Nashville & E. R. Co.*, 57 Fed. Rep. 165; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435; *Ketcham v. New York & E. R. Co.*, 133 Ind. 346; *Seybolt v. Railroad Co.*, 95 N. Y. 562. There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous, it should be made to appear that the government in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company."

But that the messenger is not bound by such an agreement where he has no knowledge of it, see *Chamberlain v. Pierson*, 87 Fed. Rep. 420.

Doctrine of strict construction applied to a provision in a drover's pass, that the holder, in leaving the caboose and going along and over tracks, did so at his own risk, and held that it did not extend to anything beyond the ordinary hazards peculiar to running cattle and freight trains, and that a drover, who, while attempting to board a train beginning to move, was struck by a water spout, negligently allowed to remain close to the track, could recover. *Fitchburg & E. R. Co. v. Nichols*, 85 Fed. Rep. 945.

Exemption from liability for negligence no defense to statutory action by widow for herself and children or next of kin. *Clark v. Geer*, 86 Fed. Rep. 447; *Adams v. Northern P. R. Co.*, 95 id. 938.

Stipulation for exemption from liability except for gross negligence in stock pass issued to shipper held not to bind his minor son riding

in the car with, and in charge of, the stock. *Chicago &c. R. Co. v. Lee*, 92 Fed. Rep. 318.

Carrier of passengers cannot exempt itself from liability for negligence. *Williams v. Oregon Shore-Line R. Co.*, 18 Utah, 210; *Saunders v. Southern R. Co.*, 13 id. 255.

Carrier, to bind a passenger to reasonable limitations, must show that the latter assented to the terms thereof. *Ranchau v. Rutland R. Co.*, 71 Vt. 142.

Stipulation on a free pass exempting carrier from liability is binding upon the person traveling upon it. *Muldoon v. Seattle City R. Co.*, 7 Wash. 528.

Exemption from liability for negligence, void. *Davis v. Chicago &c. R. Co.*, 93 Wis. 470.

#### (b). DISCLOSURE OF VALUE.

When interrogated as to the value of goods or notified that the carrier has valued them for the purpose of limiting his liability, the shipper commits a legal fraud if he remain silent, and the carrier is discharged from liability for ordinary negligence; and so if the shipper falsely represent the value of the goods to be less than they are.

But where there is no special contract limiting the common law liability of the carrier, nor any notice so specially brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods, unless he is asked thereof by the carrier; but the carrier has the right to make inquiry and to have a true answer, and if he is deceived by a false answer given he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to mislead him, he is responsible for the loss, however great may be the value. *Magnin v. Dinsmore*, 62 N. Y. 35.

*Batson v. Donovan*, 4 Barn. & Ald. 21; *Orange County Bank v. Brown*, 9 Wend. 116; *Railroad Company v. Lockwood*, 17 Wall. 357, 380; *Crouch v. L. & M. W. R. Co.*, 14 C. B. 255; Story on Bailments, sec. 567; *Riley v. Horne*, 5 Bing. 217.

See, *Thorogood v. Marsh* (Niel Gower, 105); and *Marsh v. Home* (5 Barn. & Cress, 322); *Pardee v. Drew*, 25 Wend. 459; *Warner v. West. Trans. Co.*, 5 Robt. 490; *Richards v. Westcott*, 2 Bows. 589; s. c., 7 id. 6; *Great Northern R. W. Co. v. Shepherd*, 11 Engl. L. & Eq. 367.

But, see contra, *Brooke v. Pickwick*, 4 Bing. 218; *Clay v. Willan*, 1 Hy. Blk. 298; *Yate v. Willan*, 2 East 128; *Izett v. Mountain*, 4 id. 371; *Nicholson v. Willan*, 5 id. 507.

Where a carrier by his contract limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, *silence alone*, on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is *fraud in law*, which discharges the carrier from liability for ordinary negligence.

Where the shipper accepts carriage upon the terms of a limited liability, silence is the same as an assertion of little value; and the carrier is not only thereby deprived of his adequate reward, but is misled as to the degree of care and security which he should provide.

As to whether, in such case, the carrier will be relieved where his acts amount to a misfeasance or abandonment of his character as carrier, *quaere*.

This action was brought to recover the value of a package of watches.

The receipt given by the company contained this clause; "If the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of or damage to the property aforesaid." Plaintiff's evidence tended to show that the goods were not delivered, but that the box which contained them was afterwards found empty at Gowanus, Long Island. Defendant gave evidence tending to show that a greater price would have been charged for transportation had the true value been stated; also that the package would have been put in the money and valuable package department, the packages in which were transported in safes locked and sealed, while where no value was stated it went in the freight department where such precautions were not taken. *Magnin v. Dinsmore*, 62 N. Y. 35.

**From opinion.**—"Where there is no special contract limiting the common-law liability of the carrier, nor any notice so specifically brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods, unless he is asked thereof by the carrier; but the carrier (for proper reasons, *Crouch v. L. & N. W. R. Co.*, 14 C. B. 255) has a right to make inquiry and to have a true answer, and if he is deceived by a false answer given, he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to mislead him, he is responsible for loss, however great may be the value. Such is stated in *Story on Bailments* (sec. 567) to be the better opinion, and the cases there cited sustain the text. Where there is a special contract limiting liability, or other thing tantamount thereto, it is otherwise."

The disclosure of value, in such case, is a condition precedent to liability on the part of the carrier for mere ordinary negligence unaccompanied with any misfeasance or willful act.

An omission on the part of the carrier to make inquiry as to the value is not a waiver of the limitation in the contract.

To constitute a conversion of goods by a carrier, there must be a wrongful disposition of goods or withholding thereof; a mere non-delivery will not suffice, nor will a refusal to deliver goods on demand, if the goods have been lost through negligence or have been stolen.

Angell on Carriers, secs. 431-433; *Seovill v. Griffith*, 2 Kern. 509; *Anon*, 4 Esp. 157; *Ross v. Johnson*, 5 Burr. 2825.

Negligence alone is not misfeasance or an abandonment of the character of carrier, which will deprive them of the benefit of the limitation.

The act which will deprive the carrier of the benefit of a contract for limited liability fairly made, must be an affirmative, but not necessarily an intentional act of wrongdoing; and the onus of proving this is upon the party claiming it. *Magnin v. Dinsmore*, 70 N. Y. 410.

*Baldwin v. L. & G. W. Steam Co.*, 11 Hun, 496.

Where the property is of extraordinary value, a condition that the carrier will not be responsible for loss, if the true character and value of the articles are not stated and freight paid, will operate to exempt the carrier from liability even for his own negligence, unless the condition was fulfilled. He is not bound to speak unless notice of non-liability on the part of the bailee, in case he remains silent, is given. But from the record now here, it appears that some information was given by the plaintiff's agents and servants to the carrier at the time of shipment that the boxes contained marble statuary, and hence had a special value, which would entitle the defendant to increased compensation for carriage, if it saw fit to exact it.

The shipment bill simply described two boxes of marble, "contents and value unknown," and contained a condition that no statuary would be carried at the defendant's risk unless a memorandum as above was delivered. There was no such memorandum, but the consignor's agent informed defendant that the boxes contained statuary. Boxes were marked "handle with care" and shipment was made in the usual manner on defendant's road. There was no actual or proposed concealment. Held, that a nonsuit was error; that if defendant was fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observances of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment and of defendant's negligence. *Rathbone v. N. Y. C. & C. R. R. Co.*, 140 N. Y. 48.

A limitation of liability to a given amount, unless value is specified, was valid in the absence of fraud or gross negligence. *Toy v. Long Island R. Co.*, 26 Misc. 792.

Statement that a package containing valuable music, was merely music, thereby obtaining transportation for less than would otherwise have been charged, was such fraud and concealment as relieved the carrier from liability for its loss. *Southern Exp. Co. v. Wood*, 98 Ga. 268.

Shipper voluntarily undervaluing goods was bound by a limitation of

liability to the agreed valuation. *Chicago &c. R. Co. v. Miller*, 79 Ill. App. 473.

Common honesty dictates that he who delivers property to a carrier, knowing that it requires peculiar care and attention to its safe transportation, should make known to him the necessity, in order that the proper precaution may be taken. *Wilson v. Hamilton*, 4 Ohio St. 723, 741.

Citing *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hardee v. Drew*, 25 Wend. 85; *Miles v. Cottle*, 6 Bing. 743. But disclosure of value need not be made unless asked. *Sewall v. Allen*, 6 Wend. 349; *Hollister v. Nowlan*, 19 Wend. 234; *Phillips v. Earl*, 8 Rich. 182; *Sleat v. Flagg*, 5 B. & Ald. 342.

Carrier, giving reduced rates on account of property being understated as to its value, was liable in full for its loss, where it did not limit its liability. *Louisville &c. R. Co. v. Levi*, 8 Ohio C. D. 373.

The fact that the weight of injured cotton exceeds that of the entire shipment, which was "estimated," did not exempt a carrier from liability as to that injured. *Springs v. South Bound R. Co.*, 46 S. C. 104.

There was no fraud or concealment in a shipment of negatives, marked "Photo goods," though, were their true value known, a higher rate would have been charged. *Southern P. R. Co. v. D'Arcais*, (Tex. Civ. App.) 64 S. W. Rep. 813.

#### (c). CARE REQUIRED IN CASE OF RELEASE.

##### **Carrier must use reasonable care although the goods are released.**

Accordingly, where goods, having been shipped upon the defendant's railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire or explosion of any kind," were destroyed by fire kindled by sparks from the locomotive hauling them,—*held*, that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks (2 Redfield on Railways, 3d. ed. 189, chap. 24, sec. 1, 176; *Ford v. London and Southwest R. Co.*, 2 Foster & Finlayson, Nisi Prius R. 730; *Hegeman v. Western R. R.*, 3 Kern. 9; *Field v. N. Y. C. R. R.*, 32 N. Y. 339); but, that the charge that, if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby insure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for the plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error. *Steinweg v. Erie Railway Co.*, 43 N. Y. 123.

Citing *Sager v. P. S. &c. R. Co.*, 31 Me. 228.

A common carrier must use reasonable care although transportation is at the owner's risk.

Plaintiffs shipped under such a contract, by defendant's road at "W." eighteen boxes of jewelry, to be transported to "N. Y." The evidence tended to show that, owing to inefficient facilities or accumulation of freight from three to six days more than the usual time was taken in the transportation. Also, that before delivery to the consignee and while the boxes were in the possession of the defendant, one of them was opened and a portion of its contents abstracted. The court charged the jury that they could not find a verdict for the plaintiffs, except upon the assumption that the property had been stolen or lost while in the defendant's possession, and that such loss must be found to be attributable exclusively to the negligence of defendant in delaying the transportation. Held error. *Canfield v. B. & O. R. Co.*, 93 N. Y. 532.

S. C., 75 N. Y. 144.

If accommodations for loading horse on car are not suitable, the carrier is not excused by stipulation that loading is at the owner's risk. *Potter v. Sharp*, 24 Hun. 179.

Requiring a carrier to keep a "watch" over the goods, was too severe a measure of care, especially where there was a fire exemption clause, and in any event reasonable diligence was all that was required. *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523.

### XIII. Contracts of Shipment.

#### (a) WHO MAY MAKE.

##### I. ON BEHALF OF THE SHIPPER.

The presumption is that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue for their injury or loss, and he or the person delivering the goods to the carrier may make the usual contract of shipment. *Sweet v. Barney*, 23 N. Y. Price v. Powell, 3 Comst. 322; *Everett v. Salters*, 15 Wend. 474; *Angell on Carriers*, see, 497; *Waldron v. Price*, 22 N. Y. 368.

See, *York Company v. Central R. R. Co.*, 3 Wall. 107; *Squire v. N. Y. Central R. R. Co.*, 98 Mass. 239; *Christenson v. American Express Co.*, 15 Minn. 270; *Hunt v. Wyman*, 100 Mass. 198; *Robertson v. National S. Co.*, 139 N. Y. 416.

Plaintiff, a merchant in New York, received from "N. & T." of Rochester, an order in writing for certain goods to be sent them "via canal." The goods were delivered to defendants, common carriers upon the canal, consigned to "N. & T." pursuant to the order. The goods were lost *en route*. Held, that upon the delivery to the carrier, the title

passed absolutely to the consignees, subject only to the right of stoppage *in transitu*, and that plaintiff, consignor, could not maintain an action for their loss. *Krulder v. Ellison*, 47 N. Y. 36.

See *Porter Mfg. Co. v. Edwards*, 29 Hun, 509.

A consignor's agent may stipulate terms for the transportation, and so a cartman has the power to release the carrier, and consignor to a distant consignee is the latter's agent to make stipulation. *Squire v. New York Central Railroad Co.*, 98 Mass. 239; *Christenson v. American Express Co.*, 15 Minn. 240; *Anderson v. Coonley*, 21 Wend. 279; *Jeffrey v. Bigelow*, 13 id. 518; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498.

1 Red. Railways, 22; citing *London v. N. W. R. Co.*, 7 H. & N. 600; *Lewis v. G. W. R. Co.*, 5 id. 867.

An agent employed to ship goods to the owner has authority to make such contract with the common carrier as in the honest exercise of his discretion he sees fit. *Shelton v. The Merchants' Despatch Trans. Co.*, 59 N. Y. 258.

Persons who delivered potatoes for S. & Co., shippers, signed usual shipping bills filled out by defendant's agents. These limited defendant's common-law liability in various particulars. S. & Co. had no knowledge of and did not expressly authorize this; they, however, knew it to be the general custom of railroad companies to require it. In an action for the non-delivery of potatoes and for damages by delay in the delivery of the others, held, that conceding it to have been within the presumed authority to make or accept stipulations or conditions for the reception and carriage of the property, beyond that, so far as it was dependent upon such presumption of authority, the owners were not necessarily bound; that the provisions, so far as they may be otherwise construed, were not applicable to the shipments in question; and, therefore, only the terms and conditions, so far as *reasonable* and applicable to through transportation, were to be deemed within the terms of the contract. *Riley v. N. Y., L. E. & W. R. Co.*, 34 Hun, 91; *Babcock v. L. S. & M. S. Ry. Co.*, 49 N. Y. 491; *Condict v. G. T. Ry. Co.*, 54 id. 500; *Coffin v. N. Y. C. & H. R. R. R. Co.*, 64 Barb. 379, 56 N. Y. 632; *Bostwick v. Baltimore & O. R. R. Co.*, 45 id. 712; *Germania F. Ins. Co v. M. & C. R. R. Co.*, 72 id. 90; *Guillaume v. General T. Co.*, 100 id. 491; *Swift v. Pacific &c. Co.*, 106 id. 206; *Park v. Preston*, 108 id. 431.

One of the conditions in the shipping bills was to the effect that no claim for loss or detention shall be allowed unless notice in writing and particulars of the claim be "given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods, in respect to which said claim is made, are delivered." Held, that this provision was applicable to shipments beyond the terminus of defendant's

railway; but that in view of the nature of the property and of the claim for damages, the time specified *was unreasonable*; and so, was not applicable to the shipments in question; and that a failure to give such notice was not a bar to a recovery. *Jennings v. Grand Trunk Railway of Canada*, 127 N. Y. 438; aff'g 52 Hun. 227.

**From opinion.**—"It is legitimate for a common carrier by contract with the shipper to provide for a reasonable time within which notice of claim for loss or damage shall be given as a condition of liability and the manner of giving it. *Express Company v. Caldwell*, 21 Wall. 264; *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Rep. 385; *Lewis v. Great Western Ry. Co.*, 5 Hurl. & Norm. 867. In those cases the notices provided for were held to be reasonable, and that question is an open one for consideration. *Westcott v. Fargo*, 61 N. Y. 542, 551; *Adams Express Co. v. Reagan*, 29 Ind. 21-92 Am. Dec. 332." But see *So. Ex. Co. v. Caperton*, 44 Ala. 101.

The fact that the consignee of goods is the owner, and as such takes part in the negotiations with the shipper, as to the rate of freight, does not constitute him a shipper; and where the vendor accepts a bill of lading in which he is named as shipper, the acceptance of it by him creates a contract, fixing his relations as such and imposing upon him the obligations arising therefrom which the law has previously declared to be assumed by those entering into such a contract. Action against consignor to recover demurrage for detention in unloading cargo from plaintiff's boat. *Van Etten v. Newton*, 134 N. Y. 143.

The shipper's agent may make. *Zimmer v. N. Y. Central R. R. Co.*, 137 N. Y. 463.

*Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Steamship Co.*, 57 id. 1.

A vendee and consignee of lumber who authorized vendor to deliver it to the carrier and superintend the shipment, was held bound by the terms of the bill of lading taken by him containing an exemption from liability for loss through perils of the sea. *Donovan v. Standard Oil Co.*, 155 N. Y. 112; aff'g s. c., 82 Hun. 614.

A connecting carrier exempting its liability as to acts beyond its own line properly delivered the goods to the next carrier. It was not liable, because, owing to an arrangement with such next carrier by the consignee, the goods were held until subsequently rejected by the consignee. *Hams v. Minneapolis &c. R. Co.*, 36 Misc. 181.

Right of action for loss of goods belongs to the consignor where the consignee is merely his agent or factor. *Louisville &c. R. Co. v. Allgood*, 113 Ala. 163.

Consignor may sue for damage to goods where consignee refused to accept them. *Savannah &c. R. Co. v. Commercial Guano Co.*, 103 Ga. 590.



Right of stoppage in transitu was not a sufficient interest in the goods to enable consignor to sue in tort for their loss or damage. *Northern P. R. Co. v. Lewis*, 89 Ill. App. 30.

In the absence of proof to the contrary, the consignee of property shipped through a common carrier, and not the consignor is to be treated as the owner. *Benjamin v. Levy*, 39 Minn. 11.

Owner was not estopped to sue for damages, where his agent shipped the goods in cars contracted for by another, where the carrier knew of, and did not object to, that manner of shipment. *Atchison &c. R. Co. v. Bryan*, (Tex. Civ. App.) 37 S. W. Rep. 235.

## 2. IN BEHALF OF THE CARRIER.

Agent may contract to carry beyond terminus of line. *Riley v. N. Y. &c. R. R. Co.*, 34 Hun. 91. *Dorr v. N. J. S. Nav. Co.*, 11 N. Y. 490. (See Connecting Carriers, *post* ).

An agent, which a common carrier, an undisclosed principal, holds out as having authority to give shipping rates, was held to have implied power to insert in a bill of lading, a provision for insurance, which was usual at that port, without a declaration of value of the goods. The shipper was not charged with notice, that the agent had no authority to grant the insurance without a declaration, by the fact that a circular issued by the agent stated that insurance was free where the value of goods shipped was stated before sailing. The statement did not imply that insurance could not be made free by stipulation in the bill of lading, nor pretend to limit his general powers among which was the power to give bills of lading and write insurance. *Lowenstein v. Lombard &c. Co.*, 164 N. Y. 324; rev'g s. c., 17 App. Div. 408; distinguishing *Lein-kauf v. Lombard &c. Co.*, 12 App. Div. 302.

A carrier attempting to carry out an unauthorized contract is liable for its negligent performance. *Nashville &c. R. Co. v. Smith*, (Ala.) 31 South. Rep. 481.

A carrier was not liable where its agent, being instructed not to give a reduced rate to shippers without their signing bills of lading containing exemptions, exceeded his authority by himself taking advantage of the rate, as shipper, without signing a bill. *Central &c. R. Co. v. Felton*, 110 Ga. 597.

An agent of a connecting carrier has no implied power to extend the latter's liability after delivery to the carrier with whom it connects, so as to cover future safe delivery. *Illinois &c. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618.

Shipper was warranted in relying on the authority of one that, with the knowledge of a carrier, holds itself out publicly in a large city as

the carrier's agent. *St. Louis &c. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; s. c. aff'd, 175 Ill. 551.

Carrier was liable for the negligence of its agent in improperly billing goods. *Chicago &c. R. Co. v. Neumann*, 84 Ill. App. 272.

Carrier was bound by the waiver of verification of a claim, specified in the contract of shipment, by one whom it allowed to hold himself out as its freight claim agent. *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47.

Shipper was not bound by a secret instruction to an agent not to make such an agreement, where it was apparently within his powers to agree to deliver a car at a certain time and place. *Stoner v. Chicago &c. R. Co.*, 109 Iowa, 551.

The company ratifies unauthorized contract by acting upon it with knowledge of the facts. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

A local station agent has no implied power, in the absence of custom, to extend the liability of a carrier beyond its own line by special contract. *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391.

It is within the general authority of an agent to deliver consignments upon the expiration of the usual period of shipments. *Rudell v. Ogdenburgh Transit Co.*, 117 Mich. 568; s. c., 44 L. R. A. 415.

It is not within the implied authority of a general manager of a railroad to agree, in consideration of shipment over its line to a third party, to guarantee payments of the purchase price therefor. *Weikle v. Minneapolis &c. R. Co.*, 64 Minn. 296.

A station agent authorized to receive and forward freight can not bind his principal by an act within his apparent authority, where the shipper knows that he is exceeding his actual authority. *Gunn v. Chicago &c. R. Co.*, 72 Mo. App. 34.

Where consignee was under a contract with consignor to pay freight, carrier was estopped from collecting more, after it had rendered a bill negligently understanding the amount, which the consignee paid, deducted from the purchase price and forwarded the balance to the consignor, a foreign corporation. *Central R. Co. v. McCartney*, (N. J. L.) 52 Atl. Rep. 515.

A local freight agent held to have no authority to bind his road for carriage beyond its lines and that it could not be implied for any previous conduct. *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp. (Pa.) 401.

Local agent had no implied authority to bind his principal for shipments beyond its own line and none was inferred by his having collected freight on a through contract. *Sutton v. Chicago &c. R. Co.*, 14 S. D. 111.

It is not within the implied power of a station agent of one place to contract for a shipment from another. Nor is it within the scope of employment of one station agent to inform another of special damages that will accrue through delay so as to charge the carrier with an increased liability therefor. *Missouri &c. R. v. Belcher*, 88 Tex. 549.

It was held not error to exclude a question as to specific instructions to an agent to make no oral contracts of shipment, in the absence of knowledge of them by the shipper, when such contracts were within the scope of his apparent authority. And in such case shipper was under no obligation to inquire as to particular limitations on agent's authority. *San Antonio & R. Co. v. Williams*, (Tex. Civ. App.) 51 S. W. Rep. 883.

A general live stock agent of a railroad company has apparent authority to agree to furnish cars for shipment. *International & R. Co. v. True*, 23 Tex. Civ. App. 523.

Where carriers operated in connection with other carriers each was held to be bound by the representations of the agent of the other, made to induce shipments over any part of the system. *Missouri &c. R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Mistake in underrating merchandise for shipment bound the carrier, where the goods were sent over a different route than that agreed, which compelled the shipper to pay a higher rate. And the carrier cannot set up a violation of the Interstate Commerce Act to avoid the agreement. *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. Rep. 846.

An agent held to have power to agree that his road would bear the expense of caring for stock during a delay owing to a strike, where the shipper was not originally under a duty in regard thereto. *Carstens v. Burleigh*, 20 Wash. 283.

It was within the apparent scope of authority of the agent of a carrier transporting goods into Canada to agree to advance the custom duties. *Waldron v. Canadian P. R. Co.*, 22 Wash. 253.

An agent had authority to contract for carriage from a place not contiguous to his company's tracks, where he and his predecessors had always made it a custom to do so. *Bigelow v. Chicago &c. R. Co.*, 104 Wis. 109.

#### (b). HOW MADE AND WHAT CONSTITUTES.

**To the extent that courts permit a modification of the liability of a common carrier, the same may be effected, not by general notice published and posted, nor by mere *ex parte* unaccepted assertion, statement or notice by the carrier, but it may be made at the time the undertaking to carry is perfected by agreement with the shipper, either by express contract or by the terms of shipment demanded by the carrier in the particular instances, so fully and fairly brought to the knowledge of the shipper without his**

dissent, that his agreement thereto may be implied, and a contract will be inferred from his acceptance of a bill of lading or shipping receipt, save in those states where the statute prohibits such contracts to be made in such manner.\* The carrier cannot compel any modification of his common-law liability.

## 1. FREIGHT.

A common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Since the very full and learned discussion of that question in *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, id. 251, it has been regarded as settled upon mature deliberation, and the conclusion arrived at in those cases has been uniformly acquiesced in and followed. *Camden Co. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, id. 153; *Alexander v. Greene*, 3 Hill 9; 7 id. 533; *Powell v. Myers*, 26 Wend. 594. These decisions rest on the very satisfactory reasons, that the notice was no evidence of assent on the part of the owner, and that he had a right to repose upon the common law liability of the carrier, who could not relieve himself from such liability by any mere act of his own. But when the exception to the common law liability is made in the bill of lading, or receipt given for the goods, and delivered to the agent of the shipper, it must be deemed to have been agreed upon by the parties. *Blossom v. Dodd*, 43 N. Y. 264; *Kirkland v. Dinsmore*, 62 id. 175; *Dorr v. New Jersey Steam Nav. Co.*, 11 id. 490.

The meaning of this decision and of others, employing similar language is, that carriers cannot limit their liability by public or general notice, published, advertised, or displayed by posting in such manner as might attract the attention of a shipper and passenger. This had been permitted in England until the act of 11 George IV. and 1 William IV. (1830), known as the English Land Carrier's Act (*Hutchinson on Carriers* 230†), which prohibited the same, but did not affect special contracts with the carrier. (Id. sec. 232.) A special contract is not limited to an express agreement signed by the parties, but includes any implied contract, or an assent to the terms proffered to or demanded of the shipper as to his particular shipment. The simple question is whether the shipper assented to the terms, however such assent may have been manifested. By the English Railway and Canal Traffic Act of 1854, the carrier was prohibited from limiting his liability as to all articles not mentioned in the carriers' act, unless the contract,

\* NOTE.—Contract in one state to carry goods to another, when goods are lost, is governed by state where loss occurred. *Gray v. Jackson & Co.*, 51 N. H. 9. See also *Texas & C. R. Co. v. Payne*, 15 Tex. Civ. App. 58; *Mexican & C. R. Co. v. Ware*, (Tex. Civ. App.) 60 S. W. Rep. 343; *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100. When law of place of contract signed only by carrier, requires evidence other than mere receipt by the shipper to show his assent, as in *Illinois*. (*Adams Ex. Co. v. Haynes*, 12 Ill. 89; *American Ex. Co. v. Schier*, 55 id. 140; *Illinois Cent. R. Co. v. Frankenberg*, 51 id. 88), and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought. *Houlley v. No. Transp. Co.*, 115 Mass. 301.

† NOTE.—The sections in *Hutchinson on Carriers* on this subject are clear and complete.

found by the court or judges to be just and reasonable, were signed by the shipper (*Hutchinson on Carriers*, sec. 233). The English rule, in this frequent necessity of procuring the shipper's consent to the contract, differs from that usually prevailing in America. Although in *Gould v. Hill*, 2 Hill, 623, it was held that the carrier could not limit his common law liability by contract or notice, such decision, denying both the manner of doing it and a right to do it at all, was not thereafter followed, as will be seen from the decisions.

When goods are shipped under a verbal agreement, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper *after* he has parted with control of his goods, although such bill limited the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, do not conclude him from showing what the actual agreement was. *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712.

*Swift v. S. Co.*, 106 N. Y. 206; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418 (bill of lading was delivered after goods were in transit); *Am. Ex. Co. v. Spellman*, 90 Ill. 455; *Wilde v. Trans. Co.*, 47 Iowa, 247; *Louisville R. Co. v. Meyer*., 78 Ala. 597; *Cent. L. J.*, 1877, as to a ticket; *Wilson v. R. Co.*, 21 Gratt. 654. Contract is made when ticket is purchased, *Kent v. R. Co.*, 45 Ohio St. 288; *Rawson v. Penn. R. Co.*, 48 N. Y. 212; *Guillaume v. Gen. Trans. Co.*, 100 id. 498. After verbal contract had been made its legal effect was not changed by a receipt delivered to consignor's clerk, who delivered the goods at the station and had no authority to modify same. *Filletown v. Grand Trunk R. Co.*, 55 Maine, 462; *Gott v. Dinsmore*, 111 Mass. 45.

See *Wheeler v. R. Co.*, 115 U. S. 29; *Pomitt v. R. Co.*, 62 Mo. 527.

Express receipt limited value of trunk: shipper by accepting assented thereto and was bound.

In the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting its common-law liability, contained in a receipt given by such company for freight, were known and assented to by the party receiving it. *Steers v. Liverpool, &c. C. S. Co.*, 57 N. Y. 1; *Zimmer v. N. Y. Cent. &c. R. Co.*, 137 id. 460.

See *Grossman v. Dodd*, 63 Hun, 324.

Where a shipper, upon delivery of property to an express company for transportation, receives, without dissent, a receipt, with the understanding that it contains a contract on the part of the company as to the carriage, in the absence of fraud or imposition, the company has a right to infer an assent on his part to conditions in the receipt, not unusual or unreasonable, limiting its common law liability as carrier; and he is precluded from denying it thereafter to the company's injury. *Collender v. Dinsmore*, 55 N. Y. 200; *Magnin v. Dinsmore*, 56 id. 168; *Hinckley v. N. Y. C. & H. R. R. Co.*, id. 429.

After a loss, therefore, it is too late for the shipper to object that he omitted to read the receipt, and was ignorant that it contained such conditions. *Kirkland v. Dinsmore*, 62 N. Y. 171, rev'g 2 Hun. 46; 4 T. & C. 304, distinguishing *Blossom v. Dodd*, 43 N. Y. 264.

*Morris v. Construction Co.*, 44 Wis. 405; *Jones v. R. Co.*, 89 Ala. 379; *Farnham v. R. Co.*, 55 Penn St. 53; *Snider v. Adams Ex. Co.*, 63 Mo. 376; *Merrill v. Express Co.*, 62 N. H. 514.

Where goods are delivered to a carrier for transportation and before the goods are shipped a bill of lading or receipt is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them.

To take a case out of this general rule, it must appear that before the delivery of the bill of lading the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *The Germania Fire Ins. Co. v. The Memphis & Charleston R. Co.*, 72 N. Y. 90, distinguishing *Bostwick v. The B. & O. R. R. Co.*, 45 id. 712.

**From opinion.**—"As a general rule, when goods are delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is bound to examine it and ascertain its contents; and if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. *Long v. N. Y. Central R. R. Co.*, 50 N. Y. 76. Neither can he set up ignorance of its contents. *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool & E. S. S. Co.*, 57 id. 1; *Maghee v. C. & A. R. R. Co.*, 45 id. 514."

A bill of lading has a twofold character; first, that of a receipt; and second, that of a contract. *Pollard v. Vinton*, 105 U. S. 7.

The receipt as between the shipper and ship-owner is explainable, but parol evidence is not admissible to vary the terms of that portion of it constituting the contract. *Parsons on Shipping*, vol. 1, 190, and cases cited.

The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes of that instrument a binding contract, and defines the rights and liabilities of the parties to it. *C. H. & D. & M. R. Co. v. Pontius*, 19 Ohio St. 221; *Germania Fire Ins. Co. v. Memphis & C. R. R. Co.*, 72 N. Y. 90; *Van Etten v. Newton*, 131 id. 143.

A shipper is limited to an amount not exceeding the valuation specified in the contract made with the carrier, in the event of loss or injury to goods. It is incumbent upon a shipper to acquaint himself with the contents of a contract executed by him. *Zimmer v. N. Y. C. & E. R. R. Co.*, 137 N. Y. 460.

**From opinion.**—"Cases where parties, proposing to have articles of property transported by a common carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travelers who commit their trunks or other articles of baggage, to an agent of some express or transfer company, and receive at the moment some paper, which, as it has been said, amounts simply to a voucher enabling them to follow and identify their property. *Madan v. Sherard*, 73 N. Y. 329."

Plaintiff was held to have acquiesced in the terms of a bill of lading limiting the carrier's liability where, though the original shippers, from whom they purchased the goods after shipment, did not know of its contents, the plaintiff was aware thereof and with that knowledge gave directions concerning the disposition of the goods. *North British &c. Ins. Co. v. Central Vermont R. Co.*, 9 App. Div. 4; s. c. aff'd, 158 N. Y. 726.

Acceptance of a receipt, containing a limitation as to the value of goods not stated, binds the shipper under a statute providing that one accepting a written contract with knowledge of its terms assents to the limitations as to valuation therein contained. *Michalitschke v. Wells &c. Co.*, 118 Cal. 683.

Carrier cannot by any act of his own, to which the other party does not consent, limit his liability; the parties may make an express contract for that purpose, and if they both have a *fair opportunity* to understand the terms of the contract entered into, they are bound by it. *Wallace v. Matthews*, 39 Ga. 633.

A clause in a receipt limiting liability when no value was stated was held not binding on a shipper, unless he had expressly assented thereto as required by statute. *Wood v. Southern Ex. Co.*, 95 Ga. 451.

A carrier can not limit its liability by a mere notice, not amounting to an express contract. *Central &c. R. Co. v. Lippman*, 110 Ga. 665.

Whether the agreed valuation was an arbitrary preadjustment of damages or was honestly made on probable valuation, was for the jury. *Southern R. Co. v. Horner*, (Ga.) 41 S. E. Rep. 649.

The usual rule in Illinois, where the statute has not changed it, is that the shipper is bound by the terms of receipt if he takes it with full knowledge. *Adams Ex. Co. v. Haynes*, 42 Ill. 89.

*Chicago & No. W. R. Co. v. Church*, 12 Ill. App. 17. *Chicago &c. R. Co. v. Montfort*, 60 Ill. 175.

Carrier can limit his liability but not by contract expressed in receipt. \**Chicago &c. R. Co. v. Chapman*, 133 Ill. 96.

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\* NOTE.—By Illinois R. S. 1874, sec. 33, chap. 114 (and as to railroads, sec. 71) it is provided that whenever any property is received by a common carrier to be transported from one place to another, within or without this State, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitations expressed in the receipt for such property.

Restrictions on a carrier's liability did not bind a shipper where he did not accept the bill of lading, while understanding and assenting to its provisions. *Chicago &c. R. Co. v. Davis*, 159 Ill. 53.

Restriction of a carrier's liability to its own line, contained in a receipt delivered on acceptance of the goods for carriage consigned beyond, does not constitute a valid exemption. Such limitation may however be accomplished by contract through the assent to them, when inserted in a bill of lading. Mere acceptance of the bill does not constitute such assent. But it is a question of fact for the jury. *Chicago &c. R. Co. v. Simon*, 160 Ill. 648.

Carrier can not bind a shipper to the limitations of its liability contained in a bill of lading without the latter's signature or proof of his positive assent thereto. *Illinois C. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618.

To be bound, shipper must assent to the contract of limitation. *Chicago &c. R. Co. v. Calumet Stock Farm*, 194 Ill. 9; aff'g s. c., 96 Ill. App. 337.

Free transportation to care for stock construed not a consideration for an exemption from liability for loss by fire, but was a consideration for the assumption of the care of the stock by the shipper. *Baltimore &c. R. Co. v. Crawford*, 65 Ill. App. 113.

Assumption of the duty of feeding and watering stock by the shipper and limitation of company's liability therefor was valid, though the written contract was not signed until it had been nearly performed. *Cleveland &c. R. Co. v. Patterson*, 69 Ill. App. 438.

A shipper, entitled by his original contract to free transportation to look after his cattle, was not bound by the provisions of a subsequent one executed hurriedly and under protest to gain the right secured by the original contract. *Wabash R. Co. v. Lannum*, 71 Ill. App. 84.

Subsequently issued bills of lading were held to be mere evidence of dates and quantities of shipment without effect in varying a previous parcel contract for shipment. *St. Louis &c. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; s. c. aff'd, 175 Ill. 557.

Mere receipt of bill of lading does not show assent to conditions therein. Burden is on carrier to establish such assent. *Elgin &c. R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

Issuing bill of lading after loss with exemptions was ineffective to limit liability. *Cleveland &c. R. Co. v. Wilson*, 99 Ill. App. 367.

A reduced rate was sufficient consideration to support a limitation of liability, and the shipping contract was valid, though signed shortly after the goods had started in transit, where that act was the concluding part of an entire transaction. *Stewart v. Cleveland &c. R. Co.*, 21 Ind. App. 218.



By shipper accepting and acting upon bill of lading, his knowledge of its stipulations, limiting carrier's liability to his own line, will be binding. *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181.

Citing *McMillan v. M. S. & C. R. Co.*, 16 Mich. 80; *Kallman v. U. S. Ex. Co.*, 3 Kan. 205; *Hopkins v. Westcott*, 7 Am. Law. Reg. (N. S.) 533, and not approving Ill. rule.

Having concluded a verbal contract for the shipment of goods with no mention of limitation of liability, shipper put the receipt containing limitations of the carrier's liability in his pocket without looking at them. He was not bound thereby. *Stoner v. Chicago & C. R. Co.*, 109 Iowa, 551.

Though a carrier offers two rates, one without and a lesser one with a limitation of its liability, the shipper is not bound by the acceptance of the latter, where he has no freedom of choice, but is coerced into it. *Atchison & C. R. Co. v. Mason*, 4 Kan. App. 391.

Where shipper had been accustomed to ship subject to an exemption as to loss beyond the carrier's own line, he must be taken to have contracted in reference thereto though the specific contract was not read over to him. *Richmond & C. R. Co. v. Richardson*, (Ky.) 66 S. W. Rep. 1035.

Where an invoice of merchandise stated that it was at the risk of the bailee from fire or otherwise until returned, there was an implied promise on part of bailee to assume such risk. *Heinstein v. Watts*, 84 Me. 139.

Evidence is not admissible, in absence of fraud, to show that consignor did not read terms of bill of lading delivered to him by the carrier. *Rice v. Dwight Mfg. Co.*, 2 Cush. 80, 87.

Wharton on Negligence, § 586, citing, *Austin v. R. Co.*, 16 Q. B. 600; *Carr v. R. Co.*, 7 Exch. 767; *MacManus v. R. Co.*, 4 H. & N. 327; *Behrens v. R. Co.*, 6 id. 366; *Snyder v. Ex. Co.*, 63 Mo. 76; *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 18; *Kallman v. U. S. Ex. Co.*, 2 Kan. 205.

The receipt, without dissent, of a bill of lading by which the carrier stipulates against liability for loss by fire, discharges carrier from such liability not caused by his own negligence. *Grace v. Adams*, 100 Mass. 508; *Hoadley v. No. Trans. Co.*, 115 id. 307.

He is presumed to understand its terms. *Hoadley v. No. Trans. Co.*, 115 Mass. 307, citing.

*Lewis v. Gt. West. R. Co.*, 5 H. & N. 867; *Squire v. N. Y. Cent. R. Co.*, 98 Mass. 239; distinguishing *Brown v. Eastern R. Co.*, 11 Cush. 97, and *Malone v. Boston & C. R. Co.*, 12 Gray, 388, where limitation was in form of a notice printed on back of passenger ticket, and there was no presumption of assent by person at time of receiving the ticket; also, distinguishing *Buckland v. Adams Ex. Co.*, 97 Mass. 124, where the shipper employed a workman to deliver the package to the carrier, and the limitation was in the receipt delivered to him, contrary to the former usage between the shipper and carrier; *Perry v. Thompson*, 98 Mass. 249, where.

in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability, and from fact that printed parts of notice were so obscured by revenue stamp as not to be read intelligibly.

A contract and release, executed by a shipper months after the shipment was unenforceable, where it was not supported by a new consideration. *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44.

Shipper had previously sent goods without expressed valuation, being aware of increased rate for goods above \$50 in value, and, on this occasion, saw the receipt containing the limitation as to value unless expressed, and corrected an error as to date. Held, evidence of knowledge and assent to the limitation. *Graves v. Adams Ex. Co.*, 176 Mass. 280.

Under a statute forbidding railroad companies from limiting their liability as carriers, such liability may nevertheless be limited by special contract. But a company cannot refuse to carry unless a shipper enter into such an agreement. If not imposed upon or misled, a shipper is bound by limitations in a bill of lading which he accepts, though he fails to read it and does not know its contents. The consignee is bound by the terms made by his consignor.\* *McMillan v. M. S. & N. I. R. Co.*, 16 Mich. 79.

**From opinion.**—COOLEY, J. "There are some matters in respect to which the carrier may qualify his liability by mere notice. Mr. Greenleaf says: 'It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above a certain sum, unless they are entered as such, and paid for accordingly.' 2 Greenl. Ev., sec. 235; see *Western Transportation Co. v. Newhall*, 24 Ill. 466. These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery. *Farmers & Mechanics' Bank v. Champlain Trans. Co.*, 16 Vt. 52; same case, 18 id. 131, and 23 id. 186. But beyond the establishment of such rules, the force of a mere notice cannot extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability.

\* NOTE. This case was decided in 1867. By sec. 5239 of Michigan Statutes (C. L. 1897 ch. 131) it is provided that "no railroad company shall be permitted to change or limit its common law liability as a common carrier, by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried." And by §6239, providing for the incorporation of railroads, it is provided that: "Any railroad company organized under this act receiving freight for transportation, shall be entitled to the rights and subject to the liabilities of common carriers except as herein otherwise provided; but no such company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by an agreement to be signed by both parties."

"A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment.\*

"Pierce on Railroads, 416. See *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 id. 251; *Jones v. Voorhees*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. H. 487; *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How. 382; *Moses v. Boston & Maine R. R. Co.*, 24 N. H. 71; *Kimball v. Rutland & Burlington R. R. Co.*, 26 Vt. 256; *Slocum v. Fairchild*, 7 Hill, 292; *Dorr v. N. J. Steam Navigation Co.*, 4 Sandf. 136; and 11 N. Y. 485; *Michigan Central R. R. Co. v. Hale*, 6 Mich. 243. The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists. *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How. 382, per Nelson, J.†

"The evidence of such a contract in the present case consists, *first*, of the defendant's mode of doing business; *second*, of what are called in the case bills of lading, and which contain the supposed limitations. It is admitted by the plaintiffs that all the contracts of affreightment, the instructions to the agents, and the printed rules posted in all the depots and station houses of defendants for the past ten years, have contained clauses exempting them from liability for loss by fire, and providing that when goods are in the depot awaiting delivery to consignees, the company will be liable as warehousemen only, and not as carriers; and that plaintiffs have been accustomed to do business with defendants, and to receive and send goods over their road under bills of lading of this description.

"There are several reasons why knowledge in plaintiffs of defendant's usage to make restrictive contracts cannot control the present case. In the first place, knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode: and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common-law rights thereafter. In the second place, the defendants have no power under the law to establish a usage restricting their liability: as that would come directly in conflict with the clause in the general railroad law heretofore quoted. And in the third place, if this were otherwise, the usage would be irrelevant to the present case, since the proof relates to dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs here, while the contracts here in question were in each instance made with consignor at a distance, and in most cases by other railroad companies, whose usages do not seem to be uniform.

\* NOTE.—See, also, *Wallace v. Matthews*, 39 Ga. 633; *Chicago, &c., R. Co. v. Chapman*, 135 Ill. 96.

† Note.—See, also, *Gaines v. Union Trans. &c. Co.*, 26 Ohio St. 418; *Graham v. Davis*, 4 Id. 392; *U. S. Ex. Co. v. Boehman*, 28 Ohio St. 144; *Verner v. Sweitzer*, 32 Penn. St. 208; *Railroad Co. v. Barrett*, 36 Ohio St. 448.

" It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

" A bill of lading proper is the written acknowledgement of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed to their destination, and there delivered to the parties therein designated. Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation; and is the measure of their rights and liabilities, unless where fraud or mistake can be shown. Redf. on Railways, 307-309, and notes. Ang. on Carriers, sec. 223. It has acquired from usage a negotiable character, and the carrier may be estopped, as against the indorsee for value, from showing mistakes in giving it. Redf. on Railways, 307. Whether the contracts which railroad companies are accustomed to give on the receipt of goods for transportation, and which are usually called by the same name, are subject to all the same incidents as the bills of lading proper, we need not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, *I think, the weight of authority, and certainly the rule in this state, that the carrier may stipulate in them for a limitation of his common-law liability.* Michigan Central R. R. Co. v. Hale, 6 Mich. 243.

" Bills of lading are signed by the carrier only, and where a contract is to be signed only by one party, *the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it.* This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his *liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one,* (Brown v. Eastern R. R. Co., 11 Cush. 97.); and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else—as, for instance, a mere receipt for money—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such. King v. Woodbridge, 34 Vt. 565. But, except in these and similar cases, *it cannot become a material question whether the consignor read the bill of lading or not.* The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms, taking whatever the railroad companies see fit to give them, and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or if we may be allowed to state the same thing in different words, as everybody is negligent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the outset, whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident or

mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties *compotes mentes* in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

"It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freights in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs, would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

"*I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it.* An exemption from liability from losses arising from specified causes, when embodied in the bill of lading, has been frequently recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice. *Davidson v. Graham*, 2 Ohio, N. S. 131; *Parsons v. Monteath*, 13 Barb. 353; *York Co. v. Central R. R. Co.*, 3 Wall. 107; *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 491; and in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in *Moore v. Evans*, 14 Barb. 524; *Kallman v. Ex. Co.*, 3 Kan. 205, and *Whitesides v. Thurkill*, 20 Miss. 599; and it is in accordance with the general rule applicable to written contracts."

Acceptance of a bill of lading containing exemptions, without objection or insistence upon their omission, bound the shipper thereto. *Smith v. American Ex. Co.*, 108 Mich. 572.

A shipper's verbal contract was not varied by delivery to his clerk of a bill of lading which was never brought to his attention. *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568; s. c., 44 L. R. A. 415.

Where plaintiff voluntarily signed a bill of lading, which contained stipulations that were lawful, he cannot defeat it on the ground that it was signed without reading and had not his assent. *Heugstler v. Flint &c. R. Co.*, 125 Mich. 530.

In the absence of fraud or deceit, one signing a bill of lading is conclusively presumed to know its contents; but a limitation of liability as to an agreed valuation was not valid, where it was not made in consideration of reduced rates. *Kellerman v. Kansas City &c. R. Co.*, 136 Mo. 171; aff'g s. c., 68 Mo. App. 255; *Richardson v. Chicago &c. R. Co.*, 149 Mo. 311.

Where the rate exacted was the regular rate, the contract was without consideration and unenforceable and the fact that the shipper had to sign the contract to get the rate was no evidence that it was not the regular rate. *Ward v. Missouri &c. R. Co.*, 158 Mo. 226.

Shipper is bound by the terms of the contract signed by him, though he failed to read it, unless there was fraud, mistake or duress, and a reduction of rates is a sufficient consideration to support a limitation of common law liability. *Wyrick v. Missouri R. Co.*, 74 Mo. App. 406.

Recital of the fact of a reduced rate in consideration of a limitation of liability is only *prima facie* evidence of the fact. *Bowring v. Wabash R. Co.*, 77 Mo. App. 250.

Special rates was sufficient consideration to support a limitation of liability for delays of live stock to the extra expense for food and water. *Vaughn v. Wabash R. Co.*, 78 Mo. App. 639.

Bill of lading contained an agreed valuation far below actual value without offering in exchange a reduction of rate or an additional facility. The limitation was without consideration, unreasonable and void. *Gardner v. Southern R. Co.*, 127 N. C. 293.

See, also, *Hinkle v. Railway Co.*, 126 N. C. 932.

A bill of lading signed by company and accepted and acquiesced in by the consignor is binding upon the latter, although not signed by him, and terms and conditions of contract expressed therein cannot be contradicted by proof. *Gaines v. Union Trans. & Ins. Co.*, 28 Oh. St. 418.

Citing *C. H. D. R. Co. v. Pontius &c. R. Co.*, 19 Oh. St. 222.

The *assent* of the shipper or owner of goods to conditions limiting common-law liability, is not to be *implied* or *presumed*, but in each case of an action for a loss the assent must be shown by competent evidence, as in other cases of contracts. As the carrier is bound to receive and transport all goods offered for a reasonable compensation, subject to all the responsibility incident to the employment, the presumption is, in the absence of proof sufficient to remove it and to fix a different liability, that the shipper intended to insist on his common law right. *New Jersey v. Merchant Bank*, 6 How. U. S. 311; *Graham v. Davis*, 4 Ohio St. 376; *Adams Ex. v. Noch*, 2 Duval, 563; *Railroad v. Man. Co.*, 16 Wall. 329.

In each case the question is, what are the terms of the contract of shipment? Are they such as the law prescribes, or such as the parties agreed to? This being a question of fact, usage or custom cannot be set up to absolve the carrier from his ordinary duties, which public policy, his general undertaking, or his special promise may have bound him to do. *Cox v. Hiesley*, 19 Penn. St. 243; *McMasters v. Penn. R. R. Co.*, 69 Penn. St. 371; *The Sultana v. Chapman*, 5 Wis. 454; *Cox v.*

Peterson, 30 Ala. 608; Schouler on Bail, 442; *Railroad Co. v. Barrett*, 36 Oh. St. 448.

Draymen of plaintiff's agent, on delivery of goods to carrier, received from the latter dray tickets reading "to be exchanged for the usual bill of lading of the company, notice of the terms of which is hereby admitted, and this property is received subject to all the provisions limiting liability therein contained," and nothing further was done. Such acceptance by the draymen, in the absence of actual knowledge by plaintiff or his agent, did not bind the plaintiff to an assent to the limitations specified. *Mack v. Great Western Dispatch*, 2 Oh. C. D. 22.

See, also, *Pittsburg &c. R. Co. v. Blakemore*, 1 Oh. D. 26.

Failure of shipper to notice valid limitations of a carrier's liability in a bill of lading accepted by him, was not sufficient to invalidate its terms. *Stevens v. Lake Shore &c. R. Co.*, 20 Oh. C. C. 41; s. c., 11 Oh. C. D. 168.

A general notice of limitation must be such as amounts to actual notice, or shown to have been so conspicuous that the party sought to be affected by it could not have failed to discover it without gross negligence.

Emblazoning the general object on a check in large letters, but stating the restriction in small ones, is not sufficient. *Verner v. Sweitzer*, 32 Pa. St. 208.

Citing Story on Bailm. sec. 558; Angell on Carr. sec. 247-9; 2 Greenl. Ev., sec. 216; *Chouteaux v. Leech*, 6 Harris, 232-3.

Shipping receipt, exchangeable for and subject to the regular bill of lading, and therein expressed to constitute a contract upon its acceptance, is a part thereof, though not delivered until after the goods had started in transit. *Goodman v. Merchant's &c. Co.*, 3 Super. Ct. (Pa.) 282.

Liability of a carrier was not limited by the delivery of a bill of lading containing limitations after transportation had begun. *Illinois C. R. Co. v. Craig*, 102 Tenn. 298.

Release from liability for past negligence of carrier without consideration was void. *San Antonio &c. R. Co. v. Barnett*, 12 Tex. Civ. App. 321.

Recital of liability, in a release, for failure to furnish cars, of a reduced rate as a consideration therefor, did not bind the shipper where there was no actual reduction made. *Missouri &c. R. Co. v. Darlington*, (Tex. Civ. App.) 40 S. W. Rep. 550.

Where shipper, relying on an oral contract for shipment at a given rate, loaded his goods, he can not be compelled to execute a written contract for an increased rate or a decreased liability, and if executed on moment of starting because agent refuses to transport unless it was done, the duress avoids it. In any event gift of a free pass could not

constitute a consideration for such limitations, as it was issued to induce and to enable shipper to care for his cattle. *Texas &c. R. Co. v. Avery*, 19 Tex. Civ. App. 235.

See, also, *San Antonio &c. R. Co. v. Wright*, 20 id. 136.

A verbal contract of shipment was not varied by signing a written contract, after the goods had started and the freight was paid, without reading it. *Galveston &c. R. Co. v. Botts*, 22 Tex. Civ. App. 609.

Carrier sought to introduce a written contract limiting its liability to its own line, which the shipper claimed was without consideration. The question of failure of consideration was properly submitted to the jury. *San Antonio &c. R. Co. v. Botts*, (Tex. Civ. App.) 51 S. W. Rep. 853.

Shipper was not permitted to avoid the limitations contained in a bill of lading, though signed in haste by his agent without reading, subsequent to a verbal contract of shipment, where he knew that his custom was to sign such contracts containing such stipulations. *Ft. Worth &c. R. Co. v. Wright*, 24 Tex. Civ. App. 291.

Although a common carrier may limit his common law liability by a special contract assented to by the consignor of the goods, an unsigned *general* notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

*Elmore v. Sands*, 54 N. Y. 512; *Blossom v. Dodd*, 43 id. 264; opinion *supra*; *Rawson v. R. Co.*, 48 id. 212; opinion *supra*; *Nevins v. Steamship Co.*, 4 Bosw. 225; *Wilson v. R. Co.*, 21 Gratt. 654.

**From opinion.**—"In the *New Jersey Steam Navigation Company v. The Merchants' Bank* (6 How. 344), and *York Company v. Central Railroad*, (3 Wall. 107), speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: 'It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may, or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.'"

See *Bank of K. v. Adams Ex. Co.*, 93 U. S. 174.

Limitation of liability to a stated valuation, unless otherwise expressed, was valid, and binding, though made in the form of a notice printed upon



the back of a bill of lading, with a reference thereto on the face. *Cel-deron v. Atlas S. S. Co.*, 69 Fed. Rep. 514.

Acceptance of a bill of lading without signing is sufficient evidence of assent to its terms. *The Henry B. Hyde*, 82 Fed. Rep. 681.

A clause limiting carrier's liability stamped in red ink across one end of a shipping receipt at right angles to the body of the receipt, which was in black ink, held, not part of the contract unless brought within the shipper's knowledge and assent, though he signed the receipt. *New York &c. R. Co. v. Sayles*, 87 Fed. Rep. 444.

Limitation of liability was not effectual, where it was not based on any consideration whatever. *Berry v. West Virginia &c. R. Co.*, 44 W. Va. 538.

The presumption of assent of the shipper to the terms of a bill of lading raised by delivery to and acceptance thereof by him is not overcome, in the absence of fraud or deceit, by evidence of his failure to read it. And evidence that in many cases the same rate was charged when no bill of lading was issued, does not overcome the presumption of consideration for a special contract contained in the bill of lading. *Schaller v. Chicago &c. R. Co.*, 97 Wis. 31.

## 2. BAGGAGE.\*

Passenger in a railroad car, dimly lighted by a single light at one end, delivered two baggage checks to an express messenger and received in return a card or receipt on which the numbers of the checks were entered, and which also contained an agreement below the receipt and separated therefrom by a line drawn under it, limiting the liability of the company, printed in much smaller type than the rest of the card or receipt. It was not read by the passenger, and was in fact illegible where he was sitting. The card or ticket was not signed by any one, and did not appear like a contract, and would not from its general appearance be taken for anything more than a token or check, denoting the number of the baggage checks received, to be used for the identification of the baggage on its delivery, and Judge Church, in the conclusion of his opinion, says that no contract was proved:

1st. Because it was obscurely printed. (See *Verner v. Sweitzer*, 32 Penn. St. 208.)

2d. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper was a contract, and

3d. Because the circumstances attending the delivery of the card re-

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\* NOTE.—For other cases concerning baggage not connected with limitation of liability therefore see "Passengers," *post* p. 607.

pelled the idea that the plaintiff had such knowledge or assented to the terms of the alleged contract. *Blossom v. Dodd*, 43 N. Y. 264.

**From opinion.**—"This paper is subject to the criticism made by Lord Ellenborough, in *Butler v. Heane* (2 Camp. 415), in which he said that 'it called attention to everything that was attractive, and concealed what was calculated to repel customers;' and added: 'If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it.' \* \* \* In *Brown v. E. R. R. Co.* (11 Cush. 97), where the limitation was printed on the back of a passenger ticket, the court say: 'The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket.' In cases of *Prentice v. Decker*, (49 Barb. 21), and *Limburger v. Westcott*, (Id. 283), limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts. A different construction was put upon the delivery of a similar card, in *Hopkins v. Westcott* (6 Blatchf. R. 64); but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of *Grace v. Adams* (100 Mass. 560), relied upon by the defendant's counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew the paper contained the conditions upon which the money was to be carried, and was, therefore, presumed to have assented to them, although he did not read the paper. The court say: 'It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading.' So, in *Van Goll v. The S. E. R. Co.* (104 Eng. Com. Law R. 75), the same principle was decided. Willes, J., said: 'Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there.' Kenting, J., said: 'It was incumbent on the company to show that such was the contract.' \* \* \* 'I think there was evidence that the plaintiff assented to those terms.'"

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried.

If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the

terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he had entered upon his journey does not affect his rights. *Rawson v. The Pennsylvania R. Co.*, 48 N. Y. 212.

**From opinion.**—"The question to be considered is, whether the matter printed upon the face of the railroad ticket limited the liability of the defendant; and that it did not, is now too well settled to admit of dispute. *Blossom v. Dodd*, 43 N. Y. 264. The words thus printed do not purport to embody the contract between the parties. They are mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or on a separate piece of paper posted up at the ticket office; and hence this case is clearly within the rule that a carrier cannot limit his liability by notice, but can do so only by express contract.

It must, however, be admitted, that if the railroad agent had called plaintiff's attention to this language, when he sold the ticket and took her money, or if it had been shown that she knew of this language when she paid her money and took the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed. But here she testified that she did not read this language, and there is no proof that she received the ticket under such circumstances that the law will presume that she must have known and understood the language, and assented to the terms. It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, stops to read the language printed upon it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract, or in any way limits the carrier's common-law liability.

A ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another.

The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights."

Stipulation on a ticket, signed by defendant's agent, that the defendant should be liable only for gross negligence, and then only to the extent of fifty dollars (\$50), unless a bill of lading were signed therefor, specifying the articles, and that the money and jewels were at the owner's risk. A trunk was not delivered or accounted for and the defendant was grossly negligent and liable to the extent of fifty dollars (\$50). *Steers v. Liverpool, N. Y. & H. R. S. Co.*, 57 N. Y. 1, rev'g judgt for plff.

Where a traveler, on delivery of baggage to a local express company, receives a paper, which, from the circumstances of the transaction, he has a right to regard simply as a receipt or voucher, to enable him to follow and identify his property, and no notice is given to him that it embodies the terms of a special contract, or is intended to subserve any other purpose than as a voucher, his omission to read the paper is not

*per se* negligence, and he is not, as a matter of law, bound by its terms. *Madan v. Sherard*, 73 N. Y. 329, aff'g judg't for pl'ff.

The question whether, in a particular case, the party receiving such a receipt accepted it with notice of its contents or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one of evidence to be determined by the jury.

Defendant's agent came into a railroad car, in which plaintiff was traveling, and called for baggage; he received the check for plaintiff's trunk, with directions as to the delivery, and marked on a blank receipt the date, number of check and place of delivery, which he handed to plaintiff, without anything being said as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have read the receipt; without looking at or reading it, he put it in his pocket. The receipt was marked upon the margin "domestic bill of lading," and purported to be a contract relieving defendant from, or limiting his liability in certain specified cases, and among others limiting its liability, save in case of a special contract, to \$100. The court refused to charge, as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk under its terms, and limited defendant's liability to the amount specified, but submitted the question to the jury. Held, no error: that defendant, in order to relieve itself from full liability, was bound to establish a contract upon the special terms contained in the receipt; that no such contract arose, as matter of law, from the acceptance of the receipt under the circumstances.

Plaintiff, a passenger from Europe, able to read English, met the agent of the defendant on an open pier, in daylight, and delivered to him the trunk, received a receipt therefor and thereupon delivered the receipt to her brother, and neither of them objected to its terms, which limited the liability of the company to \$100, unless there was a special agreement in writing. The plaintiff was entitled to recover the actual amount of the damage to the contents of the trunk through the defendant's negligence, without limit. The burden was upon the defendant to show that the passenger assented to the terms of the receipt, which was not shown. *Grossman v. Dodd &c.*, 63 Hun, 324; aff'g judg't for pl'ff; aff'd, 137 N. Y. 599.

From opinion.—"As stated in *Madan v. Sherard* (73 N. Y. 329), where a traveler, on delivery of baggage to a local express company, receives a paper which, from the circumstances of the transaction, he has a right to regard simply as a receipt or voucher to enable him to follow and identify his property, and no notice is given to him that it embodies the terms of a special contract; or is intended to subserve any other purpose than a voucher, his omission to read the paper is not *per se* negligence and he is not, as matter of law, bound by its terms.

The question whether, in a particular case, the party receiving such a receipt accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so to require him to acquaint himself with its contents, is one of evidence to be determined by the jury. It will thus be seen that no such contract arises, as a matter of law, from the acceptance of the receipt, but the defendant, in order to relieve itself from full liability, is bound to establish a contract. *Sunderland v. Westcott*, 40 How. Pr. 469; *Blossom v. Dodd*, 43 N. Y. 264; *Rawson v. Penn. R. R. Co.*, 2 Abb. (N. S.) 220; *Limburger v. Westcott*, 49 Barb. 283; *Woodruff v. Sherrard*, 9 Hun, 323. \* \* \* These cases are to be distinguished from the cases of *Nicholas v. New York Central and Hudson River Railroad Company*, 89 N. Y. 370; *Guillaume v. The General Transportation Company*, 100 id. 498, and *Germania Fire Insurance Company v. Memphis, &c. Railroad Company*, 72 id. 93."

No contract limiting the liability of a carrier for loss of baggage arises from the mere acceptance of a receipt or ticket containing such condition, unless the attention of the owner of the baggage was called to such provision or he assented to it in some particular way, although it was not necessary that it should be read by him. *Lechowitzer v. Hamburg Am. Packet Co.*, 6 Misc. 536, aff'g judg't for pl'ff. (New York City Court.)

Defendant's passage tickets provided that baggage of a greater value than a certain sum must be specially mentioned and shipped under a bill of lading as cargo, and also that "a charge will be made for extra freight on shipboard" at a certain rate.

Plaintiff purchased her ticket and was charged the extra rate; such arrangement was out of the provision of the ticket contract and constituted a special agreement for the transportation of baggage, and the baggage not having been delivered, liability for the breach of the agreement was not avoided by the limitations in the contract. *Glorinsky v. Cunard S. S. Co.*, 6 Misc. 388, aff'g judg't for pl'ff. (N. Y. Common Pleas.)

Notwithstanding stipulation printed on ticket: "Passengers are not allowed to carry baggage beyond \$100 in value, and *that* personal, unless notice is given and an extra amount paid at the rate of a price a ticket for every \$500 in value," recovery was allowed for articles of traveler's baggage, although their value was more than \$100. *Nerius v. Bay State Steamboat Co.*, 4 Bosw. N. Y. 226.

*Woodruff v. Sherrard*, 9 Hun, 322.

Carrier cannot limit his common-law liability as to safety of baggage by notice; hence notice in a stage-coach "all baggage at the risk of the owner," will not protect him in an action for loss of trunk due to negligence. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251.

*Clark v. Faxton*, 21 Wend. N. Y. 153; *Hollister v. Nowlen*, 19 Wend. 234. See *Dwight v. Brewster*, 1 Pick. 50.

A receipt, given by an express company in exchange for a baggage check, containing stipulations limiting liability, held not binding unless taken with knowledge of its nature and contents. *Springer v. Westcott*, 166 N. Y. 117; aff'g s. c., 19 App. Div. 366.

Failure to read a limitation of liability in a baggage receipt, was no excuse in view of a statute permitting such a limitation when accepted "with knowledge of its terms," where the circumstances would have led a prudent man to read it. *Merrill v. Pacific Transfer Co.*, 131 Cal. 582.

A railroad company may not exempt itself from liability for value of baggage beyond one hundred dollars, under Iowa Statute (Code, secs. 1308, 2184). *Davis v. Chicago &c. R. Co.*, 83 Iowa, 744.

But such provision does not apply to merchandise to be shipped as baggage. *Weber Co. v. Chicago &c. R. Co.*, 113 Iowa, 188.

Notice that carrier would not "be liable for the baggage of passengers beyond a certain amount, unless, etc.," printed on the back of the passage ticket, and detached from what ordinarily contains all that is material to the passenger to know does not raise a legal presumption that the party at the time of receiving the ticket and before the train leaves the station, had knowledge of the limitations which the carrier had attached to the transportation of the baggage of the passenger, but it is for the jury whether the plaintiff knew of the notice before commencing the journey. *Brown v. East R. Co.*, 11 Cush. 97.

Citing *Camden &c. R. v. Baldauf*, 4 Harris, 67; *Butler v. Heane*, 2 Camp. 415; *Davis v. Willan*, 2 Stark. R. 279; *Kerr v. Willan*, id. 53; *Macklin v. Waterhouse*, 5 Bing. 212.

No presumption of notice, where passenger receives a check containing conditions on its back, and on its face "Look on the back." *Malone v. Boston &c. R. Co.*, 12 Gray, 392.

Common carrier cannot restrict his liability for loss of baggage by notice, even when such notice is brought to the knowledge of the passenger. Such restriction can only be made by agreement. *Davidson v. Graham*, 2 Oh. St. 131.

*Cleveland &c. R. Co. v. Curran*, 19 Oh. St. 1; *Gaines v. Union T. & L. Co.*, 28 Oh. St. 144; *Railroad Co. v. Campbell*, 36 Oh. St. 658. A railroad ticket is not such an agreement. *Railroad Co. v. Campbell*, 36 Oh. St. 658.

Purchaser of railroad ticket does not, by his mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon in the absence of actual knowledge of them. *Kent v. R. Co.*, 45 Oh. St. 288.

*Rawson v. Penn. R. Co.*, 48 N. Y. 212; *Brown v. Eastern R. Co.*, 11 Cush. 97; *Malone v. Boston & W. B. Co.*, 12 Gray, 388; *Camden & Amboy R. W. Co. v. Baldauf*, 16 Pa. St. 67; *Blossom v. Dodd*, 43 N. Y. 264; *Quimby v. Vanderbilt*, 17 N. Y. 306.

Mere ratification of rules of a sleeping car company, by a foreign government, that baggage while in the coach was at owner's risk, construed not to bar recovery for loss by negligence, unless it appears that the laws of such place allow exemptions from loss by negligence. *Stevenson v. Pullman Palace Car Co.*, (Tex. Civ. App.) 32 S. W. Rep. 335.

The question of the right to limit liability for loss of baggage is for the court, though reasonableness thereof is for the jury. *Houston &c. R. Co. v. Seale*, (Tex. Civ. App.) 61 S. W. Rep. 431.

Carrier may restrict his liability as insurer of baggage exceeding a fixed amount in value, by special regulation, brought to the knowledge of the passenger. *N. Y. &c. R. Co. v. Fraloff*, 100 U. S. 24.

Arbitrary statement of value, not made as a basis on which to fix rates of compensation, held contrary to public policy. *The Kensington*, 183 U. S. 263; rev'g s. c., 94 Fed. Rep. 885.

Where passenger cannot read, he is not bound by the special conditions printed on the ticket sold him, which conditions were not explained to him. *Mauritz v. N. Y. &c. R. Co.*, 23 Fed. R. 765.

Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67; see, however, *Fibel v. Livingston*, 64 Barb. 179.

Stipulation in ticket limiting amount of recovery for baggage, held not binding, unless passenger's attention is specially called to it. *Wiegand v. Central R. Co.*, 75 Fed. Rep. 310.

Carrier cannot relieve itself of liability for loss of baggage or delay by stipulating that the landing shall not be a part of the carriage. *The Valencia*, 110 Fed. Rep. 221.

If reasonable regulations of carrier in regard to the manner of delivery of baggage are brought to the knowledge of a passenger, his consent thereto is not required to make them binding. *Gleason v. Goodrich L. Co.*, 32 Wis. 85.

#### (c). VARIATION OF TERMS OF CONTRACT BY PAROL.

Where the plaintiff sends to the office of a common carrier goods to be transported to another place, and a contract is there made for their transportation, and a receipt given *simply* specifying the receipt of the goods marked with the consignee's address, the receipt and parol contract may be given in evidence in an action against the carrier.

Such a receipt is not a contract embodying the previous oral engagement. *McCotter v. Hooker*, 8 N. Y. 497.

Where a shipper of property takes from the carrier a bill of lading, receipt or other voucher expressing the terms and conditions upon which the property is to be transported, the writing, in the absence of proof of fraud or mistake, must be taken as the evidence, and the sole

evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior parol negotiations to vary its terms. *Long v. The New York Central R. Co.*, 50 N. Y. 76; *Hinekley v. N. Y. Cent. & E. R. Co.*, 56 id. 429.

**From opinion.**—"The rule that when a contract was reduced to writing recourse must be had to the instrument to ascertain its terms, and that resort cannot be had to prior negotiations to vary its terms, and that everything resting in parol becomes thereby extinguished, was applied to a contract for the sale of a ship in *Mumford v. McPherson*, 1 J. R. 414; to a bill of lading in *Creery v. Holly*, 14 W. R. 26; to a charter of a vessel in *Renard v. Sampson*, 2 Kern. 561; and to a contract for grading and paving streets in *Riley v. City of Brooklyn*, 46 N. Y. 444. The rule was recognized in *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712; but the case was taken out of the rule by the fact that the goods had been actually shipped under the verbal agreement, and the written agreement, or bill of lading, was sent to the shipper one or two days after the property had been shipped, and after the owner had lost the control of the goods and was in no situation to object to its terms. *Renard v. Sampson*, *supra*, is cited with approval in other cases which have been held not within the rule, for the reason that the part of the contract still resting in parol was separable and distinct from that part which had been reduced to writing. *Whitbeck v. Wayne*, 16 N. Y. 532; *Barker v. Bradley*, 42 id. 316. Here the contract was entire and the written instrument was complete, making by itself a perfect contract, and was delivered and accepted by the plaintiff's agent at the time of the receipt of the goods by the defendant; and there are no circumstances in the case, as made, to authorize a resort to the prior verbal negotiations or agreement by the parties."

If language is explicit, it cannot be varied by parol, or a meaning given to it different from that called for by its terms. Nor can it be varied by proof of inconsistent custom and usage, although it may be in such way explained, when necessary. *Collender v. Dinsmore*, 55 N. Y. 200; but see *The Delaware*, 14 Wall. 519, 605-6.

Oral agreement with Red Line to transport in refrigerator car is not modified by bill of lading sent to shipper *too late to relake the goods*, where "refrigerator car" is omitted, and where the agent told the shipper "it would make no difference; that the car would go through all right." If shipping line consists of several carriers, and bills of lading limit liability of each carrier to his own line, no carrier is liable beyond his own line. *Ricketts v. Baltimore & Ohio R. Co.*, 59 N. Y. 637; *Belger v. Dinsmore*, 54 id. 166; *New Jersey & Navigation Co. v. Merchants' Bank*, 6 How. U. S. 384; *Dorr v. New Jersey Nav. Co.*, 1 Kern. 185; *Nicholas v. N. Y. C. & E. R. Co.*, 4 Hun. 329.

Agreement to send freight *through in original car* is not merged in shipping bill which provided for carrying the same to the terminus of defendant's line. By change of car the freight was injured. Defendant liable. *Riley v. N. Y. L. E. & W. R. R. Co.*, 34 Hun. 97. *Shiff v. New York Central R. Co.*, 16 Hun. 278.



In an action to recover the damages resulting in the loss of certain potatoes which the plaintiff alleged the defendant had undertaken to transport from Avoca, N. Y., to Elkhart, Ind., the bill of lading given to Saltsman by the railroad company recited in the earlier portion thereof. "Notify D. Carpenter, Elkhart, Indiana;" and proceeded, in a subsequent part, as follows: "Which the N. Y., L. E. & W. R. R. Co. agrees to *forward* from Avoca, N. Y., to Buffalo, N. Y."

Held, that the plaintiff had a right to prove the oral agreement of the railroad company to transport the potatoes to Elkhart, Indiana, and that such agreement was not merged in the bill of lading. *Saltsman v. The N. Y. L. E. & W. R. R. Co.*, 65 Hun. 448.

Evidence of a local usage allowing longer than a reasonable time for removal of goods was inadmissible to contradict an express provision in a contract that liability as a carrier was to cease upon arrival of the goods; the custom being in vogue at the time and expressly stipulated against. *Tallassee Falls Man. Co. v. Western R. &c.*, 128 Ala. 167.

Extrinsic evidence is admissible on the question whether a stipulation as to agreed valuation was fairly and honestly entered into. Circumstances held to warrant a jury in finding a verdict for \$125 though \$50 had been inserted in the contract as the agreed value. *O'Malley v. Great Northern R. Co.*, (Minn.) 90 N. W. Rep. 974.

In the absence of fraud or duress, a written contract for shipment was held to supersede previous oral understandings. *San Antonio &c. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

Shipper, upon applying for transportation, had tendered him the usual bill of lading containing limitations, among others, as to value, such as he had before executed. On this occasion he objected to the statement as to value, but was told that it was merely formal though the bill expressly stated that the agent was without authority to vary its terms. Held not to show duress or fraud in procuring the contract. *Jennings v. Smith*, 106 Fed. Rep. 139.

## XVI. Deviation from Contract and Instructions.

**When a carrier of goods deviates from the route stipulated in his bill of lading, he becomes an insurer, and so, responsible for all loss and damage to the goods, even from unavoidable casualty.** *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514.

Carrier forwarding goods beyond the terminns of the route is bound by the instructions of the owner, and he disregards them at his risk, unless safety, not convenience, requires it, and he must then notify the owner of the deviation. *Johnson v. N. Y. C. R. R. Co.*, 33 N. Y. 610; *Ackley v. Kellogg*, 8 Cow. 225; 1 Parsons on Cont., 69; *Forrester v. Boardman*, 1 Story, 43.

If the carrier materially varies the route, by which carriage was contracted to be carried, the carrier becomes an insurer. (*Danseth v. Wade*, 2 Scam. 285; *Hartung v. Pepper*, 11 Pick. 41; *Steel v. Flagg*, 5 Barn. & Ald. 342; this last case is distinguished from the previous case of *Bateson v. Donovan*, 4 B. & A. 20, on the ground that in this case the carrier acted in direct contravention of his contract. *Jones on Bailments*, 28; *Coleman v. New York Central R. R. Co.*, 33 N. Y. 610.) In such a case the first carrier is liable for default of the connecting carrier.

But if it should be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default or deviation, the carrier should be excused. The burden of proof of this fact, however, is on the carrier.

Where the contract of a carrier is that the goods should be carried "all rail,"—held, that the *necessary* crossing of ferries, in the transportation was not a deviation, and that the contract to carry "all rail" would be performed by the transportation by rail as far as was practicable. If, however, the goods could have been carried by rail, their transportation by any other mode, even for a few miles, would render the carrier liable as an insurer. *Davis v. Garrett*, 6 Bing. 716; *Danseth v. Wade*, *supra*. *Story on Bailments*, sec. 509; *Abbott on Shipping*, 362. *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514.

A contract to transport goods from Havre to New York via London is open to the explanation that the contract necessarily meant by water to Southampton, thence by rail to London and there transshipment to New York; inasmuch as the business had been carried on in that manner for many years and the method for doing it was notorious and well known to persons dealing with defendant's agents at Havre. *Robertson v. National S. S. Co.*, 139 N. Y. 416.

Instruction to ship a consignment of number in one car was reasonable and binding, where the carrier had a car of sufficient size; carrier was liable for loss for deviation therefrom though loss of one of the cars was not through its negligence. *Uptegrove v. Central R. Co.*, 16 Misc. 11; *aff'g s. c.*, 14 Misc. 460.

An action arises upon failure of carrier to carry cotton out of a certain port on a certain day, agreed upon by contract. *Richmond & C. R. Co. v. Bedell*, 88 Ga. 591.

Discretion as to the mode of shipment must not be knowingly exercised to the disadvantage of the shipper. *Stewart v. Comer*, 100 Ga. 754.

Defendant received goods for transit on the S. The boat left without them and escaped a fire which destroyed the C., the next boat out, which carried them. Liability as insurer attached upon deviation from

the contract though the same fire would have destroyed the goods had they been held for the next trip of the *S. Louisville &c. Co. v. Rogers*, 20 Ind. App. 594.

Where a car of onions delivered Tuesday to a carrier to be transported sixty-four miles, did not arrive until Saturday. Liability attached for their loss. *St. Clair v. Chicago &c. R. Co.*, 80 Iowa, 304.

Initial carrier, receiving goods billed over lines of certain connecting carriers, held liable as insurer for sending them over other lines. *Brown &c. Co. v. Pennsylvania Co.*, 63 Minn. 546.

Limitation of liability expressed in a contract does not avail a carrier who transports animals by freight, instead of by passenger service as agreed upon, and stock is injured by the rougher service. *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302.

Carrier was not liable for failing to follow instructions to carry fruit in a ventilated car, when it did not agree to do so, and it was not the custom unless there was a full car load. *Davenport Co. v. Pennsylvania R. Co.*, 113 Pa. St. 398.

Carrier was liable for failure to notify the shipper of connecting carrier's refusal to accept the goods, and its delivery to another carrier rendered it liable as insurer for safe delivery. *Louisville &c. R. Co. v. Odil*, 96 Tenn. 61.

Carrier held liable for negligence, but not conversion, for failure to communicate directions as to route to a connecting carrier. *Booth v. Missouri &c. R. Co.*, (Tex. Civ. App.) 37 S. W. Rep. 168.

And so as to the connecting carrier, where the only effect of the deviation was failure to give prompt notice of arrival. *Southern P. Co. v. Booth*, (Tex. Civ. App.) 39 S. W. Rep. 510.

Carrier was liable for sending the goods over a different route than that called for by the contract, whereby consignee failed to receive prompt notice of their arrival. *Southern &c. R. Co. v. Booth*, (Tex. Civ. App.) 39 S. W. Rep. 585.

Carrier was liable for rough handling on another line over which it forwarded the goods in violation of the terms of the contract, though it had limited its liability to losses on its own line. *Texas &c. R. Co. v. Boggs*, (Tex. Civ. App.) 40 S. W. Rep. 20.

A carrier, at liberty under the bill of lading to select the connecting carrier, was negligent in selecting, without necessity, one on which it knew there was a strike in operation. *Houston &c. R. Co. v. Hour*, 15 Tex. Civ. App. 502.

Discretion reserved by a bill of lading to forward by the next boat, if prevented by any cause from going by the steamer specified, was reasonably exercised where the goods (metal) were left for the next boat

because of lack of room after stowing the perishable goods offered. *The Kansas*, 87 Fed. Rep. 766.

Delivery of cotton at West Wego, a place opposite New Orleans, the terminus of railways from Texas and the place where consignments were taken aboard steamers for transportation abroad, was not a deviation from a contract to carry cotton to New Orleans for shipment to Europe. *Marande v. Texas &c. R. Co.*, 102 Fed. Rep. 246.

A carrier, under contract to carry goods direct to a given place, sent them in a different direction and by another carrier to be by it transhipped to the place specified. The former was liable for loss while in the hands of the latter. *Seavey Co. v. Union Transit Co.*, 106 Wis. 394.

### XV. Loading and Care of Shipment.\*

It is the duty of the carrier to call the shipper's attention to a defect in the car, yet if the shipper neglects it under circumstances, that charge him with knowledge of its defects, the carrier is not liable for injuries arising from such defects; but this will not excuse extraordinary detention. *Blackstock v. N. Y. & E. R. R. Co.*, 20 N. Y. 48.

The train conveying the cattle was detained sixteen hours at an intermediate station, in constant readiness to start when another train, which was belated, should arrive. The owner of the cattle proposed to take them out of the cars and water them, but refrained on being informed by the carrier that the cars might start within a period too brief for that purpose. Held, that it was a question for the jury whether this amounted to a refusal by the carrier to permit them to be taken out.

The carrier, having control of the train, is responsible for any injury to the cattle, from their not being watered at the place of detention. The owner was not required to demand that the train should proceed, nor to persist in attempting to water the cattle until forcibly resisted.

Where the freighter must submit to an injurious detention of his property or to the use of a vehicle having a visible defect from which but slight damage could result during a transit in a reasonable time, his election to use the vehicle is not such negligence as to exonerate the carrier from the further damages resulting through an extraordinary detention.

When the owner of property to be transported makes his own selection of the vehicles, under circumstances which charge him with full knowledge of their capabilities and defects, the carrier is not responsible for any injury which may result exclusively from such defects.

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\* NOTE As to the care of cattle see also "Carriage of Animals," *ante*, p. 219.  
As to care of perishable goods, see also "Perishable Goods," *ante* p. 229.

The carrier, however, is bound to see that the freightor has such knowledge. He is not bound to enter the vehicles to examine them. To exonerate the carrier he must show that defects not palpable and visible were pointed out, or prove such circumstances as will justly charge the freightor with knowledge of their existence. *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232.

Although a carrier negligently delayed transportation of grain, yet, as meantime it became heated through the neglect of its custodian to stir it, as was his duty, the negligence of the carrier was not the proximate cause. It was not the duty of the defendant to so stir the grain. The grain was injured in the storehouse and not on board the defendant's boat, and the claim was that the defendants did not take and deliver on time and according to contract. Defendants had neither possession nor control of such storehouse. *Hamilton v. McPherson*, 28 N. Y. 72.

If a shipper be responsible for the watering of cattle and be prevented from doing it by the carrier, the latter is liable. *Penn. v. Buffalo &c. R. Co.*, 3 Lansing, 443.

The defendant, an owner of freight, agreed that it should be unloaded at a particular place. When the plaintiff's intestate was unloading it an engine came up on the neighboring track, without urgent necessity, and frightened the horses so that they ran away and killed the intestate. It was a part of the agreement that the owner and his servants should not be molested while unloading the car. *Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383, aff'g judg't for pl'ff.

A railroad company owes a shipper of freight, while loading, the same ordinary care which every man owes to his neighbor to do him no injury by negligence, while both are engaged in lawful pursuits. The plaintiff's intestate was assisting the defendant's servants to load a wagon into a car, when the engine backed suddenly against the car and killed him. The defendant was liable.

Provision in a contract of shipment that shipper is "to load, transship and unload said stock at his own risk," did not release defendant for injury to shipper by backing car upon him while engaged in loading. *Stinson v. N. Y. Central R. R. Co.*, 32 N. Y. 333.

A railroad company owes a stranger no duty either to guard him from danger or in any way to anticipate and save him from the consequences of his own negligence. The plaintiff contracted to deliver to the defendant, upon a siding alongside of its own main track, a carload of lumber properly supported at the side by cross pieces. The defendant's agent, in order to unload the lumber, disconnected the cross pieces and removed a large portion of the lumber, and left over night a high,

narrow pile on the side toward the main track, which, in the absence of the cross pieces, was blown by a high wind upon the main track. The engineer of a train on the main track perceived the obstruction but not in time to stop the train, and the locomotive and cars were broken and damaged thereby. Evidence justified the finding that the defendant was, and the plaintiff was not, negligent. The plaintiff owed no duty to the defendant to unload or care for the unloading of the car, and was not bound to anticipate any danger from it. *N. Y., L. E. & W. R. R. Co. v. Atlantic Refining Co.*, 129 N. Y. 597.

As a general rule, it is the duty of a railroad company to load freight delivered to it for transportation into its cars, and it may not devolve this duty, by any regulations, upon the shipper, and it cannot legally, as a condition of transportation, generally exact from the shipper a contract to place the freight upon its cars.

As to whether this rule applies to bulky freight, and whether as to it the company may make a regulation requiring the shipper to load it, *quære*. *London &c. Ins. Co. v. Rome, W. & O. R. Co.*, 144 N. Y. 200; *aff'g s. c.*, 68 Hun. 598.

A carrier, undertaking to move machinery in the dark, was liable for failure to provide necessary lanterns for the purpose. *Jackson &c. Works v. Hurlburt*, 15 Misc. 93; *s. c. aff'd*, 158 N. Y. 34.

Perishable articles (plants) were frozen during a delay in transportation. Carrier was not liable, where it was not shown that the delay was the cause of the freezing. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615; *aff'g s. c.*, 20 *id.* 130.

Under a contract providing that owner of stock shipper should load and unload them, no liability attaches to the carrier for injuries caused by improper loading. *Fordyce v. McFlynn*, 56 Ark. 424.

Carrier was negligent in its duty towards a shipment of cattle where it induced the shipper to load for a 10.42 train in the morning, but failed to move till 5.30 in the afternoon. *Kansas &c. R. Co. v. Ayers*, 63 Ark. 331.

Delay by fog in transportation of poultry packed in ice, resulting in the melting of the ice and damage to the poultry, is chargeable to carrier. *Peck v. Weeks*, 31 Conn. 145.

If a shipper agrees to feed and water his stock in case of delay in transportation, he will be held to the contract and no recovery will be allowed for deterioration of stock in consequence of failure to feed them. *Boat v. Cent. R. Co.*, 87 Ga. 463.

Negligence in conductor to fail to throw water on stock on learning of their heated condition. *Illinois Cent. R. Co. v. Adams*, 12 Ill. 474.

Negligence, in providing an unsuitable refrigerator car to a shipper

of hams, was not excused upon inspection thereof by the shipper's vendor, where the latter acted as the carrier's agent. *Chicago &c. R. Co. v. Davis*, 159 Ill. 53.

A shipper who assumes the duty of loading does so at his own risk and not as the agent of the carrier. *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645; aff'g s. c., 63 Ill. App. 145.

Carload of furniture was found at its destination to be badly broken. The fragments in many cases suggested an accident or repacking in a new car. Carrier was liable. *Louisville &c. R. Co. v. Cunningham*, 88 Ill. App. 289.

The agreement of owners to take charge of animals shipped, throws upon them the burden of showing that injuries done to stock were due to carrier's negligence. *Terre Haute R. Co. v. Sherwood*, 132 Ind. 129.

It was not negligence in a carrier of inflammable materials, not to place its cars so as to be under the guard of the police or so as to be accessible in case of fire. *Insurance Co. &c. v. Lake Erie &c. R. Co.*, 152 Ind. 333.

However unruly a horse may be, car door should be strong enough to resist its struggles. *Smith v. New Haven &c. R. Co.*, 94 Mass. 531.

No recovery where plaintiff put combustibles in cars in violation of known rules of company. *Pratt v. Ogdensburg &c. R. Co.*, 102 Mass. 557.

Carrier not liable for damage by one horse to another during transportation from owner's failure to remove their shoes and negligence in fastening their halters. *Evans v. Fitchburg*, 111 Mass. 142.

No recovery was allowed for loss of horse when the owner failed to fasten him securely near the open door of a railroad car. *Hutchinson v. Chicago &c. R. Co.*, 37 Minn. 524.

A carrier did not discharge his duty as to the care of perishable goods frozen in transit by simply doing as others usually did under similar circumstances, in regard to care of fruit. *Hinton v. Eastern R. Co.*, 72 Minn. 339.

A shipper is not entitled by right to "lay out" a car containing stock; and if the same are suffering from his negligent arrangement he cannot recover of the company for failure to afford a "lay out." *Illinois Cent. R. Co. v. Peterson*, 68 Miss. 154.

Where in a shipment of horses, no "lay out" is provided for by contract, and they can be fed and watered in the car, the carrier is not liable for failure to stop the train so as to give shipper a chance to rest his horses and rearrange them. *Illinois Cent. R. Co. v. Peterson*, 68 Miss. 454.

Obligation of company to "lay out" a stock car containing cattle and hogs, when necessary, for saving the stock, is not avoided on mere ground that place chosen by shipper did not have a safe stockpen for hogs, if cattle could have been unloaded separately. *Johnson v. Alabama &c. R. Co.*, 69 Miss. 191.

Cost of erecting standards on flat cars for the carrying of hay, the same being done by shipper, cannot be charged to carrier. The shipper is not the judge of sufficiency of car accommodations. *Sloan v. St. Louis &c. R. Co.*, 58 Mo. 220.

A carrier was not negligent in failing to keep cars at small stations where a sufficient quantity was kept within a reasonable distance. *Huston Bros. v. Wabash R. Co.*, 63 Mo. App. 671.

Carrier not answerable for injury to stock caused by overloading the cars, even in the absence of contract exempting it. *Rixford v. Smith*, 52 N. H. 355.

Carrier permitting combustible material to be used on its cars must answer for damages to goods caused thereby. *Powell v. Penn. R. Co.*, 32 Pa. St. 414.

If pots consigned for shipment were carefully packed when delivered to the carrier and were found to be damaged on arrival at their destination, the inference is that the carrier was negligent in transporting them. *Phoenix Pot Works v. Pittsburg &c. R. Co.*, 139 Pa. St. 284.

The door of a car which was to be unloaded in a few hours was left open a short distance. A fire was communicated to it from a building 23 feet away, within 20 minutes after it started. Carrier was not negligent. *Scott v. Allegheny Valley R. Co.*, 172 Pa. St. 646.

Live stock; no liability for delay from extraordinary snowstorm, but for overcrowding cars to the injury of stock, liability attaches. *Ritz v. Penn. R. Co.*, 3 Phila. 82.

Where the sudden starting of a train carrying cattle threw them off their feet and bruised them, liability attaches to the carrier. *Gulf &c. R. Co. v. Ellison*, 70 Tex. 491.

Failure to transport stock within a reasonable time, and jerking cars so that the cattle were crippled gives right of action. *Gulf &c. R. Co. v. Ellison*, 70 Tex. 491.

Carrier held to obligation to feed and water stock notwithstanding a custom of the owners to do it. *Missouri P. R. Co. v. Fagan*, 72 Tex. 127.

Carriers of live stock should provide proper facilities for loading the same without extra charge beyond charge of transportation. *Covington Stockyards Co. v. Keith*, 139 U. S. 128.

Damage to a consignment of plumbago from the leaking of oil casks



stored near it chargeable to carrier. *Braker v. The H. G. Johnson*, 48 Fed. Rep. 696.

A carrier of stock must provide suitable ventilation, and an action will lie for failure to take the number of cattle agreed upon, although the shipper refused to ship them because of defective ventilation. *The Alvah*, 59 Fed. R. 630.

Carrier was liable for negligently exposing cotton to an excepted peril, such as fire while in places of transshipment or while in depots, landings, etc. *Thomas v. Lancaster Mills*, 71 Fed. Rep. 481.

Carrier delivered cotton to a compress company to be compressed for shipment, and, when compressed, permitted it to remain on the platform an unreasonable time exposed to danger from fire from passing locomotives. It was liable for the destruction of the cotton by fire. *Missouri &c. R. Co. v. McFadden*, 89 Fed. 138.

Carrier was not excused from the consequence of defects in tank cars for oil, by the fact that they were hired from another. *Cincinnati R. Co. v. Fairbanks & Co.*, 90 Fed. Rep. 467.

Carriers were not released from their duty of care as to transportation by the fact that the cars were owned and maintained by another. *New York &c. R. Co. v. Cromwell*, 98 Va. 227; s. c., 49 L. R. A. 462.

Where conduct of owner of stock occasioned injury as where he left car door open, no liability attaches to carrier. *Roderick v. R. Co.*, 7 W. Va. 54.

Loading of wagon on car by owner under circumstances calculated to warn him of the danger of so doing, does not make carrier liable for loss caused by such negligent loading. *Millmore v. Chicago &c. R. Co.*, 37 Wis. 190.

It was negligence to allow strawberries to remain for seven hours before refilling the ice box, as was necessary for proper refrigeration. *Lamb v. Chicago &c. R. Co.*, 101 Wis. 138.

## XVI. Delivery.

I. If the consignee of goods be present upon their arrival, he must take them without unreasonable delay.

II. If he lives in the immediate vicinity, the carrier must notify him and then they must be taken without unreasonable delay.

III. If he is absent, unknown, or cannot be found, or refuses to receive them, then the carrier can place them in his freight house, and, if the consignee does not call for them in a reasonable time, the liability as a common carrier ceases. If the consignee has a reasonable opportunity to remove them and does not, he cannot hold the carrier as an insurer. *Powell v. Myers*, 26 Wend. 591; *Fisk v. Newton*, 1 Denio 45; *Jones v. The Norwich and New York Trans. Co.*, 50 Barb. 193; *Roth v. Buffalo and State Line*

R. R. Co., 34 N. Y. 548; *Northrop v. Syracuse, B. & N. Y. R. Co.*, 3 Abb. App. Dec. 386.

IV. The liability of the intermediate carrier continues until that of the next carrier begins, *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Gould v. Chapin*, 20 id. 266; *Ladue v. Griffith*, 25 id. 364; *McDonald v. Western Railroad Corporation*, 34 id. 497; when for mutual convenience of consignee and carrier the carrier keeps goods over night, he is not an insurer. *Fenner v. Buffalo & State Line R. Co.*, 44 N. Y. 505.

A warehouseman delivered the plaintiff's wheat upon an order of certain brokers who were entitled to an equal amount of wheat deposited with the same warehouseman. Such brokers, the defendants, received the money for the wheat and paid it over to their principals, who, for the first time, were then apprised of the mistake. The brokers and their principals were jointly liable to the plaintiff for the value of the wheat. *Cobb v. Dows*, 10 N. Y. 335; *Olmstead v. Houghtaling*, 1 Hill, 318; *Irving v. Motley*, 7 Bing. 543.

Any delivery that discharges the carrier as to the consignee, discharges him as to the consignor.

A common carrier of money from bankers in the interior to a bank in New York city, having no notice of the ownership, except what is implied from the address of the package, is authorized to treat the consignee as entitled to control the manner of its delivery.

Accordingly, where an express company entrusted with a package of money addressed "People's Bank, 173 Canal street, New York," by the direction of the bank, delivered the package in a distant part of the city to its agent, from whom it was stolen, held, that the consignor to whom the package belonged, could not maintain an action for its non-delivery. *Sweet v. Barney*, 23 N. Y. 335.

On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff, and awaited further instructions, or it should have relieved itself from liability by depositing the hemp for safe keeping in a suitable warehouse. *Forsyth v. Walker*, 9 Barr. 148; *Gould v. Chapin*, 20 N. Y. 259; *Fisk v. Newton*, 1 Denio 451. *Johnson v. N. Y. Central R. Co.*, 33 N. Y. 612.

A common carrier by water is not discharged from all responsibility by the discharge from a vessel at a proper place, reasonable hour and on due notice, where a wharf has not been secured by the owner or consignee for storing the goods. If the consignee does not appear to claim or is unable or refuses to receive the goods, the carrier should place them on proper deposit or in proper custody. (Story on Bailments, sec. 545; *Ostrander v. Brown*, 15 J. R. 39; *Mayell v. Potter*, 2 J. Cas.

371; *Fisk v. Newton*, 1 Den. 45; *Richardson v. Goddard*, 23 How. (U. S. R.) 28.

The consignee is entitled to reasonable time to remove the goods and, meanwhile, they are at the risk of the carrier, who has no right to put them in store for the consignee. *Redmoud v. Liverpool & Philadelphia S. S. Co.*, 46 N. Y. 578.

February 20th the plaintiff consigned some unmarked packages of butter to himself and also wrote "S."; "The roll sent you to-day, the 20th, you will find of very good quality." On this letter, presented to the defendant, "S." obtained the butter. It should have been submitted to the jury to determine whether the plaintiff was negligent. Nonsuit was error. *Viner v. N. Y., A. G. & M. S. R. Co.*, 50 N. Y. 23.

A box of jewelry was shipped by defendant's express company and proof was given of the non-delivery of the goods to the consignee, and that some months after shipment the box which had contained them was picked up empty. No explanation of non-delivery was shown. Held, that these facts warranted the submission of the question of negligence to the jury; and a refusal so to do was error. *Maguin v. Dinsmore*, 56 N. Y. 168.

In the same case in 70 N. Y. 417, the court said: "It would have been error to charge the jury that they might find a conversion upon the evidence before them, which was merely that the goods had not been delivered to the consignee, and that the box in which they had been delivered to the carrier had been found in the water in or near New York harbor, a year or thereabouts thereafter. The last circumstance did not add to the proof of non-delivery as tending to show in what way the loss had occurred, whether the box had been stolen or had been casually, and by ordinary negligence lost and rifled of its contents, and thrown away." (*Bowlin v. Nye*, 10 Cush. 416.)

See 70 N. Y. 410; *Gleadell v. Thompson*, 56 id. 194.

Goods, as per bill of lading, were to be taken alongside of vessel or deposited at risk and expense of the consignee in the defendant's warehouse. On the arrival, the consignee got a permit for landing but did not remove; the defendant put the goods in the warehouse and then delivered them to the wrong person. The defendant was liable. *Collins v. Burns*, 63 N. Y. 1.

It is the duty of carrier to deliver within reasonable time after *due arrival*. It is not only his duty thus to transport the goods, but he has not performed his contract as carrier until he has delivered or offered to deliver them to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them; and if a reasonable and

diligent effort is not made, the carrier is liable for the consequences of the neglect. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254.

"W." the owner of grain in storage, gave "N." an order on a warehouseman to deliver the same to the defendant, common carrier, subject to order. The defendant, without right, gave "N." a bill of lading stating that the grain was shipped by "N." subject to the plaintiff's order. "N." obtained advance from the plaintiff, and sold it for advances. The plaintiff was sued by "W." for conversion, and a verdict having been obtained against him, the plaintiff paid and bought the present action to reimburse itself. Held, that the action could be maintained. *The Farmers & Merchants' Bank of Buffalo v. Erie R. Co.*, 72 N. Y. 188.

See *McKinney v. Jewett*, 90 N. Y. 267.

There was evidence tending to show the non-delivery of a portion of certain goods shipped. The court said: "Had it not been for the rulings of the court below in this case we should have considered the law to have been settled beyond controversy, that proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury." *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 185; 6 Am. Rep. 61; *Magnin v. Dinsmore*, 56 N. Y. 168; *Steers v. Liverpool, N. Y. & P. S. Co.*, 57 id. 6; 15 Am. Rep. 453; *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; *Claffin v. Meyer*, 75 id. 260; 31 Am. Rep. 467; *Schmidt v. Blood*, 9 Wend. 268; *Moore v. Evans*, 14 Barb. 524. The principle upon which this rule is founded embraces as well the case of a partial as of a total failure to deliver the subject of a bailment. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532.

See "Bailments," *ante* 97.

The consignor sent gold to the consignee, "152, etc., Bleekert street, New York, Utica, America;" November 26th a bill of lading was made out for delivery at 152 Bleekert street, New York, and sent to the consignor, to which he made no answer. The ship sailed on the 28th and two days were needed for the bill of lading to reach the consignor. Contributory negligence was for the jury.

As a general rule, when goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them. To take a case out

of this general rule, it must appear that before the delivery of the bill of lading the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90.

This rule, however, has no application where there was a contract which had been acted upon, and where goods had actually been shipped under such parol contract, the subsequent receipt of a bill of lading, and the neglect to act thereon did not conclude a party from showing the parol contract. *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 112.

In 72 N. Y., *supra*, Rapallo, J., in commenting upon the case last cited, says:

"Whether he read it (the bill of lading) or not was immaterial, except upon the question whether his retention of it was evidence of an actual consent to vary the contract under which he had shipped the goods. He was in no situation to object to its terms and could not have reclaimed his goods."

See *Hill v. S. B. & C. R. R. Co.*, 73 N. Y. 351.

*Guillaume v. General Transportation Co.*, 100 N. Y. 491.

The defendants as common carriers, received merchandise for transportation from the plaintiff, addressed to a consignee at W., which they carried to C., the terminus of their route, and delivered to an irresponsible warehouseman, a common agent in that respect, for several other carriers and for themselves; from the premises of the warehouseman it was taken by a teamster, such being ordinarily the means of transportation between C. and W., and left, in the absence of the consignee, on his premises, with notice to, and in the presence of a member of his family; the consignee afterward refused to receive it, and notified the teamster thereof, who returned it to the warehouse of C., without notice of any kind to the warehouseman where it was lost, and the plaintiff brought a suit to recover its value. Held, that he was properly non-suited. *Selinger v. Simmons*, 2 Lansing, 325.

See *Waggner v. Finch*, 1 Hilt. 213; 1 N. Y. 145.

When goods delivered to express company, receipted and entered on bill, the burden is on the defendant to show absence of negligence in case of non-delivery. *Westcott v. Fargo*, 6 Lansing, 319.

A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. Plaintiff agreed to sell them, gave an invoice of them to the broker, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them gave a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from them their full value; held, that the plaintiff had not invested the broker with any evidence of title, nor put it in his power

to deceive the defendant and induce him to purchase the goods under the belief that they were the broker's property, and that plaintiff could recover of the defendant the purchase-price of the goods.

The person who received the goods and signed the receipt, testified that he did not notice that it stated the goods were received from the plaintiff. Held, that it was negligence, on his part, not to have discovered that fact, and that the consequences of his negligence must be borne by the defendant. *Bussell v. Lederer*, 1 Hun, 274.

A carrier by water may relieve himself from liability by delivering merchandise upon a wharf with notice thereof to the consignee, after reasonable time to him to remove it has expired. *Price v. Powell*, 3 Comst. R. 322; *Redmond v. Liverpool, N. Y. & Phila. S. Co.*, 46 N. Y. 583; *McAndrew et al. v. Whitlock, Jr.*, 52 id. 45.

He must, it would seem from these cases, give the consignee due notice before unloading and a reasonable time to take charge of and secure the goods. The propriety of such a rule is manifest, from the facts in this case, from which it appears that the ship was several weeks unloading. If the consignee or owner, after such notices, and the expiration of a reasonable time, does not remove the goods, they may be stored by the carrier, and his liability thereby ended. *Robinson v. Chittenden*, 7 Hun, 133; s. c., rev'd on another point, 69 N. Y. 525.

Carrier delivered freight to wrong person; it insures delivery to consignee, hence liable. Story on Bailments, sec. 545b; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34. *Scheu v. Erie R. Co.*, 10 Hun, 498.

If carrier deliver goods contrary to instructions and thereafter the shipper takes again such goods, makes repairs on them and retains them, it is a ratification of first delivery. *Brooks v. American Ex. Co.*, 14 Hun, 364; *Green v. Clark*, 5 Denio, 497.

Although consignee receipted goods as in good order, it is not estopped for damage thereto by negligence of carrier, unless latter prejudiced thereby. Notice of claim for damages to second carrier is notice to first contracting carrier. *Monell v. N. C. R. R. Co.*, 16 Hun, 585.

Under chapter 326 of Laws of 1858 and chapter 353 Laws of 1859, freight carried under a bill of lading cannot be delivered by carrier except upon surrender and cancellation of bill of lading; but if part of property be actually delivered to owner of bill of lading before he parts with same, subsequent purchaser has no action for conversion for that part, but only so much as may have remained undelivered. *The Merchants' Bank of Canada v. Union R. R. Co.*, 69 N. Y. 373; *City Bank v. Rome, &c. R. R. Co.*, 44 id. 136; *National Bank v. Dearborn*, 115 Mass. 219. By the transfer of these bills of lading the plaintiffs were directly substituted in the place of the consignee, having his rights

to the property and no others. *Trustees, &c. v. Wheeler*, 61 N. Y. 88, 105; *Crane v. Turner*, 67 id. 431; *Colgate v. Pennsylvania Co.*, 31 Hun. 291; s. c. aff'd, 102 N. Y. 120.

Goods arrived by defendant's road; within half an hour all of consignee's teams began removing the goods; they stopped at the usual hour at night. Before morning the remainder of the goods were destroyed by fire. Verdict directed for plaintiff was sustained. *Dunham v. B. & A. R. R. Co.*, 46 Hun. 245.

Following *Faulkner v. Hart*, 82 N. Y. 413; *Moses v. Boston & Maine R. R. Co.*, 32 N. H. 523; *Wood v. Crocker*, 18 Wis. 345; *Wood v. Milwaukee &c. R. Co.*, 27 id. 541; *Parker v. Milwaukee &c. R. Co.*, 30 id. 689; *Louisville, Lexington & Galveston R. Co. v. Maris*, 16 Kas. 333; disapproving *Norway Plains Co. v. Boston &c. R. Co.*, 1 Gray 263; *Rice v. Hart*, 118 Mass. 201; *Reed v. Richardson*, 98 id. 216.

Delivery of machinery, shipped for delivery only on performance of a condition precedent by the consignee, without such performance was a conversion. The attempt by shippers to collect the purchase price of the vendees was not an acquiescence in the delivery or a waiver of the right of action where they never assented to the delivery and always insisted on looking to the carrier for damages. *McSwegan v. Pennsylvania R. Co.*, 7 App. Div. 301; rev'g s. c., 16 Misc. 157.

Defendant tendered goods to the consignee who rejected them. They were in the station four or five weeks and then put out on storage. Liability as carrier ceased, on tender to consignee and as warehousemen, when put on storage, and though carrier gave consignor no notice of the rejection of the goods, the latter had notice through the consignees and failed to take any steps in regard to the goods for a year. *Manhattan Rubber-Shoe Co. v. Chicago &c. R. Co.*, 9 App. Div. 172.

Defendant was directed by the consignee to carry stone to New Orleans and there deliver it to a connecting carrier. Delivery to the latter was held to be a delivery to the consignee, so as to relieve first carrier for negligence in failing to properly deliver by the second carrier. *Osterhoudt v. Southern P. Co.*, 47 App. Div. 146.

A carrier was liable for delivery of goods, when it had undertaken to stop them *in transitu* and had not used reasonable care in securing their return before delivery, especially where plaintiff was informed that there was plenty of time and paid for a telegram for the purpose. *Rosenthal v. Weir*, 54 App. Div. 275; s. c. aff'd, 170 N. Y. 148.

Defendant, without making inquiries, placed a barrel of whiskey consigned to a woman at a certain place in the cellar of the building which was under her husband's saloon, where he kept his liquor. Defendant was bound to know at his peril that he had made a proper delivery and was liable where the facts did not establish that the husband was her

agent for the purpose of receiving it. *Soun v. Smith*, 57 App. Div. 372.

Where the door of an office at which goods are directed to be delivered is locked, with a notice thereon that articles for the occupant should be delivered to the janitress, a delivery of the goods at the door, with a statement to the janitress that they are for such occupant, is sufficient to relieve the carrier from liability. *Ruffin v. Ruggiero*, 10 Misc. 739. (New York Common Pleas.)

A custom of delivering goods to a consignee's agent upon the production of a notice of arrival did not justify delivery upon its production by a third party. *Sinsheimer v. New York &c. R. Co.*, 21 Misc. 45.

Delivery of three boxes, one larger than the others, with instructions to bill two together, did not make the carrier negligent in not assuming that the shipper's intent was to have the larger one billed separately. *Feldstein v. Old Dominion S. S. Co.*, 21 Misc. 60.

A carrier, upon request of consignor to use all available means to stop goods *in transitu*, secured the return of part of the goods from a connecting carrier, but damaged. Carrier was not liable, in the absence of proof of negligence on its part. *Ryer v. Pennsylvania R. Co.*, 26 Misc. 715; aff'g s. c., 25 id. 289.

Consignor, to whom goods had been returned, was not precluded from having a reasonable time to inspect the goods before acceptance, where they were delivered in such a condition as to make it impossible to tell whether they were damaged or not. *Brand v. Weir*, 27 Misc. 212.

Consignor can not recover for the non-delivery of goods where they are returned and tendered to him after two months, on failure to find the consignee, the goods not having depreciated in the meanwhile. *Brookston v. Westcott Ex. Co.*, 29 Misc. 634.

A provision in a bill of lading that a carrier might deliver without requiring the production of the bill of lading, did not excuse delivery to a complete stranger. *Marrus v. New Haven Steamboat Co.*, 62 N. Y. Supp. 471; rev'g s. c., 60 id. 994.

A carrier of a trunk, to be delivered to another carrier, deposited it near the latter's baggage room door on a platform provided for the purpose, calling the latter's attention to it and giving instructions as to its shipment. Was not negligent. *Anniston Transfer Co. v. Gurley*, 107 Ala. 600; s. c., 34 L. R. A. 137.

Goods were directed to Lakeview, Fla., via Crest View, the nearest station thereto on defendant's line. Carrier's agent, owing to mistake in its guide book as to proper place for delivery of shipments to Lakeview, forwarded the goods to Evergreen, Fla. Held to be a misdelivery. *Louisville &c. R. Co. v. Beruheim*, 113 Ala. 489.



A carrier was not liable for delivery to a consignee without production of a bill of lading, where it had been forwarded without notice to a bank with a draft for collection, as the carrier's right of delivery in such case was not affected by the Ark. Stat. making bills of lading negotiable, etc. *Nebraska Meal Mills v. St. Louis &c. R. Co.*, 64 Ark. 169.

Bill of lading provided that delivery should be complete upon side-tracking the car in places where there was no freight agent or depot. It was held that delivery was complete upon side-tracking the car in front of the office of the party in interest and carrier was not liable for the latter's breaking open the car and taking away the goods before paying a draft therefor. *Hill v. St. Louis &c. R. Co.*, 67 Ark. 402.

Carrier was liable for a misdelivery to one who, having possession of the duplicate bills of lading sent to the consignee, impersonated the consignee. *Cavallaro v. Texas &c. R. Co.*, 110 Cal. 348.

Goods were properly delivered upon putting them into the hands of the real consignee's agent to whom the shipper intended to send them but which were ordered by one impersonating the latter and who finally obtained them through such agent. *Southern Ex. Co. v. Williams*, 99 Ga. 482.

A carrier was liable where having delivered goods to one ultimately entitled thereto, without producing the bill of lading but upon receiving an indemnity check, it surrendered the latter upon the production of the bill of lading by one whom it was to notify upon arrival of the goods. Negligence of the plaintiff to whom the bill of lading was consigned in losing it was no defense. *Raleigh &c. R. Co. v. Lowe*, 101 Ga. 320.

Goods were properly delivered to the assignee of a firm upon the written order by one of the partners apparently for the firm, though secretly intended otherwise. Failure to require the surrender of the bill of lading upon delivery to the consignee was not a breach of any duty owing to the consignor. *Chicago Packing &c. Co. v. Savannah &c. R. Co.*, 103 Ga. 140; s. c., 40 L. R. A. 367.

A carrier's breach of duty to the consignor for failure to require the surrender of the bill of lading upon delivery as agreed, was waived by obtaining with knowledge thereof, acceptance of a draft on the consignees drawn against the shipment. *Southern R. Co. v. Kinchen*, 103 Ga. 186.

Carrier was liable to the *bona fide* holder of a bill of lading for seizure of the goods made possible by an arrangement by the carrier with the consignor and another, to which such holder could in no way be made

A carrier being an insurer was liable for delivery to one impersonating a party. *Western &c. R. Co. v. Ohio Valley &c. Co.*, 107 Ga. 512.

himself to the consignor as the consignee. *Pacific Ex. Co. v. Shearer*, 160 Ill. 215; s. c., 37 L. R. A. 177.

A bank, to secure advances, obtained a bill of lading of cattle with itself as consignee, while they were in transit billed to the owners without restriction. Carrier was not liable to it for delivery to the original consignees. *Lake Shore &c. R. Co. v. National Livestock Bank*, 178 Ill. 506; rev'g s. c., 59 Ill. App. 451.

Fraud will not relieve a carrier from liability for loss of goods; so when money was delivered to wrong person on fraudulent representations, the express company was liable. *Shearer v. Pacific Ex. Co.*, 43 Ill. App. 64.

Consignor directed shipment to him at places designated by a third party. Carrier was liable, when, instead it delivered the goods to the latter. *Illinois C. R. Co. v. Carter*, 62 Ill. App. 618.

Goods consigned, care of "B.'s Express," were delivered to the consignee without the production of the bill of lading. Carrier was not liable. *Schlesinger v. West Shore R. Co.*, 88 Ill. App. 273.

Where consignee, because of delay, refuses to receive goods, a carrier does not convert them by failing to return them to consignor. *Louisville &c. R. Co. v. Heilprin*, 95 Ill. App. 402.

Carrier, in defense of a failure to deliver to party named in the bill of lading, set up delivery to the rightful owner. The reply stated the latter obtained them on false pretenses. It was held sufficient on demurrer. *Cleveland &c. R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.

Consignee, being presumptively the owner, has a right to control goods in transit. *Tebbs v. Cleveland &c. R. Co.*, 20 Ind. App. 192.

Possession of a bill of lading does not vest ownership of the goods; so, a carrier who delivered canned goods to one who produced a bill of lading, showing that the consignors were also consignees of the same, is liable. *Weyand v. Atchison &c. R. Co.*, 75 Iowa, 573.

Delivery of a car upon a side track, the usual place of delivery, to the consignee's assignee, consignee having been paid, was complete, though without the production of the bill of lading or notification of arrival. *Anchor Mill Co. v. Burlington &c. R. Co.*, 102 Iowa, 262.

A carrier, having misdelivered goods, was liable therefor, where, though the shipper agreed to await the return of the station agent, no effort was made for seven days after his return to recover and deliver them. A tender was thereafter ineffectual. *Hamilton v. Chicago &c. R. Co.*, 103 Iowa, 325.

Carrier may show that car remained sealed from time of receipt of the goods to its delivery on an issue of complete delivery. *Missouri &c. R. Co. v. Simonson*, (Kan.) 68 Pac. Rep. 653.

Carrier, holding goods without charge for storage, was liable for subsequent misdelivery to a third party without production of the bill of lading. *Missouri P. R. Co. v. Weil*, 8 Kan. App. 839.

Carrier must deliver goods to the rightful owner; but if pledgee of bills of lading for grain permits pledgor to exhibit them as his own no redress may be had against the carrier for delivery to the pledgor. *Douglass v. People's Bank*, 86 Ky. 176.

Carrier instructed not to deliver except upon the production of the bill of lading and draft annexed was liable for disobedience. In such case there is no presumption that the consignee is owner. *Louisville &c. R. Co. v. Hartwell*, 99 Ky. 436.

Carrier was liable for delivery to an imposter, representing himself to be the consignee, after notice by the consignee that he has not ordered the goods. *Louisville &c. R. Co. v. Ft. Wayne Electric Co.*, (Ky.) 55 S. W. Rep. 918.

It is the duty of the consignee to receive the consignment and test defendant's liability for damage, not to refuse to receive it. *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286.

A package, intrusted with a carrier for transmission to the Secretary of the Treasury (U. S.) to be delivered before a given time, was properly delivered at the customary place for delivery of such packages before that time, though it did not reach him in person until long after. *Aldrich &c. Co. v. American Ex. Co.*, 117 Mich. 32.

Carrier was liable for delivering goods at an intermediate station, to the shipper, who consigned them to himself with direction to notify a third party, without the surrender of the bill of lading, where the shipper had secured an advancement thereon. *Ratzer v. Burlington &c. R. Co.*, 64 Minn. 245.

Carrier was not liable for a failure to follow the directions of the consignor, where the goods were delivered to the actual owner thereof with right of possession. *Thomas v. Northern P. Ex. Co.*, 13 Minn. 185.

Where there is a reasonable doubt as to a stranger's demand, carrier is not liable for a reasonable delay to investigate. *Merz v. Chicago &c. R. Co.*, (Minn.) 90 N. W. Rep. 1.

Carrier was liable for a delivery to the shipper upon the production of a duplicate bill of lading, though in good faith, and acting on a custom to deliver to consignee after six days, where the original bill of lading directed delivery to the shipper or his order and had been indorsed for value, and the indorsee had no notice that the carrier intended to act on that custom. *Midland Nat. Bank v. Missouri P. R. Co.* 132 Mo. 192.

Carrier was not liable for delivery to consignee, not having been noti-

fied that the goods were not sold but merely consigned. *Evans Garden Cultivator Co. v. Missouri &c. R. Co.*, 64 Mo. App. 305.

Carrier was not liable at suit of shipper for delivery to the consignee without presentation of the bill of lading, where the goods were billed to shipper's order and telegrams from an agent of the shipper were shown in support of the apparent authority of consignee. *Schwarzchild &c. Co. v. Savannah &c. R. Co.*, 76 Mo. App. 623.

Carrier who received an indemnity bond was liable for failure to stop goods *in transitu*, where it prevented the shipper from sending a telegram over the public wire and negligently delayed sending it over its own, so that delivery of the goods intervened. *Willock v. Missouri &c. R. Co.*, 79 Mo. App. 76.

Side tracking a car was not a proper delivery where there was a depot or warehouse where goods were usually unloaded. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

Instruction to notify one not the consignee of the arrival of the goods did not authorize a delivery to him without the production of the bill of lading. *Union &c. Co. v. Westcott*, 41 Neb. 300.

A carrier of goods to end of its line consigned to a point beyond it was bound to make delivery to the connecting carrier, but upon doing so its liability by the common law and by statute ceased. *Fremont &c. R. Co. v. Waters*, 50 Neb. 592.

Refusal to deliver by a station agent until he received further instructions as to whether a doubtful charge was valid and would be insisted on by the company, was held not a conversion. *Hett v. Boston &c. R. Co.*, 69 N. H. 139.

Parties fraudulently induced consignor to ship goods to a responsible consignee and, impersonating the latter, they obtained the goods from the carrier. The carrier was liable. *Oskamp v. Southern Ex. Co.*, 61 Oh. St. 341; rev'g s. c., 14 Oh. C. C. 176.

Carrier was not liable for delivery to a consignee producing the invoices sent to him by the consignor, under the impression that he was another customer of the same name. *Lake Shore &c. R. Co. v. Luce*, 11 Oh. C. C. 543.

Option as to place of delivery was waived by refusal to deliver at all. *Buckeye Pipe Line Co. v. Fee*, 15 Oh. C. C. 637.

A carrier acts at his peril upon stopping goods *in transitu* in delivering to either party. He may bring the goods into court and compel claimants to settle their rights. *Howe v. Cincinnati &c. R. Co.*, 18 Oh. C. C. 333.

Under a bill of lading for carriage by a carrier over its own route and delivery to a connecting carrier, it was liable for loss on a wharf boat on

which the goods were placed for transfer. *American Roofing Co. v. Memphis &c. Packet Co.*, 5 Oh. N. P. 146.

Carrier was not liable for unloading goods in a storm upon an open platform, there being no building there. *Allan v. Pennsylvania R. Co.*, 183 Pa. St. 174; s. c., 39 L. R. A. 535.

Failure to notify consignor of inability to find the consignee, was not negligence, where the former failed to put his name and address on the package for that purpose. *Walsh v. Adams Ex. Co.*, 15 Pa. Super. Ct. 292.

Shipper sent on his bill of lading in plain form, with draft attached, for collection. The bill of lading stated, unless the word "order" was inserted in connection with the consignee's name, it might deliver without requiring production of the bill of lading. Carrier was not liable for delivery without such production, in the absence of notice of the transaction. *Weisman v. Philadelphia &c. R. Co.*, 22 R. I. 128.

Consignor drew a draft upon the consignee for the goods and indorsed the bill of lading, in which the goods were billed to consignor's agent, to the plaintiff as security for the payment of the draft. Carrier was liable to the latter for delivery to the consignee without the production of the draft and bill of lading. *Stone v. Chicago &c. R. Co.*, 8 S. D. 1.

A common carrier is liable to consignor of goods for failure to identify the person presenting the bill of lading as the consignee. *Sword v. Young*, 89 Tenn. 126.

Carrier was not liable for delivery, without surrender of the bill of lading, to the consignee who was the actual owner and who paid for the goods, though the consignor's agent failed to turn over the proceeds to his principal and the bill of lading provided that no delivery should be made without its production. *Witt v. Tennessee &c. R. Co.*, 99 Tenn. 442.

Carrier should deliver goods on presentation of bill of lading by consignee. *Dwyer v. Gulf &c. R. Co.*, 69 Tex. 107.

A carrier was not liable for refusal to deliver to one other than the consignee, whom it did not know to be the real owner and the only evidence it had was a telegram from the shipping agent that another person had stated that the property should have been billed to such claimant and that he "presumed" that delivery to him would be all right. *Gulf &c. R. Co. v. Fowler*, 12 Tex. Civ. App. 683.

Carrier was not liable for delivery to a drayman apparently authorized by the consignee to receive the goods. *St. Louis &c. R. Co. v. Crawford*, (Tex. Civ. App.) 35 S. W. Rep. 748.

Liability of a carrier of a trunk to be delivered to another carrier, for depositing it at the latter's usual place of delivery in the absence of the

owner, where there was conflicting evidence as to whether he stated that he would be on hand to look after it, was properly left to the jury. *Ft. Worth Transfer Co. v. Isaacs*, (Tex. Civ. App.) 40 S. W. Rep. 39.

Request to deliver a coop of chickens through a side gate instead of the front was reasonable and the carrier was liable for a refusal to comply therewith. *Gary v. Wells &c. Ex.*, (Tex. Civ. App.) 40 S. W. Rep. 845.

A connecting carrier refused to receive goods which had been injured by the prior carrier. The shipper, notified of its inability to forward the goods beyond that point, was not bound to receive the goods there and make an attempt to prevent further damages. *Gulf &c. R. Co. v. Frank Co.*, (Tex. Civ. App.) 48 S. W. Rep. 210.

Defendant was negligent in delivering goods to a person impersonating a well known resident, especially without other identification than the production of the letters with which he fraudulently procured the consignment to him, and without requiring production of bill of lading. *Pacific Ex. Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Pacific Ex. Co. v. Critzer*, (Tex. Civ. App.) 42 S. W. Rep. 1017.

Under a bill of lading providing that carrier's liability was to cease upon the arrival of the goods and permitting their removal and storage at owner's expense within 24 hours thereafter, the railroad company was liable for removal of the car, about 24 hours thereafter and delivery to a third party without the owner's consent. *St. Louis &c. R. Co. v. Hall &c. Mach. Co.*, 23 Tex. Civ. App. 211.

Plaintiff was not obliged to receive cattle at midnight, where he was a stranger in the city and had not money for the freight with him, and carrier's liability did not cease upon unloading at such time, especially in view of a statute requiring company to have suitable places for protection of freight when unloaded. *Houston &c. R. Co. v. Trammell*, (Tex. Civ. App.) 68 S. W. Rep. 716.

Shipper recovered damages to cattle during detention by carrier upon his refusal to pay a higher rate than he had originally agreed to pay. *Gulf &c. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. Rep. 119.

Where goods were misdirected and re-forwarded partly over defendant's line, it has a right to hold them against freight charges though they exceed the value of the goods. *Texas &c. R. Co. v. Klepper*, (Tex. Civ. App.) 69 S. W. Rep. 426.

Carrier was not bound to turn over heavy castings upon their delivery for the convenience of the consignee. *Hudson River Lighterage Co. v. Wheeler &c. Co.*, 93 Fed. Rep. 344.

Consignor by agreement was to ship goods to consignee and charge the same to account current. The latter remitted fully and received the

goods. His title thereto was not defeated by application of the money by the consignor to an old account, and the carrier was not liable for delivery of the goods to him without the bills of lading. *Herbst v. The Asiatic Prince*, 91 Fed. Rep. 343.

Delivery at Westwego under a shipment to New Orleans for transshipment to Europe was proper as that was the port at which steamers from New Orleans for Europe loaded. *Reiss v. Texas &c. R. Co.*, 98 Fed. Rep. 533; s. c. aff'd, 99 id. 1006.

Refusal by owner to receive goods, billed to him, at destination consigned, constituted an estoppel in an action for their non-delivery. *Beedy v. Pacey*, 22 Wash. 94.

Carrier was liable for delivering shipment to consignee without bills of lading when it had issued bills of lading which were negotiable by statute. *First National Bank v. Northern P. R. Co.*, (Wash.) 68 Pac. Rep. 965.

#### (a). NOTICE OF ARRIVAL.

Bill of lading provided for "tender to the consignee," also that carriage should be complete a reasonable time after arrival without notice. While the carriage was complete without notice, notwithstanding the consignee never made application by reason thereof, that did not dispense with the tender required. *Diamant v. Long Island R. Co.*, 30 Misc. 444.

A railroad company was held to a common carrier's liability for loss of goods by fire, where it failed to give notice to consignee personally or by mail within 24 hours of arrival as required by statute. *Louisville &c. R. Co. v. Cowherd*, 120 Ala. 51.

Common carrier should notify consignee of arrival of goods, under Code, sec. 2120, and failure of consignee to remove goods for three months after their arrival is not of itself an unreasonable delay. *Wilson v. California Cent. R. Co.*, 91 Cal. 166.

Notification to one fraudulently representing himself to be the consignee did not terminate liability as common carrier. *Carallaro v. Texas &c. R. Co.*, 110 Cal. 348.

Delay of carrier to notify consignee of arrival of goods, which delay was in violation of custom, renders him guilty of negligence and subsequent loss by fire is chargeable to him. *Richmond &c. R. Co. v. White*, 88 Ga. 805.

Liability of common carrier by rail ceases as common carrier on unloading goods without notice to consignee. *Gregg v. Illinois &c. R. Co.*, 141 Ill. 550; *Illinois &c. R. Co. v. Carter*, 165 id. 520.

The duty of a carrier by water to notify the consignee of the arrival

of his goods may be waived by a usual course of business in the trade, or previous course of dealing between the parties. *Illinois C. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618.

No recovery was allowed the owner of poultry transported by carrier from C. to H. for failure to notify him of its inability to find consignee. *Merrill v. American Exp. Co.*, 62 N. H. 514.

Carrier's duty to give notice of arrival was allowed to be modified by stipulation as to small towns where no station house had been built and no freight agent located. *Allam v. Pennsylvania R. Co.*, 183 Pa. St. 174; 39 L. R. A. 535.

A carrier in giving notice of arrival, having given the numbers of the cars goods were in, was not liable for failing to state what cars they were originally shipped in or transferred from during transit. *Galveston &c. R. Co. v. Hunt*, (Tex. Civ. App.) 32 S. W. Rep. 549.

## XVII. When Liable as a Warehouseman.

When the carrier has discharged his whole duty in transporting goods, and is unable to deliver them in the manner required of him as a common carrier, he may select a suitable warehouseman, and by depositing the goods with him be relieved from further responsibility; or if he retain possession of them, he will be only required to exercise the ordinary care exacted of a warehouseman, either in his custody of the goods, or the delivery thereof.

See complete discussion in *McMillan v. R. Co.*, *post*, p. 331.

A carrier transferred goods to a float from which trans-shipment was to be made to the next carrier. A reasonable time not having elapsed for the next carrier to take them, the first carrier still held them as carrier and was liable for fire.

The general rule is, that a common carrier is bound to deliver a parcel which he has undertaken to carry, at the place to which it is directed by the consignee personally. *Gibson v. Culver*, 17 Wend. 305; *Ostrander v. Brown*, 15 John 42; *Fisk v. Newton*, 1 Denio 46. Personal delivery, however, is sometimes dispensed with, in the case of carriers by ships or boats. Notice given to the consignee of the arrival and place of deposit, comes in lieu of personal delivery. 2 Kent's Com. 605.

When goods are safely conveyed to the place of destination, and the consignee is dead, absent or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods. *Miller v. Steam Navigation Co.*, 10 N. Y. 431.



A package was committed to the defendants as carriers, directed to "Russell & Annis, Port Gibson, care of Dawley, Express Agent, Vienna, 981." The express line ran to Vienna, but Port Gibson was off the line, but the Vienna agent was accustomed to hold express matter for delivery there or deliver it. Held, that he received this package not as an intermediate consignee of the plaintiff, but as defendant's agent. *Russell v. Livingston*, 16 N. Y. 515.

Although the second carrier refuses unreasonably to receive goods, yet, the first carrier remains liable as insurer. To relieve itself the carrier must store goods in a warehouse or otherwise indicate a renunciation of the obligation. So held, where a carrier on the Hudson river having goods at Albany to be delivered to a carrier on the Erie canal for transportation to the owner, removed the goods to a floating barge used by him as a place of temporary storage and to facilitate shipment to canal boats. The canal carrier unreasonably delayed to receive them after being requested and promising so to do, and they were consumed by fire. *Goold v. Chapin*, 20 N. Y. 258; *Miller v. Steam Navigation Co.*, 6 Seld. 431.

A warehouseman at Buffalo was also a carrier on the Erie canal. He received goods shipped at Detroit addressed to his care to go from Buffalo to East Albany, at 30 cents per 100 pounds. He received them as carrier and was liable for loss by fire in his warehouse, without his fault.

When a person is both carrier and warehouseman, it is well settled that, if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of a carrier. Aug. sec. 133, and *Blossom v. Griffin*, 3 Kern. 569, 572. But when goods are deposited in a warehouse subject to the further order of the owner, the case is otherwise. In such case, as Judge Buller said, in *Garside v. The Proprietors of the Trent and Mersey Navigation Company* (4 Term 581), "The keeping of the goods in the warehouse is not for the convenience of the carrier, but the owner of the goods. In such case, the rights and duties and responsibilities of warehousemen would attach to the persons having the goods in store." But this rule cannot apply to any person having the charge or custody of the goods while they are *in transitu*. When a carrier deposits property in his own warehouse at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible. Story on Bailments, sec. 447, 536; *Forward v. Pittard*, 1 Term. 27; *Hyde v.*

Trent Navigation Company, 5 id. 380. *Ladue v. Griffith*, 25 N. Y. 364.

A carrier agreed to deliver flour at New York and to let it remain about ninety days after its arrival. The consignee refused to receive thereafter. The defendant was bailee of the owner and was not liable for injury to it without his fault. *Hathorn v. Ely*, 28 N. Y. 78.

See *McDonald v. W. R. R. Co.*, 34 N. Y. 497.

Where it has been a long custom for the consignees to receive goods, upon their arrival each day, at the carrier's wharf and remove them, a specific notice of their arrival is not necessary as the carrier's duty is ended when the goods are landed at the accustomed place, and the consignees have a reasonable time to remove them; but if the arrival is on a holiday and it has not been the custom to receive goods upon that day, reasonable time after such day should be given to remove them.

Goods were destroyed by fire in the night time upon the wharf. There was no means of extinguishing the fire, and although the watchman was left with some colored men, none of them were produced as witnesses, nor did it appear that the watchman was at his post. The case was one for the jury. Nonsuit reversed. *The J. Russell Mfg. Co. v. N. H. S. Co.*, 50 N. Y. 121; distinguishing *Lamb v. The Camden & C. R. Co.*, 46 N. Y. 271.

Plaintiffs contracted in New York with a carrier for the transportation of certain goods to Boston, and the delivery thereof to plaintiffs, who were the consignees. The goods were received by defendants, who were connecting carriers over the latter part of the route, and were residents of Massachusetts. Upon arrival of the goods at Boston they were called for, but a delivery refused until the next day as it was not convenient to deliver at the time. They were unloaded the same afternoon and placed in defendant's warehouse, but too late for delivery; and during the night the warehouse with the goods was destroyed by fire. In an action to recover the loss, held, that defendants were liable; and this, although under the decisions of the court of Massachusetts, the operators of the road, as matter of law, cease to become common carriers and become warehousemen, when the duty of transportation is completed and goods are deposited in a warehouse awaiting the orders of the owner or consignee. *Faulkner v. Hart*, 82 N. Y. 413; 12 J. & S. 471.

From opinion.—"The rule as to the liability of carriers under the facts stated is well established by the law merchant, and the authorities are numerous which sustain the position that the carrier is bound to pay for the loss of the goods destroyed. It is his duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered

the goods, or offered to deliver them to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of, or to remove the same." *Gatcliffe v. Bourne*, 4 Bing. (N. C.) 314; s. c., 11 Clark & Fin. 45; *Price v. Powell*, 3 Comst. 322; *Zinn v. N. J. St. Co.*, 49 N. Y. 442; *Sherman v. Hudson River R. R. Co.*, 64 id. 254; *The "Saltana" v. Chapman*, 5 Wis. 454; *Sleade v. Payne*, 14 La. Ann. 453; *Graves v. H. & N. Y. St. Co.*, 38 Conn. 143; *C. & R. I. R. R. Co. v. Warren*, 16 Ill. 502; *Moses v. B. & M. R. R.*, 32 N. H. 523; *The Tangier*, 1 Clifford 396.

"The decisions of Massachusetts establish that the proprietors of a railroad, who transport goods for hire and deposit them in a warehouse until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for their loss by fire, without negligence or default on their part; that the railroad corporation ceases to be a common carrier; and becomes a warehouseman, as a matter of law, when it has completed the duty of transportation, and has assumed the position as a warehouseman, as a matter of fact, and according to the usages and necessities of the business in which it is engaged. *Norway Plains Co. v. B. & M. R. R. Co.*, 1 Gray 263; *Rice v. Hart*, 118 Mass. 201. \* \* \*

"If there had been a positive statute of the state of Massachusetts providing that the carrier's liability should cease when the goods had been deposited at the end of the route in a suitable warehouse, a different question would arise, and it might well be contended that, as the question arose under the statute of that state, the question of liability would depend upon the construction placed upon such statute by the court in Massachusetts, in accordance with the decisions of the courts of this state and the Supreme Court of the United States. *Jessup v. Carnegie*, 80 N. Y. 441; *Mills v. M. C. R. R. Co.*, 45 id. 626; *Whitford v. Panama R. R. Co.*, 23 id. 465; *Elmendorf v. Taylor*, 10 Wheat. 152; *Shelby v. Guy*, 11 id. 367; *Town of Ottawa v. Perkins*, 94 U. S. 260; *Fairfield v. County of Gallatin*, MS. Opp. U. S. Sup. Ct."

The liability of a railroad company for negligence for freight destroyed by fire from the burning of the freight house, after its arrival and while still on the freight car, and before delivery, was a question for the jury. There were two questions for the jury: First. Whether the fire which burned the freight house and the car containing the plaintiff's goods standing on the adjoining track, was caused by sparks thrown from a defective engine; and, second. Assuming that the engine from which the fire was communicated was in good order, whether the defendant was negligent in leaving the plaintiff's goods in the car exposed to the danger of fire from the burning of the freight house. *Tanner v. N. Y. C. & H. R. R. R. Co.*, 108 N. Y. 623.

Tin was shipped in defendant's steamship, under a bill of lading, stipulating that it should be transported via London to New York. The steamer having it on board arrived at her wharf in New York harbor on Saturday, and notice was on the same day given to the consignees. The goods were on Monday deposited on the proper wharf. After the consignees had had three full days to remove the tin, it was

discovered that part of it had been removed from the wharf by some one without authority from the consignees. Held, that as said loss occurred after the lapse of a reasonable time for the removal of the tin by the consignees after notice, defendant was not liable *as a common carrier*.

The wharf was closed by a gate through which the missing tin must have been taken; the delivery to consignees of cargo landed at defendant's wharf was under the direction of a delivery clerk, who had been instructed not to deliver goods to be taken from the wharf without taking a receipt, and it was the practice of the cartman, when goods were being removed by a cartman, to count the load and take the cartman's receipt in a book provided for that purpose. The delivery clerk testified that when he knew the cartmen, he sometimes permitted them to take goods without receipting for them. There were no receipts taken for the tin in question. The servants of defendant were negligent in *omitting to take ordinary care* in the custody of the tin in question, permitting it to be removed without taking receipts; the defendant was chargeable with such negligence.

Although the complaint was based solely on the contract of affreightment, as the case was tried upon both theories of liability without objection, it was too late to take the objection here. *Tarbell v. The Royal Exchange Shipping Co.*, 110 N. Y. 170, rev'g 21 J. & S. 190, and judg't for pl'ff.

**From opinion.**—"The general principle that the duty and obligation of a common carrier by water, does not, *ipso facto*, cease on the unloading of goods from the ship and their deposit upon a wharf, and especially where the place of discharge is also the terminus of the particular voyage, is the settled doctrine of this court and the generally accepted doctrine of the maritime law. The obligation of the ship owner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will discharge the carrier may be constructive and not actual. To constitute a constructive delivery the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier, as such, terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option, or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability, as insurer, is by such failure terminated. *Redmond v. Liverpool Co.*, 46 N. Y. 578; *Hedges v. Hudson R. R. Co.*, 49 id. 223. \* \* \*

The consignees had three full days thereafter in which they could have removed the tin, before the first of December, the day when the loss was discovered. They were not prevented from removing it from the wharf during those days

by any act of the defendant, or by any vis major, and it is very clear that its removal during that time was practicable in the exercise of due diligence by the consignees. *Richardson v. Goddard*, 23 How. (U. S.) 28. Under these circumstances, the defendant, under the authorities, must be held to have made delivery of the tin under its contract as carrier, and to have discharged itself from its custody as such; and as the loss, upon the evidence and findings, must be held to have occurred after notice to the consignees of arrival, and the lapse of a reasonable time for the removal of the tin from the wharf, the general term properly overruled the first ground of liability asserted by the plaintiff. The general duty of a carrier to deliver, and of a consignee to receive, as defined in the authorities to which we have referred, is not, we think, essentially changed by the clause in the bill of lading that the goods are to be delivered 'from the ship's deck, when the shipper's responsibility shall cease,' or by the clause that the goods are to be received by the consignee 'immediately the vessel is ready to discharge.' *Collins v. Burns*, 63 N. Y. 1; *Gleadell v. Thomson*, 56 id. 194. The defendant, in our view, is not liable as carrier for the reason that it made delivery, as such, according to the general rule governing the liability of carriers by water.

But this conclusion does not meet the other ground of liability asserted, and found by the trial court, viz., that the defendant neglected to exercise due and proper care of the tin and negligently permitted it to be taken from its wharf by strangers, which is the substance of the findings on this branch of the case. \* \* \*

There can be no doubt, we suppose, that in many cases a carrier's whole duty in respect to goods carried by him is not discharged by a constructive delivery terminating his strict responsibility as carrier.

Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. The law enables him to wholly exempt himself from responsibility in such a contingency by giving him the right to warehouse the goods. When this is done he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman, the carrier is not liable. *Redmond v. Liverpool Co.*, 46 N. Y. 578, and cases cited. But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage by implication of law, a duty as bailee or warehouseman to take ordinary care of the property. This duty of ordinary care rested upon the defendant in this case."

Carrier receiving goods addressed to points on line of connecting carrier, and also price for the same, undertakes to carry through for the price paid. If first carrier has not authority to contract for second carrier, it contracts itself for the whole line. Where contract required rail service the first carrier is liable for loss if it employs water transportation. *Condict v. G. T. R. Co.*, 4 Lansing, 106; s. c. aff'd, 54 N. Y. 500.

Common carriers had at terminus an elevator through which they received merchandise for transportation, and also used as storehouse. Having received there grain from a connecting carrier, consigned to a point beyond the other terminus of his line, without agreement or di-

rections for storage, they were held liable as carriers and not as warehousemen. *Rogers v. Wheeler*, 6 Lansing, 420; s. c. aff'd, 52 N. Y. 262.

Defendant received box for West Virginia, C. O. D. \$40, and receipted with exemption against negligence of connecting carriers, and stipulated to forward to nearest point reached by it; and, having done this, the connecting carrier took and tendered the same to consignee, who refused to accept it, and it was placed in the warehouse where it was burned. Defendant held not liable save as warehouseman, which was not found. Words "C. O. D." did not affect character of shipment. *Gibson v. American Mer. Ex. Co.*, 1 Hun, 387.

A package sent by the defendant to be delivered C. O. D. Consignee notified of arrival but could not pay, promising to pay in a few days. Meanwhile defendant's express office was broken into and package stolen. Defendant then was warehouseman and not carrier and not negligent in not notifying consignee of the delay. *Grossman v. Fargo*, 6 Hun, 310.

Plaintiff sent his trunk to Watertown by defendant's express, and while yet at defendant's office the plaintiff paid the charges and receipted for the trunk and was allowed thereupon to take from the trunk some articles, though he locked it and said that he intended to leave it there until the next day. Before he called for it, the agent had delivered it to other parties, who claimed to have been sent for it. A nonsuit was improper, as it was a question for the jury whether the agent was acting within his apparent authority in making the arrangement, and whether the defendant was liable as a warehouseman.

Upon a new trial the question was properly submitted to the jury as above, and whether the defendant retained the trunk as a warehouseman or bailee, it was held that a direction to the agent not to do the act was not a defense unless it were made known to the plaintiff. A verdict for the plaintiff was sustained. *Oderkirk v. Fargo &c. Ex. Co.*, 61 Hun, 418.

A consignment of cotton having arrived at its destination, defendant began unloading and sent the consignee notice that 100 bales were ready for delivery, who, upon receipt thereof, removed a portion of the cotton. Failure to remove the rest for three full days was an unreasonable delay and the carrier's relation to the goods was changed to warehouseman. *Wynantskill Knitting Co. v. Murray*, 90 Hun, 551.

Diamonds, misdirected, were received at the place designated on Saturday at 4 p. m., where they remained until 7:30 p. m. on Monday, the defendant having immediately mailed a notice of arrival to the consignee directed to the address given. A reasonable time having expired for delivery and there having been no negligence as to its custody as

warehouseman. defendant was not liable. *Laporte v. Wells &c. Co.*, 23 App. Div. 267.

Plaintiff shipped certain bales of hops by the defendant's line, which, upon arrival in New York, were lightered to a dock, and the consignee was notified of their arrival. He replied that they would be removed during the day, but only one load was taken, and late in the afternoon he sent word that no more would be taken that day. The captain of the lighter then covered the bales with tarpaulins to protect them, but, in consequence of a heavy storm during the night, the hops were damaged, and the consignee refused to receive the balance. Held, that the space of one day afforded a reasonable time for the removal of the bales, and that there was a constructive delivery sufficient to relieve defendant of liability as carrier; that under the circumstances it was not required to store the goods, and having used the usual means of protection, was not liable as warehouseman. *Brand v. The New Jersey Steamboat Co.*, 10 Misc. 128. (New York Common Pleas.)

Stipulation that property not removed within 24 hours would be stored at the sole risk of the owner, referred to the termination of the carrier's liability and did not relieve it of the liability of a warehouseman for the unexplained disappearance of the goods. *Aaronson v. Pennsylvania R. Co.*, 23 Misc. 666.

Where consignor gives notice to carrier to hold goods consignee has refused to accept, till called for, carrier becomes liable thereafter only as warehouseman. *Byrne v. Fargo*, 36 Misc. 543.

Where, in the absence of husband, wife directed carrier to leave the goods upon the dock, as her husband was not ready for them, carrier after a reasonable time became liable only as warehouseman. *King v. New Brunswick Steamboat Co.*, 36 Misc. 555.

Goods injured after termination of defendant's character as common carrier may be recovered for only as for bailment to warehouseman. *Ala. &c. R. Co. v. Grabfelder*, 83 Ala. 200.

Reasonable time for consignee to remove goods must elapse before a company's liability for them, as carrier ceases. Three days was a reasonable time for the removal of a piano. *Columbus &c. R. Co. v. Lud-den*, 89 Ala. 612.

Custom may determine the fact of delivery; if cars containing goods were to be side tracked until a way bill was furnished, liability of connecting carrier would be that of a warehouseman until such way bill was given. *Mount Vernon Co. v. Alabama &c. R. Co.*, 92 Ala. 296.

After a reasonable time has elapsed for the consignee of goods to call for them, the liability of the carrier as such ceases and he becomes liable as warehouseman. *Anniston &c. R. Co. v. Ledbetter*, 92 Ala. 326.

An express company, making no delivery beyond its office, notified consignee of the arrival of his goods, and received in reply a request to leave them at the office until the next day. The liability as carrier terminated and liability as warehouseman began with the notification of arrival. *Southern Ex. Co. v. Holland*, 109 Ala. 362.

Stipulation that liability as common carrier should cease immediately on arrival construed to mean, after a reasonable time for removal.

Six days was held to be unreasonable time for the removal of 437 bales of cotton, though the consignee had to haul it six miles to its factory, and the carrier was not liable as insurer for loss by fire. *Tallassee Falls Man. Co. v. Western R.*, 128 Ala. 167.

Where goods remained in carrier's possession by reason of consignee's refusal to accept, on ground that they were damaged, at the time of a subsequent fire, the liability was that of a warehouseman and not a carrier. *Frederick v. Louisville &c. R. Co.*, (Ala.) 31 South Rep. 968.

Failure of railroad company to remove cotton from compress company's warehouse is not the cause of the burning of the same, and damages therefor cannot be awarded against it. *Martin v. Railway Co.*, 55 Ark. 510.

Defendant had been in the habit of giving notifications of arrival of goods stating that unless removed within a given time they would be stored at the owner's risk and storage therefor would be charged. Held, insufficient to show a custom continuing liability as common carrier and varying the general rule that such liability ceases on arrival of goods at destination and deposit in place of safety. *Georgia &c. R. Co. v. Pound*, 111 Ga. 6.

Cars containing consigned goods were side tracked on tracks of consignee for unloading and were burned. Defendant's liability as insurer had ceased when on consignee's order it had side tracked the cars. *Peoria &c. Co. v. U. S. Rolling Stock Co.*, 136 Ill. 613.

A carrier is liable only as warehouseman for corn destroyed by floods, after it had reached its destination, and before delivery to the consignee, it being the custom for consignee to receive such a shipment on the track if he fails to designate a place of delivery. *Gregg v. Illinois Cent. R. Co.*, 141 Ill. 550.

Liability as carrier terminated upon the arrival within the usual time for transit and deposit in a safe deposit or warehouse ready for delivery, though the consignee was not notified thereof. *Illinois C. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618; *Chicago &c. R. Co. v. Kendall*, 72 Ill. App. 105.

Stipulations limiting liability not available where goods billed to one not the consignee. *Chicago &c. R. Co. v. Fifth Nat. Bank*, 26 Ind. App. 600.



Liability of a company for goods in depot not called for, for eight days, is that of warehouseman. Loss of goods by fire after that period is chargeable to company, if demand had been made for them and owner was told that they had not arrived. *Union &c. R. Co. v. Moyer*, 40 Kas. 184.

Goods were delivered to carrier, but not for shipment, until others arrived the next morning. Liability before shipment was that of a warehouseman. *Missouri P. R. Co. v. Riggs*, 10 Kan. App. 578.

On the continuance of liability as common carrier after goods have reached their destination and await delivery to consignee, who has not been notified of their arrival the court was divided. *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79.

**From opinion**, Cooley, J.—“What that liability is when they have transported property over their road and deposited it in their warehouse to await delivery to the consignee is the next question demanding consideration.

On this point three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts.

*First.* That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the Massachusetts cases. *Thomas v. Boston & Providence R. R. Co.*, 10 Met. 472, and *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 Gray, 263, and those which follow them.

*Second.* That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business. *Morris & Essex R. R. Co. v. Ayres*, 5 Dutch. 393; *Blumenthal v. Brainerd*, 38 Vt. 413; *Moses v. Boston & Maine R. R.*, 32 N. H. 523; *Wood v. Crocker*, 18 Wis. 345; *Redf. on Railw.* sec. 157.

*Third.* That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification. *McDonald v. W. R. R. Corp.*, 34 N. Y. 497, and cases cited; 2 Pars. on Cont. 5th ed., 189; *Ang. on Carriers*, sec. 313; *Chitty on Carriers*, 90.

The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand ready to take it away when received. It is assumed to be simply a question of reasonable diligence with the consignee whether he ascertains the receipt of his consignment or not: the regularity of the trains being such as to leave him without reasonable excuse if he fails to inform himself.

There may be railroad lines in the country where the application of this rule would do injustice to no one.

If the business is not so great but that freight trains can be run with the same regularity as those for passengers, and the freight can always be sent

forward immediately on being received for the purpose, a notice from the consignor will usually apprise the consignee with sufficient certainty when the goods may be expected. But on the long through lines such regularity is quite impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or, in other words, as it may suit his convenience and his interest to forward it. This may be many days, or even weeks, after its receipt, or it may be immediately. It is not always in the power of the carrier to give reliable information upon the subject, and unavoidable delays will frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is an almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who, therefore, never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare *Scholes v. Ackerland*, 13 Ill. 574, and *Crawford v. Clark*, 15 id. 561, with *Eichards v. M. S. & N. I. R. R. Co.*, 20 id. 404, and *Porter v. Same*, 20 id. 407. See, also, *Chicago & R. I. R. R. Co. v. Warren*, 16 id. 502, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms, upon consideration springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the in-

cidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can elaim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and to facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods, or, if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it cannot possibly be either properly, expeditiously or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce, it would be impossible to transact the amount of business now done, if the cars must stand upon the track until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are also absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquestionably liable as carriers from the time of their receipt. In every view, therefore, they seem indispensable to the business of the carrier; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a ware-

houseman against the will of the owner of the property, on the ground solely that he has erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. It is a rule which allows the insurer to absolve himself from obligations to the insured, by supplying himself with the conveniences for the transaction of his business, and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled, the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If, by understanding with the consignee, the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them."

A carrier who has in accordance with statutory requirement parted with grain to the public warehouseman "for and in behalf of the plaintiffs," who had been notified of the same, is not liable for its loss. *Arthur v. St. Paul &c. R. Co.*, 38 Minn. 95.

Liability of a carrier as such terminated by tender to a connecting carrier and a refusal to receive by the latter, and, being liable thereafter as warehouseman only, the original carrier was not negligent, where the loss of stock in pens through an infectious disease was one which it had no reasonable cause to anticipate. *Larimore v. Chicago &c. R. Co.*, 65 Mo. App. 167.

Where the carrier was not to be liable unless the goods were removed on arrival, it was relieved, where they were not removed within a reasonable time after notification though that was not made on the day of arrival. *Herf &c. Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

Freight received and stored in a freight house remained there six days, though a part was taken away on arrival. It was held that a reasonable time for removal had expired and that the carrier's liability was thereafter that of warehouseman only. *Welch v. Concord R. Co.*, 68 N. H. 206.

As the warehouse of defendant company in which were goods of plaintiff was burning up, plaintiff requested that he might be allowed to save his property, but company refused on the ground that the con-

tents of the warehouse could be stolen if the doors were opened. Held, it was not liable for destruction of plaintiff's property. *Turrentine v. Wilmington &c. R. Co.*, 100 N. C. 315.

Goods were delivered, to be held for shipment until crated. The holding was that of a warehouseman only. *Fisher v. Lake Shore &c. R. Co.*, 17 Oh. C. C. 491.

Flour was delivered to defendant steamboat company to be sold and the proceeds returned. While it was carrying the flour it was a carrier; upon landing the flour it became a factor; when the flour was sold and the specific proceeds of the sale were received by it, it became a carrier again, and for the loss of such money by fire on the return trip it was answerable. *Harrington v. McShane*, 2 Watts. (Pa.) 443.

Carrier held not liable for damage by storm to goods unloaded on an unprotected platform at a way station with no station house, or agent, where a stipulation provided that goods should be at owner's risk when unloaded. *Allam v. Pennsylvania R. Co.*, 183 Pa. St. 114; rev'g s. c., 3 Pa. Super. Ct. 335.

Defendant was not liable, even as warehouseman, where the shipper after dark and when the defendant's freight house had been closed for the night, went to it and put goods inside from an upper window. *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.

Though a company was not required to provide storage in a warehouse, it was at least a depository and as such bound to use such reasonable care for protection of goods as the conditions permitted. *Springs v. South Bound R. Co.*, 46 S. C. 104.

Delivery sufficient to constitute one a warehouseman is only made by depositing the goods in a safe warehouse and the liability of a carrier continued so long as the goods remained in a car, which could not be construed to be a warehouse. *Hipp v. Southern R. Co.*, 50 S. C. 129.

A carrier did not constitute itself a warehouseman, by placing goods upon a wharf and notifying the consignee, a connecting carrier, to remove them as soon as possible. *Texas &c. R. Co. v. Clayton*, 113 U. S. 348:: aff'g s. c., 84 Fed. Rep. 305.

A carrier was at least a warehouseman, where its cars still containing the goods carried, were placed in the yards of an association furnishing certain terminal facilities but not having control or possession of the cars themselves. *Hunting Elevator Co. v. Bosworth*, 119 U. S. 415; rev'g *Bosworth v. Chicago &c. R. Co.*, 87 Fed. Rep. 12.

A carrier is relieved from liability as such for damage to fruit, under a stipulation in the bill of lading providing that consignee must be on hand to receive the goods, otherwise carrier will deposit them in warehouse without notice. *The Boskenna Bay*, 40 Fed. Rep. 91.

Carrier was liable where the goods were misplaced upon arrival and the consignee informed that they had not arrived. Consignee finally discovered them, but too late for removal before their destruction by fire. *Central Trust Co. v. East Tennessee R. Co.*, 70 Fed. Rep. 764.

Citing *Railway Co. v. Kelley*, 91 Tenn., 699.

Carrier was liable as warehouseman for negligence, where it had so few employes that it was unable to discover a leaky carboy of acid placed in the building by a drayman. *Farmer's Loan &c. Co. v. Oregon, &c. Co.*, 73 Fed. Rep. 1003.

A carrier depositing goods in its warehouse was held to be a bailee for hire and not a naked depositary and was liable for negligence, where it permitted a car marked "powder" to be so close to the warehouse as to deter firemen in their efforts to extinguish a fire in the house. *Hardman v. Montana &c. R. Co.*, 83 Fed. Rep. 88; s. c., 39 L. R. A. 300.

Carrier received cotton for transportation to New Orleans there to be transhipped in steamers. It was destroyed after unloading upon the wharf but before the customary notification and checking off by the steamship companies. It was held that there was no "delivery" within a stipulation against liability after delivery to a connecting carrier. *Texas &c. R. Co. v. Reiss*, 98 Fed. Rep. 533; s. c. aff'd, 99 Fed. Rep. 1006.

It was for the jury to say whether defendant's piling cotton high round its fire apparatus contributed to a loss by fire and whether or not it was negligent to store it in open sheds in close proximity to railroad track, and in not having a larger force of watchmen. *Marande v. Texas &c. R. Co.*, 184 U. S. 113; rev'g s. c., 102 Fed. Rep. 246.

Goods consigned to plaintiff at St. A. arrived safely; plaintiff called to inquire about the same in the evening of the day they arrived, but left them with a view of getting them the next morning and they were burned that night. Court held, that defendant's liability to be that of warehouseman, unless it were shown that plaintiff would not reasonably be required to accept delivery of it until the following morning. *Blumenthal v. Brainerd*, 38 Vt. 102.

Liability as common carrier continues for a reasonable time after arrival to allow for removal, after which liability is reduced to that of a warehouseman. *Berry v. West Va. &c. R. Co.*, 44 W. Va. 538.

The facilities of the consignee for removal do not affect a determination of what constitutes reasonable time therefor before termination of the carrier's liability as such. Three days was held to be reasonable as matter of law. *Bachhaus v. Chicago &c. R. Co.*, 92 Wis. 393.

## XVIII. Connecting Carriers.

A common carrier may by contract or by holding itself out as undertaking such carriage, become obligated to carry to a point beyond the terminus of the line operated by it, in which case it is liable for failure to safely carry and deliver by whosoever's default; each carrier, in such case, is also liable for his own default. If there be no contract to carry beyond its own line, the liability of each carrier will begin with the receipt and due dispatch of the goods or passenger, and end with due delivery at the end of its line. The owners of several lines are liable also when they operate their lines as one, or hold them out to be one, or use a common ticket, or indifferently receive each other's ticket, or are partners. But the mere fact that a carrier checks baggage through, receives goods marked through, receives a through price, or sells a ticket for its own line with the coupon ticket for the subsequent line, does not generally create a contract to carry through; but, the rule in several states, as well as in England, is that the receipt for shipment of goods marked to a particular point creates presumptively a contract to deliver at such point, and even the receipt of the price through has been considered important as evidence of a through contract. If the first carrier is authorized to impose its obligation on a subsequent carrier it may also confer the immunities possessed by itself; hence, exemption secured to the first carrier extends to auxiliary carriers, or if the first carrier has power to make an independent contract for shipment beyond its line, it may, in behalf of the shipper, stipulate for succeeding lines the same exemptions that it has secured for itself from the shipper.

The following rules generally prevail:

## (a). THROUGH CONTRACTS.

A carrier may contract to carry beyond the terminus of its own line over other roads, even into other states. *Wibert v. R. Co.*, 12 N. Y. 245; *Quimby v. Vanderbilt*, 17 id. 306; the agent in this case posted an advertisement headed "Vanderbilt's Line between New York and San Francisco," describing the route by steamships on both oceans and across the isthmus, and sold the plaintiff for a gross sum three tickets, which severally purported that he was to be carried to and across the isthmus and thence upon a particular vessel on her next voyage to San Francisco. \**Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 269; *Maghee v. Camden & Amboy R. Co.*, 15 id. 511; *Root v. Great West. R. Co.*, 45 id. 524; *Swift v. Pacific Mail S. Co.*, 106 id. 206; *Jennings v. Grand Trunk R. Co.*, 127 id. 138; *Angle v. R. Co.*, 9 Iowa 487; *Bank of K. v. Adams Ex. Co.*, 93 U. S. 111; *Bennett v. Filyaw*, 1 Fla. 403; *Cutts v. Brainard*, 42 Vt. 566—receipt contained promise

\* NOTE.—Although this case was decided under chap. 279, sec. 9, L. 1847, the opinion seems to make the liability of the defendant dependent upon the consent or contract of the carrier, not upon any compulsion of the statute, but regards the statute as an enabling act. This was held in *Root v. Great West. R. Co.*, 45 N. Y. 525. The statute was repealed by chap. 55, Laws of 1890.

to carry to destination. *Hart v. Rensselaer &c. R. Co.*, 8 N. Y. 37; *Ill. Cent. R. Co. v. Johnson*, 34 Ill. 389; *Louisville &c. R. Co. v. Campbell*, 7 Heisk. 253; *Meyer v. Rutland &c. R. Co.*, 26 Vt. 110; *Nashua Lock Co. v. Worcester &c. R. Co.*, 48 N. H. 339; *Peet v. Chicago & N. W. R. Co.*, 19 Wis. 131. "contract from N. to N. Y. at \$2.25 per barrel, J. H. S., agent." was through contract. *Penn. R. Co. v. Berry*, 68 Penn. St. 272; *Perkins v. Portland*, 47 Maine 573; *Redfield on Railways*, 284; *Schroeder v. Hudson R. Co.*, 5 Duer 55; *Toledo &c. R. Co. v. Merriam*, 52 Ill. 123; in this case the carrier attempted to limit its liability to its own line, but the general contract and practice prevailed. *Weed v. Saratoga &c. R. Co.*, 19 Wend. 534.

The defendant hired "D." to run a stage from its station to a neighboring village, and to sell tickets from the station to points on the line. The plaintiff was injured on the stage, while going to take a train for which *he held no ticket*. He had become a passenger, and the defendant was liable. It was no defense that the contract with "D." was *ultra vires*. *Buffett v. Troy & Boston R. Co.*, 40 N. Y. 169; aff'g judg't for pl'fs.

Passenger from New York to Germany delivered his trunks to defendant to be shipped to an address in England, taking a receipt reading "for transfer by slow freight" to the address given. It was held a contract to forward and not to carry and defendant was not liable for loss by fire during detention in custom house. *Parker v. North German Lloyd S. Co.*, 76 N. Y. Supp. 806.

A bill of lading which agrees to transport goods to a given place for an entire sum paid at delivery with no reference to connecting carrier other than that they shall be entitled to the benefit of a stipulation limiting its liability where valuation is not specified, construed a through contract, entitling connecting carrier to the benefit of the exemptions. *White v. Weir*, 33 App. Div. 145.

Where company's charter provided for the running of trains to one place and the company contracted to carry a passenger beyond that place, it was held that the doctrine of *ultra vires* would apply to an action for injuries received beyond the termination of the road, and that passenger could not recover for the same. *Hood v. N. Y. &c. R. Co.*, 22 Conn. 502; *Pierce v. Madison &c. R. Co.*, 21 How. (U. S.) 411. The Conn. courts still adhere to this. *Converse v. Norwich &c. R. Co.*, 33 Conn. 166. See *Turner v. R. Co.*, 20 Mo. App. 632; *Irwin v. R. Co.*, 59 N. Y. 653.

Though the carriage as contracted is necessarily over connecting lines, it is not against public policy nor a statute, prohibiting limitation of liability, to limit liability to a carrier's own line. *Hartley v. St. Louis &c. R. Co.*, (Iowa) 89 N. W. Rep. 88.



But where an agent did this in one single instance without authority, the principal was only liable to the end of its own line. *Burroughs v. Norwich &c. R. Co.*, 100 Mass. 26. See *Elkins v. R. Co.*, 3 Foster, 275.

A carrier cannot limit liability to its own line where it agrees to carry to a point over connecting lines. *Jones v. St. Louis &c. R. Co.*, 89 Mo. App. 653.

In the absence of express provisions the receipt of goods billed through and collection of through freight shows a through contract; but an express provision in a bill of lading governs. *Stevens v. Lake Shore &c. R. Co.*, 20 Oh. C. C. 41.

Where contracting carrier agrees to act as the agent of the connecting line only, the freight charges for such being separate it is not a single through contract. *Hughes v. Pennsylvania R. Co.*, (Pa. St.) 51 Atl. Rep. 996.

Furnishing a through car and collecting through freight are evidence of a through contract for the jury. *Page v. Chicago &c. R. Co.*, 7 S. D. 297.

Collection of freight for the entire distance held insufficient to warrant inference of through contract. *Sutton v. Chicago &c. R. Co.*, (S. D.) 84 N. W. Rep. 396.

While carrier must receive a connecting carrier's freight under Tex. R. S. 1895, art 4535, it may require them to be carried on a separate contract of its own, and, if it receives them upon a through contract it is liable under art. 331a for the acts of the connecting carrier. *Texas &c. R. Co. v. Raudle*, 18 Tex. Civ. App. 348.

If, however, it makes a separate contract, the fact that it receives the through rate from the first carrier does not bring it within the latter statute. *Gulf &c. R. Co. v. Short*, (Tex. Civ. App.) 51 S. W. Rep. 261.

Shipper testified that he arranged for transportation to a given point beyond defendant's line with the privilege of changing destination. Defendant was liable for its connecting carrier's negligence. *Texas Mexican R. Co. v. Gallagher*, (Tex. Civ. App.) 61 S. W. Rep. 809.

A through bill of lading from "W." to "O." signed regularly by defendant's agent, bound defendant although its line ran only to "M." and the goods were destroyed en route from "M." to "O." *Hansen v. Flint &c. R. Co.*, 73 Wis. 346; *Perkins v. Portland &c. R. Co.*, 47 Me. 573; *Isaacson v. N. Y. Cent. &c. R. Co.*, 91 N. Y. 278.

A carrier was not allowed to set up that a contract, made by it to carry goods from and to points beyond its own line, was *ultra vires*. *Bigelow v. Chicago &c. R. Co.*, 104 Wis. 109.

## (b). INITIAL CARRIER'S LIABILITY THEREON.

The carrier thus contracting to carry through is liable for injury or loss happening on any of the roads which it employs in discharging its contract to carry the goods to their destination; and, so, any carrier would be liable for the default of other carriers acting as its agents. *Hart v. Rensselaer & Saratoga R. Co.*, 8 N. Y. 31; *Quimby v. Vanderbilt*, 17 id. 306; *Bissell v. Michigan Southern & Northern Indiana R. Cos.*, 22 id. 258; *Root v. Great Western R. Co.*, 45 id. 524; *Jennings v. Grand Trunk R. Co.*, 127 id. 438; *Hansen v. Flint &e. R. Co.*, 73 Wis. 346; *Wharton on Neg. sec. 578* (note 2).

This would be so although there were a notice on the ticket or in the shipping contract that the first carrier acts as agent, or that it is not liable beyond its own line. *Condict v. Grand Trunk R. Co.*, 50 N. Y. 500; *Bussman v. Western Transit Co.*, 9 Misc. 410.

An agreement to forward fresh fruit, billed to New York, "care C. & N. W. via Erie Dispatch, New York passenger train service," and providing for through freight, was a special contract for through transit and rendered the contracting company liable for delay on connecting line in spite of a stipulation restricting its common law liability to its own line. *Colfar &c. Fruit Co. v. Southern P. R. Co.*, 118 Cal. 648; s. c., 40 L. R. A. 78.

A statute, making the initial carrier liable for failure to trace the goods and show delivery upon notice of non-delivery, held not to apply, where the goods were actually delivered, though damaged, before notice was given. *Savannah &c. R. Co. v. Austin*, 101 Ga. 629.

Initial carrier held not liable under such statute for goods, in warehouse of final carrier subject to consignee's orders, as "lost." *McElveen v. Southern R. Co.*, 109 Ga. 249.

On contract of through carriage, initial carrier is liable for negligence of connecting carrier. *St. Louis &c. R. Co. v. Elgin &c. Milk Co.*, 175 Ill. 557; aff'g s. c., 74 Ill. App. 619.

Where a carrier agrees to transport beyond its own line, it is liable for injuries on other lines in the absence of an agreement to the contrary. *Elgin &c. R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

Where a carrier undertakes by a through contract to transport for the whole distance, it cannot exempt itself from liability for the acts of connecting carriers. *Ireland v. Mobile &c. R. Co.*, 105 Ky. 400.

Where a carrier agrees to transport beyond its own line it is liable for injuries on other lines and it cannot limit it by agreement to its own. *Chicago &c. R. Co. v. Western Hay &c. Co.*, (Neb.) 90 N. W. Rep. 205.

A carrier with privilege of selecting route is liable for sending by insolvent carriers. *Post v. Southern P. R. Co.*, 103 Tenn. 184.

Where defendant's contract was to carry to a certain point it was not affected by the shipping report signed by plaintiff and agent of connecting carrier at the point of connection. *San Antonio &c. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

Agreement to carry beyond its own line renders carrier liable for injury on connecting lines. *Gulf &c. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. Rep. 119.

Carrier by agreeing to ship over a connecting line assumes liability for damage on such line. *Texas &c. R. Co. v. McCarty*, (Tex. Civ. App.) 69 S. W. Rep. 229.

A railroad who has agreed to carry to a given point cannot relieve itself from responsibility for injuries by placing the passenger in charge of another road. *Barkman v. Pennsylvania R. Co.*, 89 Fed. Rep. 453.

#### (c). CONNECTING CARRIER'S LIABILITY THEREON.

In case of a contract by a preceding carrier to carry through, a subsequent connecting carrier is only liable for loss or injury happening on its own line. *Campbell v. Perkins*, 8 N. Y. 430; *Burtis v. Buffalo & State Line R. Co.*, 24 id. 269, 272; *Root v. Great Western R. Co.*, 45 id. 525, 530; s. c., 55 id. 636; *Kessler v. N. Y. Cent. R. Co.*, 61 id. 538, aff'g 7 Lansing 62, and rev'g judg't for pl'ff; *Barter v. Wheeler*, 49 N. H. 9; *N. J. Steam &c. Co. v. Merchants' Bank*, 6 How. (U. S. R.) 344; *Smith v. N. Y. Cent. R. Co.*, 42 Barb. 225; *Van Santvoord v. St. John*, 6 Hill R. 157; *Wharton on Neg.*, see, 579.

Each connecting carrier in a through bill of lading is an agent of the others to transport and deliver the goods. The receiving carrier will be liable to owner for negligence anywhere along the line, but as between themselves each is liable only for its own negligence. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267.

The English rule is different, and by it the contracting carrier is alone liable. *Root v. Great Western R. Co.*, 45 N. Y. 524, and cases cited; *Bristol &c. R. Co. v. Collins*, 7 H. L. Cas. 794.

And so it has been held in some states. *Cincinnati &c. R. Co. v. Pontius*, 19 Ohio St. (N. S.) 22; *Coates v. U. S. Express Co.*, 15 Mo. 238; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Southern Express Co. v. Shea*, 38 Ga. 519; *Toledo &c. R. Co. v. Merriam*, 52 Ill. 123.

A shipper may recover on a through contract of any connecting carrier on whose line his goods were lost. *Carallaro v. Texas &c. R. Co.*, 110 Cal. 348.

In the absence of any special relationship or understanding or agreement with the shipper, a connecting carrier is not liable for damage

occurring in the hands of the first carrier. *Trumball v. Coulson*, 12 Colo. App. 102.

Shipper may recover of a connecting carrier for loss due to its negligence. *United States Mail Line Co. v. Carrollton &c. Man. Co.*, 101 Ky. 658.

A connecting carrier, accepting goods requiring rapid carriage on a contract for through transportation, was liable for failure to communicate for 18 days the refusal of the ultimate carrier with whom it connected, to carry without prepayment of freight charges. *Bird v. Southern R. Co.*, 99 Tenn. 419.

Connecting carrier held liable for holding goods for excessive charges. *Texas &c. R. Co. v. Hassell*, (Tex. Civ. App.) 58 S. W. Rep. 54.

Where the company agreeing to carry beyond its own line is subjected to liability for loss on a connecting line, it may recover of the latter. *Texas &c. R. Co. v. McCarty*, (Tex. Civ. App.) 69 S. W. Rep. 229.

#### (d). EFFECT OF SELLING COUPON TICKETS AND CHECKING BAGGAGE THROUGH.

The mere fact that a carrier sells tickets over its own line, and attaches a coupon ticket for subsequent lines, or receives through charges, covering a connecting line, without agreement to deliver at destination, does not make it liable for the default of the connecting line, even though it check the baggage through. In such case the rights and liabilities are the same as if the purchase had been made at actual office of the respective lines. *Babeock v. L. S. & M. S. R. Co.*, 49 N. Y. 191; *Wylde v. Northern R. Co.*, 53 id. 156; *Milnor v. N. Y. & N. H. R. Co.*, 53 id. 363; *Kessler v. N. Y. Cent. & H. R. Co.*, 61 id. 538; *Isaeson v. N. Y. Cent. & H. R. Co.*, 94 id. 278; *Poole v. D. L. & W. R. Co.*, 35 Hun. 29.

See, *Quimby v. Vanderbilt*, 17 N. Y. 306; *Brintnall v. R. Co.*, 32 Vt. 665; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332; *Burroughs v. R. Co.*, 100 Mass. 26; *Ellsworth v. Tartt*, 26 Ala. 133; *Gass v. R. Co.*, 99 Mass. 220; *Hartan v. Eastern R. Co.*, 114 id. 44, *dist'g Hill Mfg. Co. v. Boston, &c. R. Co.*, 104 id. 122; *Hood v. N. Y. &c. R. Co.*, 22 Conn. 1; *Knight v. Portland &c. R. Co.*, 56 Maine. 231; *Kerrigan v. Southern Pac. R. Co.*, 81 Cal. 248; *Myrick v. Michigan R. Co.*, 107 U. S. 102; 104 Mass. 122; 96 U. S. 258; 101 id. 146; *Nashville &c. R. Co. v. Sprayberry*, 8 Bax. (Tenn.) 341; *Naugatuck R. Co. v. Waterbury*, 24 Conn. 168; *Penn. R. Co. v. Schwartzenberger*, 45 Penn. St. 208; *Penn. R. Co. v. Cornell*, 18 Am. & Eng. R. Cas. 339; *Peterson v. Chicago &c. R. Co.*, 80 Iowa, 92; *Sprague v. Smith*, 29 Vt. 421; *Schapman*

v. Boston &c. R. Co., 9 Cush. 24; Railway Co. v. Roach, 35 Kan. 740; Chicago &c. R. Co. v. Dumsen, 161 Ill. 190; aff'g s. c., 60 Ill. App. 93; St. Clair v. Kansas City &c. R. Co., 77 Miss. 789; Lessard v. Boston &c. R. Co., 69 N. H. 648.

See, *contra*, Wolff v. Railway Co., 68 Ga. 653; Railway Co. v. Fort (Tex.) 2 Am. & Eng. R. Cas. 392; id. 395; Harp v. The Grand Era. 1 Woods, 184.

A freight contract for through shipment made by intermediate carrier will not fix liability for damage occurring on another road. *Fort Worth &c. R. Co. v. Williams*, 77 Tex. 121.

The plaintiff bought of the defendant's agent a ticket for New York *via* the defendant's line to Utica and thence by the N. Y. C. R. Co. to New York; the coupon from Utica to New York contained no terminal station, and the plaintiff, upon arrival over the defendant's road at Utica, was refused admission to the Central station and was obliged to buy a new ticket. Held, that the ticket agent on the defendant's line was not Central company's agent, but the agent of the defendant, and that the defendant was liable; *especially* as failure to insert "terminal station" was the fault of the agent. Whether the plaintiff could recover more than the price of the fare to New York, *quære*. *Griffin v. Utica & Black River R. Co.*, 41 Hun. 448, reversing nonsuit.

Defendant sold tickets from "O." to "F." stations on its road, and attached a coupon for the stage line from "F." station to "F." by Hatch's omnibus. Hatch sold tickets on separate cards, one for his stage line and one for the railway to "O." Defendant was not liable for injury on stage line by Hatch's negligence. *Poole v. D., L. & W. R. Co.*, 35 Hun. 29, reversing judgment for plaintiff.

**From opinion.**—"The separate tickets, whether regarded as contracts or tokens, are insufficient evidence to justify the conclusion as a matter of law, or of fact, that the defendant contracted to carry the plaintiff beyond Fulton station. *Milner v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363. In this case the defendant issued coupon tickets and checked the plaintiff's baggage over a connecting road. \* \* \* It was held that the tickets and check were insufficient evidence to authorize the conclusion that defendant, contracted to carry over the connecting road.

In *Kessler v. New York Central and Hudson River Railroad Company* (61 N. Y. 538), the plaintiff purchased a coupon ticket from the Baltimore and Ohio Railroad at Washington, for Buffalo, over the defendant's road, and checked her baggage through, which was never delivered. The plaintiff failed to show that the baggage came into the possession of the defendants, and it was held that the tickets and checks were insufficient evidence to justify the conclusion that the connecting roads were liable as joint contractors.

In *Isaacson v. New York Central and Hudson River Railroad Company* (94 N. Y. 278), it was held that a check upon baggage through to New Orleans was

evidence of a contract to safely deliver to a connecting road, but not evidence of a contract to deliver at New Orleans. The same principle is decided in *Knight v. Portland Railroad Company*, 56 Maine 234; *Myrick v. Michigan Central Railroad Company*, 107 U. S. 102; *Gass v. New York, Providence and Boston Railroad Company*, 99 Mass. 220; *Burroughs v. The Norwich and Worcester Railroad Company*, 100 id. 26; see, also, *Wharton on Negligence*, secs. 582, 583; 2 *Rorer on Railroads*, 975: \* \* \* see, also, *Buxton v. Northeastern Railroad Company*, Law Rep. 3 Q. B. 549; *Bristol and Exeter Railway v. Collins*, 7 H. L. Cas. 194.

The rule in England differs from the rule generally laid down in the United States. (For a discussion of the English and American rule, see 3 Alb. Law J. 485; 2 Am. Law Rev. 426.)"

The Wabash Railroad Company, the Grand Trunk Railroad Company and the West Shore Railroad Company formed a through line from Detroit to Chicago and to New York. Coupon tickets were sold, the coupon of each company being for transportation over its own road. Baggage checked under this ticket, sold by the first company, was lost on the road of the second company. *Talcott v. Wabash R. Co.*, 66 Hun, 456; reversing judgment for plaintiff on account of errors in charge.

There was some absence of unity in interpreting this contract.

Van Brunt, P. J.—The first company, and not the connecting companies, was concerned in the contract as respects the plaintiff, and the action was properly against the first company. *Burnell v. N. Y. C. R. Co.*, 45 N. Y. 188; *Carey v. Cleveland & Toledo R. Co.*, 29 Barb. 35; *Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 275; *Condict v. G. T. R. Co.*, 54 id. 505; *Sloman v. G. W. R. Co.*, 67 id. 211; *Isaacson v. N. Y. C. R. Co.*, 94 id. 278.

O'Brien, J.—The first company was not liable as a matter of law, as the coupon ticket specified that the first company was the agent of the others and limited its liability for damages occurring on its own route. *Auerbach v. N. Y. C. R. Co.*, 89 N. Y. 281.

Barrett, J.—There was no evidence of a coupon ticket, and the first company's liability resulted from the sale of a through ticket.

Where a carrier sells tickets over another line connecting with it and assumes to secure accommodations over that line, it is liable for a failure of such other line to furnish proper accommodations, notwithstanding a printed notice on the ticket that it acts as agent and is not responsible beyond its own line.

Such a notice printed on the ticket is not a contract which binds the passenger, the ticket is only a voucher that the party holding it has paid his fare.

Defendant advertised to carry passengers to the World's Fair at Chicago for a special rate, which was to include meals and berths in state-room, defendant's steamers connecting with those of the Lake Michigan and Lake Superior Transportation Company, at Sault St. Marie. In pursuance of this advertisement plaintiff bought tickets for himself and

wife. Defendant endeavored to secure berths for its passengers from the other company, which replied that it had reserved a number which would have been sufficient, but failed to furnish any to plaintiff or his wife. In an action for such failure, a nonsuit was improper. *Bussman v. The Western Transit Co.*, 9 Misc. 410. (Superior Court of Buffalo.)

While a carrier may contract to carry beyond its own line, in the absence of such a contract, by selling a through ticket over other lines, it acts merely as agent of such lines and is bound only to carry to the end of its own line and deliver to the connecting carrier. *Talcott v. Wabash R. Co.*, 89 Hun. 492; s. c. rev'd. on another point, 159 N. Y. 461.

In arranging for an excursion for a society, its vice-president desired defendant to make an arrangement with another road on whose line was a point to be visited. The defendant did so and the tickets mentioned such fact. Defendant had not agreed to transport over another line for that portion of the route and was not liable for injuries received thereon. *Koenke v. New York &c. R. Co.*, 39 App. Div. 457.

#### (c). EFFECT OF RECEIVING GOODS BILLED THROUGH.

A carrier will not usually be deemed to have contracted to carry beyond its own line from the mere fact that goods are marked through, or to a destination beyond its line; and in such case is only bound to duly deliver to the connecting carrier. *Root v. Grand Western R. Co.*, 45 N. Y. 524; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 491; *Angle v. Miss. &c. R. Co.*, 9 Iowa, 187; *Ackley v. Kellogg*, 8 Cow. 233; *Burroughs v. Norwich &c. R. Co.*, 100 Mass. 26; *Brintnall v. Saratoga &c. R. Co.*, 32 Vt. 665; *Briggs v. Boston &c. R. Co.*, 6 Allen, 246; *Bank v. C. Trans. Co.*, 18 Vt. 140; 23 id. 209; *Converse v. Norwich &c. R. Co.*, 33 Conn. 166; *F. & M. Bank v. Champlain T. Co.*, 23 Vt. 209; *Jameson v. C. & A. R. Co.*, 2 Am. L. Reg. 234 (note); *McKay v. N. Y. C. R. Co.*, 50 Hun. 562; *McMillan v. Michigan &c. R. Co.*, 16 Mich. 119; *Nutting v. Conn. R. Co.*, 1 Gray, 502; *Penn. R. Co. v. Berry*, 68 Penn. St. 272; *Peet v. Chicago &c. R. Co.*, 19 Wis. 136; *Perkins v. Portland &c. R. Co.*, 47 Maine, 573; *Rome R. Co. v. Sullivan*, 25 Ga. 228; *Van Santvoord v. St. John*, 6 Hill, 157; *Zeuner v. C. & A. R. Co.*, 27 Penn. St. 334; *Klein v. Dunlap*, 16 Misc. (N. Y.) 31; *Osterhoudt v. Southern P. R. Co.*, 47 App. Div. (N. Y.) 116; *Howard v. Chesapeake &c. R. Co.*, 11 App. D. C. 300; *Hartley v. St. Louis &c. R. Co.*, (Iowa) 89 N. W. Rep. 38; *Hoffman v. Union P. R. Co.*, 8 Kan. App. 379; *Missouri &c. R. Co. v. Houston*, 10 id. 356; *Louisville &c. R. Co. v. Cooper*, (Ky.) 42 S. W. Rep. 1134; *Richmond &c. R. Co. v. Richardson*, (Ky.)

43 S. W. Rep. 465; *Seasongood v. Tennessee &c. T. Co.*, (Ky.) 54 S. W. Rep. 193; *Taylor v. Maine C. R. Co.*, 87 Me. 299; *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391; *Fremont &c. R. Co. v. Waters*, 50 Neb. 592; *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp. (Pa.) 401; *Cincinnati &c. R. Co. v. Fairbanks &c. Co.*, 90 Fed. Rep. 467.

See Am. note to 11 Exch. 497.

Where a carrier stipulates for the carriage of property *through*, it is liable for a default of a connecting line; but, although goods be marked "through," yet, in the absence of a contract to carry through, or of partnership between the carriers, the receiving company is bound only for the due delivery of the goods to the next carrier. *Van Santvoord v. St. John*, 6 Hull. 158, 161, 162; *Jameson v. C. & A. R. W. Dist. Ct. Phila.* 4 Am. L. Reg. 234, note. Chapter 270, Laws 1847, has no application. *Burtis v. The Buffalo & State Line R. R. Co.*, 24 N. Y. 269; *Root v. Great Western R. R. Co.*, 46 N. Y. 524, rev'g 2 Lans. 199.

See *McKay v. N. Y. Cent. R. R. Co.*, 50 Hun. 562.

**From opinion.**—"The English authorities hold that in such a case the company first receiving the goods marked for a particular place, without expressly limiting its responsibility, undertakes *prima facie* to carry them to their destination, even though beyond the limits of the company's route, and is to be regarded as a carrier throughout the entire route; and that this rule applies when the goods are directed to points even beyond the limits of England; and the English cases have carried the rule so far as to hold the contract is *exclusively* with the first company, and that there is no right of action in favor of the owner against any of the subsequent companies on the route. *Muschamp v. Lancaster & P. R. W.*, 8 M. & W. 421; *Watson v. Ambergate R. W.* 3; Eng. L. & E. 497; *Seothorn v. S. Staffordshire R. W.* 8 Exch. 341; s. c., 18 Eng. L. & E. 553; *Wilson v. York R. W.* id. 557; *Crouch v. London & N. W. R. W.*, 25 id. 287; *Bristol & Ex. v. Collins*, 7 Ho. Ld. Cas. 194.

The fact that the contract *fixes the price for the entire carriage does not* enable the connecting carrier to avail himself of limitations enuring to the initial company, and the first company is not the agent of the shipper to make such limitations with the connecting company.

Where a carrier undertakes for a specified compensation to transport over his own route, and to deliver at the terminus thereof goods marked to a consignee beyond such terminus, a through contract will not be implied from the fact that in the description of the goods in the *contract the marks showing the ultimate destination are given*. Nor is such a contract extended or affected by the fact that in making it a printed blank is used adapted to a through contract extending over other and connecting lines, and making the contract to read *ostensibly for and on behalf of all the carriers over whose lines the goods may pass*. The written portions of the contract will control, and only so much of the printed matter in the blank form used as is consistent therewith is of any effect.



Leeds v. Mechanics' Ins. Co., 4 Seld. 351; Harper v. Albany Mutual Ins. Co. 17 N. Y. 194; all that is compatible with or inappropriate to the intent of the parties as indicated by the written portion is to be rejected. *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491.

See *Jennings v. Grand Trunk R. Co.*, 52 Hun. 227.

**From opinion.**—"The Camden and Amboy R. and T. Company were held liable as common carriers under a contract somewhat like this made with the Pennsylvania Railroad Company, under which the goods were transported by the latter company to Philadelphia, and there delivered to the former company. *C. & A. R. & T. Co. v. Forsythe*, 61 Penn. R. 81."

A railway company sold two tickets, connected, one being for its own road and one for the connecting road, and checked the baggage for the entire trip, with the letters of the second road on the check, whereon the baggage was lost. The facts imported an agency, on the part of defendant, and not a contract by it as principal, for transportation over the connecting line, and defendant was not liable. *Milnor v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363, aff'g judg't for def't.

Distinguishing *Quimby v. Vanderbilt*, 17 N. Y. 306; *Hart v. R. & S. R. R.*, 8 id. 37; *Weed v. S. and S. R. R.*, 19 Wend. 534, and *Barnell v. N. Y. C. R. R.*, 45 N. Y. 184.

**From opinion.**—"It is well settled in this state that a railroad corporation may bind itself, by contract, beyond its line (45 N. Y. 514; 22 id. 269; 4 Seld. 37; 17 N. Y. 306). \* \* \* Each case must depend upon its own facts, but I have been unable to find any authority in this country which holds that the facts in this case constitute in law a contract on the part of the company selling tickets for the entire route. The decided tendency of the authorities is the other way. *Knight v. Portland, S. & P. R. R. Co.*, 56 Me. 234; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332; 2 E. D. Smith, 184; *Root v. Great Western R. Co.*, 45 N. Y. 524."

Plaintiff purchased at the office of the B. & O. R. R. Co., at "W.," a coupon ticket from "W." to "B." over several connecting railroads, the last of which was that of defendant. She received a check for her baggage, with the names of all the roads stamped upon it. On arriving at B. she demanded her baggage, but it could not be found, and no trace was found of it after it was checked. In an action to recover for the loss, held, that in the absence of proof that the baggage came into defendant's possession, it was not liable; that the ticket and check furnished no evidence that the connecting roads were jointly engaged in the business of carrying passengers; but the facts were consistent with two theories, either that the B. & O. R. R. Co. made an entire through contract, it employing the other companies, or what was more probable, that each company was the agent of the others to sell tickets and check baggage for the others; and, in either view, defendant would not be respon-

sible without proof that the baggage came into its possession. *Kessler v. N. Y. Cent. R. Co.*, 61 N. Y. 538.

So, although a carrier check baggage to a destination beyond its own line, its duty is merely to duly carry and deliver to the connecting carrier. *Milnor v. N. Y. & N. H. R. Co.*, 53 N. Y. 363; *Steinson v. R. Co.*, 98 Mass. 82; *McMillan v. R. R. Co.*, 16 Mich. 120; *Penn. & C. R. Co. v. Sullivan*, 25 Ga. 228; *Chicago & C. R. Co. v. Mountford*, 60 Ill. 173; *McMillan v. M. S. & N. I. R. Co.*, 16 Mich. 78.

**From opinion.**—"There are a number of English cases in which it has been held, where carriers received goods and gave receipt therefor which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands. *Muschamp v. Lancaster R. R. Co.*, 8 M. & W. 421; *Collins v. Bristol & Exeter R. R. Co.*, 11 Exch. 790; same case in House of Lords, 5 H. & N. 969. The same ruling has been made in this country, where the carrier had expressly agreed to carry to a point beyond his line, for a compensation specified. *Wilcox v. Parmalee*, 3 Sandf. 610; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Noyes v. R. & B. R. R. Co.*, 27 Vt. 110. But the doctrine generally accepted by the American courts is, *that where a carrier receives goods marked for a particular destination beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line and forward from its terminus.* *Ackley v. Kellogg*, 8 Cow. 223; *Van Santvoord v. St. Jehn*, 6 Hill, 157; *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 209; *Brintnall v. Saratoga R. R. Co.*, 32 id. 665; *Nutting v. Connecticut River R. R. Co.*, 1 Gray, 502; *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246; *Perkins v. Portland & Saco R. R. Co.*, 47 Maine, 573; American note to 11 Exch. 797. And see *Angle v. Miss. & Mo. R. R. Co.*, 9 Iowa, 478. In the case in 1 Gray, the defendants receipted the goods at a station on their line 'for transportation to New York,' a point beyond their line. No connection in business was shown between them and any other railroad company. The defendants were accustomed to receive pay only over their own road. The goods in question were delivered to a connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question on the authorities. That circumstance has evidently been regarded as important in some cases. See *Weed v. S. & S. R. R. Co.*, 19 Wend. 537, and Redf. on Railw. 286 and note; but in *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1, the first carriers, who received payment for transportation over the connecting line, were regarded as having received it as agents only, and not as compensation for an undertaking by themselves to transport over such line."

A contrary rule is held in some states, viz.: that the receipt of goods marked to a point beyond the carrier's line presumptively creates a duty to carry to such point, yet the terms of the contract between the shipper

and the carrier may limit the carrier's duty to due carriage and delivery to the next connecting carrier. Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88; Toledo v. Merriam, 52 id. 123; C. & Mo. R. Co. v. People, 56 id. 365; C. & N. W. R. Co. v. Mountford, 60 id. 176; U. S. Express v. Harris, 67 id. 137; Erie R. Co. v. Wilcox, 84 id. 239; Illinois C. R. Co. v. Carter, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618; The Nashua Lock Co. v. Worcester & C. R. Co., 48 N. H. 339, and elaborate review of decisions and enforcement of the English rule. This is the English rule: Muschamp v. Lancaster R. Co., 8 M. & W., 421; Collins v. Bristol & C. R. Co., 11 Ech. 790; 5 H. & N. 969.

See, to same effect, Wilcox v. Marmelee, 3 Sandf. 610; Mallory v. Burrett, 1 E. D. Smith, 134; Noyes v. R. R. Co., 27 Vt. 110.

So in Ohio it is considered that the collection, by such contracting carrier, of fare in advance for the entire journey, without an agreement as to risks, renders it liable on receipt of the traveler's baggage to transport it safely to the end of the route, and there deliver it on demand to such owner. Railroad Co. v. Campbell, 36 Ohio St. 658, citing Schouler on Bailments, 336; Thompson on Carriers, 431; Lawson on Carriers, sec. 235; Hutchinson on Carriers, sec. 145.

But carrier may lawfully agree with the passenger that it shall not be liable, except for loss or damage on its own line. It has been considered that a through bill of lading constitutes a contract for the entire line. Mo. Pac. R. Co. v. Twiss, 35 Neb. 367; Hansen v. Flint & C. R. Co., 73 Wis. 346.

The liability of one road for injuries received by a passenger on a connecting road, depends, not upon the contract between them, but upon what the first road invited the passenger to believe. *Dye v. Virginia Midland & C. R. Co.*, 9 Mackey, (D. C.) 63.

Butter shipped by several lines was damaged while in possession of one of them. In a suit against another line it was held that acceptance of the consignment, marked for carriage beyond the terminus of its own line, establishes *prima facie* a contract for the transportation of the butter to its destination. *Beard & C. v. St. Louis & C. R. Co.*, 79 Iowa, 527.

See Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. R., 513.

Collection of fare for the whole journey without agreement as to risks makes the carrier liable for the entire journey. So held in the case of baggage. Baltimore & C. R. Co. v. Campbell, 36 Oh. St. 647.

And this was regarded as an important consideration in *Weed v. S. & S. R. Co.*, 19 Wend. 537, and see Redf. on Railroads, 286, and note.

As to whether duty to carry through or otherwise may not be inferred from usage.

See *Gray v. Jackson*, 51 N. H. 9; *Hempstead v. R. Co.*, 28 Barb. 485; *Hooper v. C. & N. W. R. Co.*, 27 Wis. 81; *Wood v. M. & H. P. R. Co.*, id. 541.

In the absence of special agreement liability on goods billed through ceases with delivery to connecting carrier. But when through agreement is made, liability cannot be limited to initial carrier's own line. *Miller Grain &c. Co. v. Union P. R. Co.*, 138 Mo. 658; *State Nat. Bank v. Chicago &c. R. Co.*, 72 Mo. App. 82; *Marshall v. Kansas City &c. R. Co.*, 74 id. 81; *Popham v. Barnard*, 77 id. 619; *Eckles v. Missouri P. R. Co.*, 72 id. 296.

Where there is no through contract, liability on goods billed through is that of warehouseman only, when connecting carrier refuses to accept. *Larimore v. Chicago &c. R. Co.*, 65 Mo. App. 167.

Injury received through the delay of one carrier was not excused by the delay of another. *Ft. Worth &c. R. Co. v. Byers*, (Tex. Civ. App.) 35 S. W. Rep. 1082.

An initial carrier was liable for negligently loading a log next to cattle car by which a horse is injured though the injury happens on the connecting line. *Galveston &c. R. Co. v. Herring*, (Tex. Civ. App.) 36 S. W. Rep. 129.

Initial carrier held liable for loss of goods refused by connecting carrier for failure to give indemnity to cover their damaged condition, or to separate the damaged from the undamaged. That excessive indemnity was demanded, was held no excuse, when none at all was tendered. *Gulf &c. R. Co. v. Frank*, (Tex. Civ. App.) 48 S. W. Rep. 210.

That the consequences of a delay developed beyond its own line was no defense. *San Antonio &c. R. Co. v. Thompson*, (Tex. Civ. App.) 66 S. W. Rep. 792.

Connecting carrier was not justified in refusing to accept cattle from connecting line as required by Tex. R. S. 1895, article 4535, on a through bill to a point within a quarantine line, where it would not have had to carry within such line, but to a point outside of it, especially where such line was void. *Ft. Worth &c. R. Co. v. Masterson*, (Tex.) 66 S. W. Rep. 833.

Initial carrier unloaded goods upon its dock and notified connecting carrier to remove them as soon as possible. Initial carrier was held liable as carrier for loss of the goods by fire before they had been removed. *Texas &c. R. Co. v. Clayton*, 84 Fed. Rep. 305.

As to what constitutes a delivery to a connecting carrier see *Chicago &c. R. Co. v. Bosworth*, 119 U. S. 412; rev'g s. c., 87 Fed. Rep. 72.

See, also, "Delivery," *ante* p. 307.

A connecting carrier held entitled to refuse to carry without prepay-

ment of charges. *Southern &c. Ex. Co. v. United States Ex. Co.*, 88 Fed. Rep. 659.

See, also, *Shewalter v. Missouri &c. R. Co.*, 84 Mo. App. 589.

(f). BURDEN OF PROOF WHEN THERE IS NO THROUGH CONTRACT.

Where no contract is made by any one of several distinct carriers to carry, except on its own line, each line is liable only for default on its own line, and it must be shown that the injury or loss happened on its line. *Kessler v. New York Cent. R. Co.*, 61 N. Y. 58; aff'g; *Lans*, 62, and rev'g judg't for pl'ff; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332. (This case holds that a journey begun on one road need not be continuous over the others, but may be at any time unless limited). *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14; *Tolman v. Abbot*, 78 Wis. 192; *Coles v. Central R. Co.*, 86 Ga. 251; *Herrigan v. Southern Pac. R. Co.*, 81 Cal. 248; *Brintnall v. R. Co.*, 32 Vt. 635; *Converse v. Trans. Co.*, 33 Conn. 166; *Louisville R. Co. v. Campbell*, 7 Heisk. 253; *Burroughs v. R. Co.*, 100 Mass. 26; *Penn. R. Co. v. Schworzenberger*, 45 Penn. St. 208; *Reed v. R. Co.*, 60 Mo. 199; *Snider v. R. Co.*, 63 id. 376; *Schneider v. Evans*, 25 Wis. 241; *Chicago &c. R. Co. v. Mountford*, 60 Ill. 175; *Gray v. Jackson*, 51 N. H. 9; *Hempstead v. R. Co.*, 28 Barb. 485.

Under sec. 48, chap. 565, Laws of 1890, it was held, that although a carrier was not liable upon a check, as a contract (*Isaacson v. New York Central and Hudson River Railroad Company*, 91 N. Y. 278), yet as trunk was checked to a point on a connecting line, it was bound to deliver the trunk to the connecting line for further transportation and must establish the fact of such delivery. *Rawson v. Holland*, 59 N. Y. 611; *Jennings v. Grand Trunk R. Co.*, 127 id. 115; *Hyman v. Central Vermont R. Co.*, 66 Hun. 202; aff'g judg't for pl'ff.

Failure of goods to arrive at their ultimate destination puts the initial carrier to his proof that he delivered the same to the connecting carrier. *Brintnall v. R. Co.*, 32 Vt. 665. The contrary was held in *Stimson v. Conn. &c. R. Co.*, 98 Mass. 83.

The words "to forward" mean "to send" not "to carry;" and where the defendants duly and safely delivered, at the end of its route, the package to a responsible carrier with proper instructions, their liability ceased. The contract expressly limited its liability as forwarders, agreed to carry to end of its route, and through charges were not paid. *Reid v. U. S. Express Co.*, 48 N. Y. 462.

Unless receiving carrier makes contract for through transportation,

no liability attaches to it for damage to vegetables occurring on a connecting line. *Illinois Cent R. Co. v. Kerr*, 68 Miss. 14.

See, also, *Tolman v. Abbot*, 78 Wis. 192; *Coles v. Central R. Co.*, 86 Ga. 251. See *Fordyce v. Johnson*, 56 Ark. 430.

The general duty of an intermediate carrier of property involves an obligation on his part to deliver the property, at the end of his route, to the succeeding carrier, within a reasonable time after its arrival. (*Rawson v. Holland*, 59 N. Y. 619.)

The plaintiff, shipper, must be deemed to have authorized the defendant, to deal with the property according to the custom, and under the direction of the dispatch company, in whose care it was consigned, at New York. (See, *Van Santford v. St. John*, 6 Hill, 151; *Mills v. The Michigan Central R. R. Co.*, 45 N. Y. 626.) *Whitworth v. Erie Railway Co.*, 81 N. Y. 420.

See *McKinney v. Jewett*, 90 N. Y. 267.

The duty of transporting cattle from E. to N. O. over several connecting roads, does not rest with the receiving road. *Alabama &c. R. Co. v. Thomas*, 83 Ala. 343.

See *Alabama &c. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173; *Mosher v. St. Louis &c. R. Co.*, 127 U. S. 390.

A contract limiting liability for goods shipped over several lines, to damage occurring on defendant's line, is binding. *Central R. Co. v. Acant*, 80 Ga. 195.

*Pa. R. Co. v. Schwarzenberger*, 45 Pa. 208.

Actual notice need not be given to connecting carrier of the arrival of goods. Notice according to the custom of business is sufficient, but the goods must be held a reasonable time for the connecting carrier to take away, and, on its neglect to do so, storage must be made or other act done to relieve the first carrier from liability as such. Held, that the goods should be held by the first carrier until the arrival of a vessel with which connection was usually made. *Mills v. Michigan Central R. Co.*, 45 N. Y. 622.

When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off, immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. *Michaels v. New York Central R. Co.*, 30 N. Y. 564.

Goods were billed to "Bryan & Sherman;" one line delivered them

to the next, the defendant, as consigned to "Ryan Sherman" and the defendant billed them to "Ryan & Sherman." The plaintiff called for them without receiving them. Defendant was liable. This action was brought against defendant as common carrier to recover damages for alleged negligence and delay in the delivery of thirteen bales of cotton, caused by this error. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; affirming 5 Daly, 521.

A carrier of a boat load of wheat lost or converted a portion of it and discharged the residue into a barge, provided by the intermediate consignee, who refused to pay the freight, charged to the first carrier for the quantity delivered without deduction for that which was lost. Held, that the intermediate consignee was not liable for freight charges unless all the freight were delivered and had authority to settle for the shortage. *Davis v. Pattison*, 24 N. Y. 317.

The defendant was an intermediate carrier of goods shipped from New York to Florida, which were discovered to be damaged while it was delivering them to the next and last carrier. The presumption that goods were delivered to it as they started applied to defendant and, for failure to properly deliver in this case it was liable. *Savannah &c. R. Co. v. Harris*, 26 Fla. 148.

Delay in transporting goods not chargeable to a connecting carrier where bill of lading was made out by receiving carrier not mentioning defendant's line, and the delay occurred on some other than the defendant's line. *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497.

Liability attaches to carrier for damage done to stock on its line, but in a car received by it from another line. *Wallingford v. Columbia &c. R. Co.*, 26 S. C. 258.

A carrier of goods using the car of another company is liable for loss occurring by reason of defects in that car. *Railroad v. Dies*, 91 Tenn. 177.

A connecting railway upon whose tracks a car containing plaintiff had been switched is liable for injuries to him, if it was its custom to so receive cars, whether plaintiff had paid fare on connecting line or not. *Chattanooga &c. R. Co. v. Huggins*, 89 Ga. 494.

When the route is made up of connecting lines no one of them is the agent or liable for the negligence of one of the others. *Sherman v. Hudson R. R. Co.*, 64 N. Y. 254.

Delivery of goods in a damaged condition held to raise no presumption against the first carrier. *Farmington Mercantile Co. v. Chicago &c. R. Co.*, 166 Mass. 154.

Carrier, receiving goods at the point named in the bill of lading as their destination for further carriage to the consignee's residence, was

held not a terminal connecting carrier within a statute making such a carrier liable for damage and compelling the connecting carriers to settle the ultimate liability. *Kerr v. Georgia R. Co.*, 105 Ga. 371.

A statute making a connecting carrier liable for damage to freight and giving it a right of action over against the carrier causing the damage, construed not in violation of the 14th amendment to the Federal Constitution. *Texas &c. R. Co. v. Bigham*, (Tex. Civ. App.) 47 S. W. Rep. 814.

Shipment of goods between points on different lines and not for delivery to a connecting carrier is within the statute. *Houston &c. R. Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43.

Under a stipulation limiting a carrier's liability to its own line, a terminal carrier was not liable for a damaged condition, due to rain, discovered upon arrival, which could not have happened on its line. In absence of proof, presumption would be that damage occurred while in connecting carrier's hands. *St. Louis &c. R. Co. v. Cohen*, (Tex. Civ. App.) 55 S. W. Rep. 1123; *Houston &c. R. Co. v. Ney*, 58 id. 43.

That the proportion of damages sustained on one of the connecting roads cannot be accurately ascertained, is no ground for giving judgment for such road, in view of a statute providing for apportionment of damages. *Texas &c. R. Co. v. Cushing*, (Tex. Civ. App.) 64 S. W. Rep. 795.

Delivery in good condition to an initial carrier and delivery in a damaged condition by a terminal carrier makes out a *prima facie* case against the latter, but where there are circumstances shown, which were likely to injure them while in former's possession and the car was not opened till it reached the destination, the question of whose negligence caused the injury was for the jury. *Missouri &c. R. Co. v. Mazzie*, (Tex. Civ. App.) 68 S. W. 56.

#### (g). EFFECT OF PARTNERSHIP OR JOINT TRAFFIC ARRANGEMENT.

When the owners of two or more lines are, or hold themselves out as jointly interested in transportation, or as partners, or are agents for each other, any or all are liable for injury or loss on any one of such lines. *Hart v. The Rensselaer &c. R. Co.*, 8 N. Y. 37; *Bissell v. Michigan Southern R. Co. and the Northern Ind. R. Co.*, 22 id. 258; *Wylde v. N. R. Co. and the Erie R. Co.*, 53 id. 156; *Alleghany v. McClarkan*, 14 Pa. St. 83; *Barter v. Wheeler*, 49 N. H. 9; *Burroughs v. R. Co.*, 100 Mass. 26; *Bostwick v. Champion*, 11 Wend. 511; *Bradford v. S. C. R. Co.*, 7 Richardson (S. C.) 201; *Fairehild v. Slocum*, 19 Wend. 329; *Gass v. R. Co.*, 99 Mass. 220; *Nashua Lock Co. v. Worcester R. Co.*, 48



N. H. 339; *Pratt v. R. Co.*, 102 Mass. 551; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Matthews v. Atchison &c. R. Co.*, 60 Kan. 11; *Rocky Mountain Mills v. Wilmington &c. R. Co.*, 119 N. C. 693; *Livestock &c. Co. v. Chicago &c. R. Co.*, 87 Mo. App. 330.

See *Chester Glass Co. v. Dewey*, 16 Mass. 94.

Three carriers, owning distinct portions of a continuous railroad, ran cars over the whole road with the same tickets, and received baggage for any part of the whole. An action for the loss of baggage received at one terminus to be carried over the whole road was maintainable against any of the companies. *Hart v. The Rensselaer & Saratoga R. Co.*, 8 N. Y. 37; aff'g judg't for pl'ff.

Two companies uniting to carry passengers over a third road beyond the charter of either, are both liable for negligence in so doing, and *ultra vires* is no defense. *Bissell v. Michigan Southern and The Northern Indiana R. Cos.*, 22 N. Y. 258; affirming judgment for plaintiff.

The Erie Company issued commutation tickets from Jersey City to N. The ticket was headed "N. R. R." and a part of the passage was over that railway owned by the N. R. R. Co. There was no distinction in the trains the commuters should take. Neither company would produce the contract showing the relation to each other, hence every inference was against the defendant. The passenger was hurt while he was preparing to alight. Both companies were liable. *Wylde v. N. R. C. and The Erie R. Co.*, 53 N. Y. 156; affirming judgment for plaintiff.

The large weight of authority is to the effect that two corporations, which have united in the business of transporting passengers, are jointly liable for injuries from negligence of the employes of either. *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Silver Lake Bank v. North*, 4 Johns. Ch. 310; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Bank v. Bank*, 3 Kern. (N. Y.) 304; *Parker v. Boston &c. R. Co.*, 3 Cush. 107; *Alleghany v. McClarkan*, 14 Pa. St. 83; *Great Western R. Co. v. Blake*, 7 Hurls. & Nor. (Exch.) 978.

When several carriers unite to complete a line of transportation, they are each liable for damages subject to reclamation against the party by whose act the damage occurred. *Richardson v. Chouteau*, 37 Fed. R. 532; *Harp v. Grand Era*, 1 Woods (U. S.) 184.

One of two companies acting as general agents of one another, can bind the other to a contract for through transportation. *Southern Pac. R. Co. v. Duncan*, 16 Ky. L. R. 119.

Where several carriers act as partners, one of them cannot by issue of a separate bill of lading vary the contract made by the other for con-

tinuous transportation over both lines. *Swift v. Pacific Mail S. S. Co.*, 106 N. Y. 206.

Limitation of liability to company's own line is not available when the connecting carrier is operated under an arrangement with it. *Howard v. Chesapeake &c. R. Co.*, 11 App. D. C. 300.

A company receiving a fee for trackage but with no interest in freight charges incurred no joint liability with the company carrying the goods. *Savannah &c. R. Co. v. Commercial Guano Co.*, 103 Ga. 590.

A through traffic arrangement between connecting carriers whereby each receives the income from, bears the expense of, and assumes responsibility for and pays rent for the cars of the other while on its track, imposes a joint liability for injury to a passenger. *Richard v. Detroit &c. R. Co.*, (Minn.) 89 N. W. Rep. 52.

Agreement for *pro rata* distribution of gross receipts on through freight held not to create a joint liability or impair the force of a stipulation limiting the liability of each to its own line. *Galveston &c. R. Co. v. Johnson*, (Tex. Civ. App.) 37 S. W. Rep. 243.

That the existence of partnership relations would not affect such stipulations, see *Galveston &c. R. Co. v. Houston*, (Tex. Civ. App.) 40 S. W. Rep. 842.

#### (h). EFFECT OF AGENCY.

When the contract shows that the initial line acted only as agent for the connecting line, it is not liable for the default of the connecting line. *Milnor v. N. Y. & N. H. R. Co.*, 53 N. Y. 363; *Kessler v. N. Y. Central R. Co.*, 61 id. 538; *Auerbach v. N. Y. C. R. Co.*, 89 id. 281; *Poole v. D., L. & W. R. Co.*, 35 Hun. 29; *Kerrigan v. Southern Pac. R. Co.*, 81 Cal. 248; *Peterson v. Chicago, &c. R. Co.*, 80 Iowa, 92.

A railway company must have contracted as principal for the entire distance to be answerable for injuries to a passenger on a connecting road. *Kerrigan v. Southern Pacific R. Co.*, 81 Cal. 248; *Peterson v. Chicago &c. R. Co.*, 80 Iowa, 92.

A carrier accepting goods for transit under a through bill of lading reciting the prepayment of freight, has notice that it must look to the initial carrier and not the owner for its own charges and those of a connecting carrier which it has paid. *Converse Bridge Co. v. Collins*, 119 Ala. 534.

A connecting carrier cannot deny the agency of an initial carrier, where it accepts and recognizes the coupons on a through ticket designed for its part of the route. *Spencer v. Lovejoy*, 96 Ga. 657.

A carrier, which voluntarily accepted goods for carriage, whose freight

had not been paid, under a through bill of lading stating that it had been paid, did not recover freight, earned by it, or paid by it to prior carriers, from an innocent purchaser of the bill of lading. *American National Bank v. Georgia R. Co.*, 96 Ga. 665.

Terminal carrier was held liable for misdelivery pursuant to unauthorized directions of connecting carrier. *Foy v. Chicago &c. R. Co.*, 63 Minn. 255.

That a carrier received fruit from a connecting carrier in an unsuitable car did not excuse it from putting it in a proper conveyance. *Shea v. Chicago &c. R. Co.*, 66 Minn. 102.

Limitation of liability of an initial carrier to damage occurring on its own line did not relieve a connecting carrier of liability for loss which resulted subsequently from its negligent piling of the boxes, which was to be permanent. *Davis v. New York &c. R. Co.*, 70 Minn. 37.

Initial carrier is not liable for an ejection by a connecting carrier with which it has arrangements for sale of tickets, where, though it gave passenger the wrong ticket, the baggage was checked upon the right one and the facts were fully explained to the connecting carrier, and the baggage check and way bill shown. *Alabama &c. R. Co. v. Holmes*, 75 Miss. 371.

By issuing a through ticket the initial carrier makes the connecting carrier its agent so as to be liable for the latter's negligence. *Omaha &c. R. Co. v. Crow*, 54 Neb. 747.

Authority by one road to check baggage to points on the line of another is not authority to check merchandise as baggage so as to impute knowledge of one that apparent baggage is in fact merchandise as notice to the other. *Toledo &c. R. Co. v. Bowler*, 63 Oh. St. 274.

A connecting carrier was not responsible for the fulfillment of an agreement for delivery at a specified date made by an agent of another carrier and representing it only. *St. Louis &c. R. Co. v. Cates*, 15 Tex. Civ. App. 135.

Connecting carrier was liable for the negligence of its agent in misinforming the final carrier that freight was unpaid, where he had been notified by the initial road that freight for the whole distance had been collected. *Missouri &c. R. Co. v. Dilworth*, (Tex. Civ. App.) 65 S. W. Rep. 502; s. c. aff'd. 67 S. W. Rep. 88.

Railroads which jointly agree with an association to carry an excursion for a gross sum, dividing the profits, are each jointly and severally liable for the acts of the servants of the other. *Collins v. Texas &c. R. Co.*, 15 Tex. Civ. App. 169.

By issuing a coupon ticket with limitation of liability to its own line, an initial carrier acts as agent of connecting lines and does not make

itself liable for the latter's negligence. *Moore v. Missouri &c. R. Co.*, 18 Tex. Civ. App. 561.

Initial carrier held liable for failure to secure a state room on connecting line pursuant to terms of contract of carriage. *Bussman v. Western Transit Co.*, 71 Fed. Rep. 654.

Two railroad companies, pursuant to agreement, had been selling each other's tickets. Plaintiff recovered for ejection while attempting to ride on one of these tickets after a disagreement between the companies had taken place and conductors were instructed not to accept them. *Cowen v. Winters*, 96 Fed. Rep. 929; aff'g s. c., 90 id. 99.

### (i). STIPULATIONS FOR EXEMPTION.\*

If the initial company stipulate to carry through with a provision for exemption for loss or injury, the connecting companies will have the same benefit of such provision as is allowable to the contracting company. *Maghee v. C. & A. R. Co.*, 45 N. Y. 514; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 491; *Lamb v. C. &c. R. & T. Co.*, 46 id. 271; *Manhattan Oil Co. v. R. Co.*, 54 id. 197. See *Hinekly v. R. Co.*, 56 N. Y. 429. *Faulkner v. Hart*, 82 N. Y. 422; *Green v. Clark*, 2 Kern. 343, 350, &c.; *Levy v. Express Co.*, 4 So. Car. 234; *Merchants' Bank v. N. J. S. Nav. Co.*, 6 How. U. S. 380; *Penn. &c. R. Co. v. Forsyth*, 61 Penn. 81; *Sanderson v. Lamberson*, 6 Binn. 129.

See *Western R. Co. v. Hamel*; *Wharton on Negligence*, 583, citing *Bristol &c. R. Co. v. Collins*, 7 H. L. C. 794; *Hall v. R. R. L. R.*, 10 Q. B. 437.

Stipulations exempting carrier contracting through from liability will presumptively apply to its own connecting line. *Green v. Clarke*, 2 Ker. 343; *Sanderson v. Lamberson*, 6 Binn. 129; 2 *Green Ev.*, sec. 210.

If the initial company stipulate to carry goods destined for a point beyond its line, and deliver to connecting carrier to be carried to its ultimate destination, and also stipulate for lawful exemptions, the first carrier should be deemed empowered to make agreement for the same, but not greater or other exemptions. *Lamb v. Camden & Amboy, &c. Co.*, 46 N. Y. 271; *Green v. Clark*, 12 id. 343.

In *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491, this seems to have been held otherwise; but the opinion carefully states that there was no agreement or contemplation for the employment of subsequent carriers, and no reduction in price as consideration for such agreement. If the public cartman who carries the goods to the first carrier has power to stipulate for exemptions, why should not the carrier, who does the same service, as regards the second carrier have a like authority at least to the extent conceded to himself by the shipper. (See *supra* 272).

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\* NOTE.—As to validity and effect of such stipulations, see "Limitation of Liability," *ante*, p. 237.

If a receiving carrier contracts for exemption in transportation over its own line, a connecting carrier cannot avail itself of that exemption; but if receiving carrier contracts for through transportation, the connecting carrier may claim the exemption. *Western R. Co. v. Harwell*, 91 Ala. 340.

A New York bill of lading for goods shipped over several lines providing for exemption from liability for loss by fire protects the defendant in whose freight depot, in East St. Louis, the goods were burned. *Brown v. Louisville &c. R. Co.*, 36 Ill. App. 140.

A through receipt given by receiving carrier restricting liability on all the lines will not avail a connecting carrier, which gave the first carrier a receipt containing different provisions. *Browning v. Goodrich Transp. Co.*, 78 Wis. 391.

The Illinois Central R. R. Co. shipped at Cairo, Illinois, cotton consigned to S. W. & Co., New York, via Chicago, where its agent was named as consignee. The bill of lading exempted the Illinois Central from damage or loss by fire, and also from safety or safe carriage beyond its road, but stipulated a through rate. The Illinois Central contracted for the transportation from Chicago to New York with the U. T. Co., and the bill of lading had the same stipulation as to fire, and that damage should be limited to the value at the time of shipment.

The property was destroyed on the wharf of the defendant, a connecting road. Held, that the Illinois Central's agent could make the same but no greater terms of exemption with the connecting road as were made with it, and so far the carriers were exempt. Also, held, that loss by fire, happening by the negligence of the connecting line, was *not* within exemption, and that the burden of proof was on the plaintiff to show the defendant's negligence. *Lamb v. C. & A. R. & T. Co.*, 46 N. Y. 271; aff'g 2 Daly, 454.

On through contract successive connecting carriers are entitled to benefit of exemptions in original bill of lading; but not on a contract to deliver to a connecting carrier. *Robinson v. New York &c. Steamship Co.*, 63 App. Div. 211.

A provision in a through contract that the carrier's liability as such shall cease upon arrival and liability as warehouseman begin, held valid and inured to the benefit of a connecting carrier. *Kansas City &c. R. Co. v. Sharp*, 64 Ark. 115.

Where connecting carrier acts as agent of initial carrier in carrying out the contract, it is entitled to the benefit, of any limitation of liability in amount as to baggage therein. *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

## COMMON CARRIER OF PASSENGERS.

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  - (e) Alighting from cars—liability—steam cars.

- (f) Alighting from cars—no liability—steam cars.
- (g) Alighting from cars—no liability—street cars.

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XIII. INJURIES FROM ASSAULT OF OTHER PASSENGERS.

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XVI. INJURIES TO PASSENGERS FROM EXTERNAL CAUSES.

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XVIII. COLLISION WITH CARS OF OTHER COMPANIES.

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- (b) Rule requiring passengers to purchase tickets before entering cars or pay extra fare on train is reasonable.
- (c) Passenger must have an opportunity to purchase ticket before he is required to pay extra train rate.
- (d) Passenger is entitled to a seat.
- (e) Requirement that ticket be stamped.
- (f) Requirement of identification by signing is reasonable.
- (g) Carrier is bound by the direction or mistake of its conductor respecting tickets and trains.
- (h) Connecting lines.
  - (i) Carrier is liable for mistakes of ticket agent.
  - (j) Mistakes of brakeman.
  - (k) Tickets for stations where train does not stop.
  - (l) Ticket taken up or canceled on train for point short of passenger's destination gives no right to ride on subsequent train.
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- (n) Tickets limited in time.
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- (p) Lost ticket.
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- (r) Failure to stop train at scheduled station.

- (s) Carrying passenger beyond destination.
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- (u) At what place and under what circumstances passenger may be ejected.
- (v) Passenger cannot be exposed to danger or unnecessary force in removal.
- (w) Re-entry after lawful expulsion.
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- (y) Ticket, non-surrender of, at gate—detention and imprisonment for.
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## XX. DRAWING-ROOM AND SLEEPING CARS.

## XXI. FERRY COMPANIES.

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- (a) Where baggage may be carried.
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- (g) When liable as a carrier after arrival.
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- (i) Who may recover for loss of.
- (j) Failure to deliver on demand.
- (k) Extra compensation.

### I. Who May Become and Remain a Passenger.

It is the duty of a common carrier to accept for carriage, upon the usual terms, and for the same service upon equal terms all persons who behave with decency, and are not dangerous to other passengers.

"A railroad company has the power of refusing to receive as a passenger or to expel anyone who is drunk, disorderly, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort or convenience of other passengers, and may exert all the necessary

\* NOTE. For cases relating to limitation of liability and to connecting carriers, see "Common Carriers of Goods," *ante*, p. 197.

† NOTE. That carrier is a special and not a common carrier in transporting special circus cars, express cars, &c., but is common, and not special, in carrying passengers on freight trains generally, see "Carriers of Goods, Limitation of Liability," *ante*, p. 237.



power and means to eject from the cars anyone so imperiling the safety or annoying others; and this police power the conductor, or other servant of the company in charge of the car or train is bound to exercise with all the means he can command whenever the occasion requires it. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible. \* \* \* The fact that the individual may have drunk to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication and its effect upon the individual and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers that gives the right and imposes the duty of expulsion." In this case it is said that while the passenger remained peaceful there was no occasion to remove him, but the opinion continues, "he did, however, thereafter make himself peculiarly obnoxious to the other passengers by his conduct and demeanor grossly insulting and annoying them, and gave occasion for the exercise of the power of removal, had the conductor seen fit, or been called upon to exercise it: and had he continued his annoying practices the conductor would have been faithless to his duty had he suffered him to remain on the car." *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 113.

*Thurston v. Union Pac. R. Co.*, 4 Dillon, 321.

An intoxicated man has a right to ride on a railroad train so long as he keeps quiet and does not interfere with others.

In this case the evidence tended to show, that the plaintiff was intoxicated at the time he was thrown down by the jerking of the car when he was about to alight. *Milliman v. N. Y. C. & H. R. Co.*, 66 N. Y. 642; affirming judgment for plaintiff.

*Pittsburg & Co. R. Co. v. Pillow*, 26 Smith (Pa.) 510.

A rule of a street railroad company, requiring conductors not to allow intoxicated persons to ride on the cars, affords no protection to the company for the forcible ejection from its car of a person not disorderly or intoxicated, but afflicted with a disease (St. Vitus' dance) which produces involuntary motions resembling the movements of an intoxicated person.

A railroad company applies such a rule at its peril. It is within the power of the conductor to ascertain the real cause of the passenger's appearance, and if he errs the company is answerable for his mistake. *Regner v. Glens Falls, Sandy Hill & Co. R. Co.*, 74 Hun, 202.

A man in a state of inebriety has a legal right to ride in a public con-

veyance so long as he remains quiet, and he cannot be legally expelled until he becomes dangerous or annoying to his fellow-passengers. *Thomson v. Manhattan R. Co.*, 75 Hun. 548.

A carrier may properly refuse to receive a passenger who has not purchased a ticket and who is in such a state of intoxication as to be helpless and almost unconscious. *Fredon v. New York &c. R. Co.*, 24 App. Div. 306.

Plaintiff, weak from anaesthetics, was on one of defendant's cars, when, by the order of the president, who thought him drunk, the conductor ordered plaintiff to leave the car, and placed his hand on his arm, whereupon plaintiff complied with the order, being assisted in doing so by the conductor and a friend, he being helpless at the time. If the physical contact of the conductor was in the slightest degree a constraining power in causing plaintiff to act and leave the car, it constituted force. It was error for the court to charge that no force was used in removing plaintiff from the car. *Watson v. The Oswego Street Railway Co.*, 7 Misc. 562. (Supreme Court, 1894.)

Right to eject passenger using vulgar and indecent language is based upon its being annoying to the other passengers. *Chicago &c. R. Co. v. Peletier*, 134 Ill. 120.

A railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable or annoying to other passengers; and is not liable in damages for refusing passage to such a one. *Pittsburg &c. R. Co. v. Vandyne*, 57 Ind. 516.

*R. Co. v. Valleley*, 32 Oh. St. 345; see *Haley v. Chicago &c. R. Co.*, 21 Iowa, 15.

Plaintiff used improper language in consequence of being falsely charged with failure to pay fare, and was ejected. Damages were recovered. *Louisville &c. R. Co. v. Wolfe*, 128 Ind. 347.

A carrier is not required to receive one afflicted with a contagious disease. *Gilbert v. Hoffman*, 66 Iowa, 205.

A railroad company, which carefully and prudently removed from its train a passenger who had suddenly become insane, and placed him in the hands of a competent overseer of the poor, is not chargeable with negligence. *Atchison &c. R. Co. v. Weber*, 33 Kas. 543.

Intoxicated passenger, obnoxious and threatening, may be ejected, and if thereafter he is run over, no liability attaches. *Louisville &c. R. Co. v. Logan*, 10 Ky. L. R. 798.

Indecent or profane language in the presence of ladies in street car justified eviction and arrest. *Robinson v. Rockland &c. R. Co.*, 87 Me. 387; s. c., 29 L. R. A. 530.

No liability attaches for refusing passage to one in such a state of intoxication as that it is reasonably certain he will become offensive and annoying to other passengers. *Vinton v. Middlesex R.*, 11 Allen, 304; *Hudson v. Lynn &c. R. Co.*, 118 Mass. 64.

See *Commonwealth v. Power*, 7 Mete. 596; *Jenks v. Colman*, 2 Sumner, (U. S.) 221.

Where a contract for transportation is not one into which the carrier was under a legal duty to enter, recovery for its breach was not governed by a statutory provision regulating damages in cases of tort. *Louisville &c. R. Co. v. Spinks*, 104 Ga. 692.

Mere blindness is not sufficient to disqualify one as a passenger, unless otherwise incompetent to travel alone. *Zachery v. Mobile &c. R. Co.*, 15 Miss. 746; s. c., 41 L. R. A. 385.

The price of a passenger's right to carriage is his own good behavior, as well as the money he pays. *Eads v. Metropolitan Street R. Co.*, 43 Mo. App. 536.

*Chicago &c. R. Co. v. Pelletier*, 33 Ill. App. 455.

Actual commission of offense is not necessary, where intoxication is such as to make it reasonably certain one will be committed. *Edgerly v. Union Street R. Co.*, 67 N. H. 312.

Where a man with a live goat in his arms was refused transportation, it was held not a question for the jury, whether the company's regulation forbidding carrying live animals in the cars was reasonable, but for the court. *Daniel v. North Jersey &c. R. Co.*, 64 N. J. L. 603.

A sheriff may board a freight train at a station where a train is actually stopping, though it is not scheduled to stop there, under a statute permitting him to board such trains "between stations where such trains stop." *Allen v. Lake Shore &c. R. Co.*, 57 Oh. St. 79.

It is an obligation not growing out of contract, but imposed by law, that a common carrier should carry any one of good character. *Dictum in Saltonstall v. Stockton, Taney* (U. S.) 11.

Mere unchastity in a female passenger does not warrant refusal to carry her; but if her character is such as to furnish reasonable grounds of belief that her conduct will be offensive to other passengers, she may be excluded from the woman's car. *Brown v. Memphis &c. R. Co.*, 5 Fed. Rep. 499.

Passenger may be rejected if it is reasonable to suppose that he is taken with smallpox, although such is not the case. *Paddock v. Atchison &c. R. Co.*, 37 Fed. Rep. 841.

Carrier may refuse to receive an apparently harmless stranger providing it knew that he was insane in fact, or had grounds to suspect he

might be dangerous. *Meyer v. St. Louis &c. R. Co.*, 54 Fed. Rep. 116.

That a person, who has been refused continued first class accommodations on the ground that his ticket was bad, had, for a short time before his ticket was examined, enjoyed them, is no ground for refusing steerage accommodations, which he offered to pay for. *The Willamette Valley*, 71 Fed. Rep. 712.

Where a party had on previous occasions used obscene and indecent language and returned on the trip intoxicated, it was proper to refuse transportation unless she should promise not to repeat the offense. *Stevenson v. West Seattle Land and Improvement Co.*, 22 Wash. 84.

A carrier is not required to carry passenger affected with contagious disease. *Walsh v. Ch. &c. R. Co.*, 42 Wis. 23.

## II. Discrimination against Passengers.

**Carriers must provide for colored passengers, holding first-class tickets, accommodations precisely equal, in all respects, to those provided for white persons holding similar tickets.**

A colored man secured berths on a steamboat, and asked those in charge to exchange them for a state-room, and upon refusal he left the boat and sued for discrimination against him on account of color. The court erroneously declined to charge, that if the plaintiff left the boat voluntarily he could not recover, as there was no evidence of an offer to pay for a state-room, except by an exchange of berths, which the defendant was not bound to accept. Non-suit should have been granted. *Miller v. N. J. S. Co.*, 58 Hun. 424; rev'g judg't for pl'ff; aff'd, 135 N. Y. 612.

See *Indianapolis &c. R. Co. v. Renard*, 46 Ind. 293; *Sanford v. Calamssa &c. R. Co.*, 2 Phila. (Penn.) 107.

By authorizing a connecting carrier to sell first class tickets to a negress, a company recognizes her title to such as an interstate passenger. *Carrey v. Spencer*, 72 N. Y. St. Rep. 108.

A colored man is as much entitled to carrier's protection as a white man; and may recover for its failure to protect him from assault from fellow passenger. *Richmond &c. R. Co. v. Jefferson*, 89 Ga. 554.

Fare cannot be demanded of one in excess of what would, under like circumstances, be charged others. *Phillips v. Southern R. Co.*, 114 Ga. 284.

A company was liable for an insult to a colored woman by a white man permitted to enter a car set apart for the use of colored people. *Wood v. Louisville &c. R. Co.*, 101 Ky. 703.

Though a statutory provision requires separate compartments for blacks and whites, which by its terms is not applicable to officers and their prisoners, an officer with a negro prisoner cannot bring him into the car for whites. *Louisville &c. R. Co. v. Catron*, 102 Ky. 323.

Such provision for separate cars is reasonable, where equal accommodations are provided for each. *Ohio Valley R. Co. v. Lander*, 104 Ky. 431.

Defendant's driver ejected plaintiff, a colored person, from defendant's stage, and recovery was allowed. *Peck v. Cooper*, 112 Ill. 192.

Regulation providing that first-class ticket holders only entitled to sleeping car berths is reasonable. *Pullman Palace Car Co. v. Lee*, 48 Ill. App. 75.

The reasonableness of a rule that persons of plaintiff's race are not to use the cabin as passengers is for the jury. *Day v. Owen*, 3 Mich. 520.

Where a colored passenger was denied the privileges of the cabin, in accordance with the regulations of the steamship company, the question of the reasonableness of those regulations is a mixed one of fact and law. *Day v. Owen*, 5 Mich. 520.

See *Hall v. DeCuir*, 5 Otto, 485; Civil Rights Cases, 109 U. S. 3; *Bass v. C. & N. W. R. Co.*, 36 Wis. 450.

Failure to furnish a colored person's car with proper accommodations in violation of statutory requirement, subjects the carrier to liability for damages for pain and suffering caused thereby. It was no defense that accommodations in adjoining cars for whites were not used. *Henderson v. Galveston &c. R. Co.*, (Tex. Civ. App.) 38 S. W. Rep. 1156; s. c. on second appeal, 42 S. W. Rep. 1030.

Wilful refusal to carry is ground of recovery. *Kibler v. Southern R. Co.*, 64 S. C. 242.

Where a ticket with sleeping accommodations has been purchased by a negro from a point in Missouri to a point in Texas, he cannot be ejected from a berth in a white person's car without furnishing him with the same accommodations in a colored person's car, under a separate coach act. *Pullman Palace-Car Co. v. Cain*, 15 Tex. Civ. App. 503.

An act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted, also, that "no person shall be excluded from the cars on account of color." Held, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, although they were as good as those which they assigned exclusively to white persons, and in fact the very cars which were, at cer-

tain times, assigned exclusively to white persons. *Railroad Co. v. Brown*, 17 Wallace's Reports, 445. See Civil Rights Cases, 109 U. S. 3.

Where railroad company refused to carry colored woman, except in smoking car, it is liable to her in damages. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683.

*C. & N. W. R. Co. v. Williams*, 55 Ill. 185; *Coger v. N. W. & C. Packet Co.*, 37 Iowa, 145; see *Green v. Bridgetown*, 9 Cent. L. J. (Ga.) 206; Civil Rights Bill, 1 Hughes, (U. S.) 541; *Westchester & C. R. Co. v. Miller*, 55 Pa. St. 200.

### III. Who Is a Passenger.

A person on the premises or vehicle, appropriated for the reception of passengers for the purpose of transportation by a common carrier, is a passenger, although he make no compensation for carriage, or such compensation be paid by another. This includes express messengers, mail agents, persons in charge of stock, but not servants of the carrier riding to and from their work as a part of the compensation, nor trespassers, nor persons riding upon freight trains by invitation of employé, when they knew or should have known that such train was not intended by the defendant for the transportation of passengers, and in the absence of authority on the part of such employé to extend such an invitation.

Although no fare has been paid, one who enters a steamboat to take passage is a passenger. *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; rev'g 5 Hun, 523; s. c., 89 N. Y. 627; 125 id. 299.

*Carpenter v. Boston & C. R. Co.*, 97 N. Y. 494, rev'g 24 Hun, 104.

Plaintiff, ten years old, had passage to H. from N. Y., and rode back, no additional charge having been asked her. She was hurt while entering slip by the side of the boat, where her hand was struck by defective spiles. Plaintiff was entitled to recover. *Doran v. The East River Ferry Co.*, 3 Lansing, 106.

Upon the employment of an unauthorized officer the defendant undertook the transportation of prisoners of war. It was liable for negligence to soldiers in charge of prisoners, although posted on platform of cars. *Truex v. Erie R. Co.*, 4 Lansing, 198.

When one boards a train under the *bona fide* belief that he is entitled to use a fifty trip family ticket, he is entitled to the rights of a passenger as to injuries negligently inflicted by the company. *Odell v. New York & C. R. Co.*, 48 App. Div. 12; s. c. aff'd. 162 N. Y. 625.

The relation begins upon one's purchasing a ticket and occupying a waiting-room provided for the purpose of awaiting the arrival of trains. Plaintiff was taken ill in waiting-room, ejected by order of the station agent and killed on tracks in front of station. *Wells v. New York & C. R. Co.*, 25 App. Div. 365.

Where a person intending to pay his fare, though he has purchased no ticket, boards a train by a lawful entrance, though not by that at which an employé is stationed to examine tickets, he is a passenger, though, at the time of accident, standing where they are not permitted to ride. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

A person is none the less a passenger because of being on a chartered excursion train. *Texasarkana &c. R. Co. v. Anderson*, 67 Ark. 123.

A ticket is not requisite to the relationship of carrier and passenger, where there is no ticket office at the station. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482.

The train having stopped to take the person aboard on his signifying his intention so to act, he becomes a passenger. *Western &c. R. Co. v. Voils*, 98 Ga. 446; s. c., 35 L. R. A. 655.

Knowledge that one has boarded the train while in motion, getting on between the tender and baggage car, without knowledge of his purpose in doing so, does not show acceptance of him as a passenger, though he holds free pass. *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115; rev'g s. c., 63 Ill. App. 102.

A purchaser of a ticket is not a trespasser on a freight train, though against the company's rules, and cannot be treated as such, where he boards it in reliance upon the statement of the ticket agent that he is entitled to do so. *Illinois C. R. Co. v. Davenport*, 177 Ill. 110; aff'g s. c., 75 Ill. App. 579.

The purchaser of a ticket about to step from the station platform to the car is a passenger. *Illinois C. R. Co. v. Treat*, 179 Ill. 576; aff'g s. c., 75 Ill. App. 327.

Carrier is not relieved of liability to plaintiff as passenger by the fact that he was received by an agent of the carrier for transportation without payment of the fare. *Benner &c. Co. v. Busson*, 58 Ill. App. 17.

While crossing defendant's tracks to take a train standing at a station for reception of passengers, deceased was killed by cars switched onto the track she was crossing. She was held to be a passenger. *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

A round trip ticket does not make one a passenger while approaching a station to board a train. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Boy of eleven, who not only has no money but has been notified that the car is not provided for passengers, is not a passenger. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453.

Where a person unable to catch a train by the regular route provided, takes a short cut without looking out for his safety, he has not acted in such a way as to be entitled to be treated as a passenger. *Chicago &c. R. Co. v. Weeks*, 99 Ill. App. 518.

Boy attempting to steal a ride by hanging on the outside of a car, is not a passenger, though he has the means of paying fare, if required. *Udell v. Citizens' Street R. Co.*, 152 Ind. 501.

That a person boarded a train erroneously thinking it stopped at his destination, did not debar him from the rights of a passenger upon tendering his fare to the first regular stopping place, though he had no ticket, because the ticket office was closed. *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189.

Slowing down a street car pursuant to a signal is an invitation to become a passenger and the relation is established upon stepping on the running board of the car. *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284.

One taking a train with knowledge that it was an excursion and not a regular was not presumed to be a passenger thereon. *Fitzgibbon v. Chicago &c. R. Co.*, 108 Iowa, 614.

By purchase of a ticket and entrance into the car one becomes a passenger and the relation is not terminated by his leaving it to avoid a collision. *Graddert v. Chicago &c. R. Co.*, 109 Iowa, 547.

Under a contract to haul cars for a circus proprietor, an employé of the latter has no claim against the railroad company for injuries caused by a truck jumping the track. *Robertson v. Old Colony R. Co.*, 156 Mass. 525.

The purchase of a ticket is not necessary to sustain the relation either at common law or under a statute permitting recovery against railroad companies for death of passengers. *Inness v. Boston &c. R. Co.*, 168 Mass. 433.

One becomes a passenger under such a statute by purchasing a ticket and mounting the platform to take the train. *Young v. New York &c. R. Co.*, 111 Mass. 33; s. c., 41 L. R. A. 193.

One becomes a passenger on a street car, which has stopped for him, by placing his foot on the running board thereof. *Gordon v. West End St. R. Co.*, 175 Mass. 181.

By getting on the steps or platform of a street car, where it has stopped at the usual place for the purpose, the relation of passenger and carrier is established. *Gaffney v. St. Paul &c. R. Co.*, 81 Minn. 459.

Also by permitting entrance on the steps of an electric train with others for the purpose of passage. *Barth v. Kansas City Elev. R. Co.*, 112 Mo. 535.

By purchasing a ticket and entering a train standing at a depot prepared for passage. *Choate v. Missouri &c. R. Co.*, 67 Mo. App. 105; *Holt v. Hannibal &c. R. Co.*, 87 id. 203.

Entrance into the car with purpose of becoming a passenger though



without a ticket, was held sufficient, whether the fare was paid before or after the accident. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 1031.

Appearance for passage at flag station a reasonable period before train time, entitled one to damages for failure to stop the train, where agent was absent and the engineer failed to see him. *Thomas v. Southern R. Co.*, 122 N. C. 1005.

Coming to a waiting room to take a train within a reasonable period of train time, constitutes one a passenger, though no ticket be bought. *Phillips v. Southern R. Co.*, 124 N. C. 123; s. c., 45 L. R. A. 163.

Purchase of a ticket with the intention of becoming a passenger is sufficient. *Exton v. Central R. &c.*, 63 N. J. L. 356; aff'g s. c., 62 id. 7.

One struck by a falling sign board, while about to board a street car stopped pursuant to his signal, was held a passenger. *Carney v. Cincinnati Street R. Co.*, 8 Oh. S. & C. P. Dec. 587.

The relation held to exist as to one while taking a place on the car. *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224; s. c., 4 Oh. Leg. News, 300.

One with a transfer ticket approaching a car standing still to get on when struck by a piece of the trolley pole broken by the conductor while reversing it. *Keator v. Scranton Traction Co.*, 191 Pa. St. 102; s. c., 44 L. R. A. 546.

A soldier on defendant's train under contract between defendant company and the government is entitled to the privileges of a passenger. *Galveston &c. R. Co. v. Parsley*, 6 Tex. Civ. App. 150.

One with a ticket and intending to ride as a passenger is not *per se* a trespasser because he gets on at the baggage car platform and while the train is moving, where others in such relations have been accepted as passengers. *Martin v. Southern R. Co.*, 51 S. C. 150.

But, where one has no ticket and gets on a train at a place not provided for passage, until accepted, he is not a passenger merely because his intentions are *bona fide*. *Missouri &c. R. Co. v. Williams*, 91 Tex. 255; rev'g s. c., 40 S. W. Rep. 350.

A ticket is not essential to status of a passenger, in view of a statute allowing the payment of fare to the conductor. *Missouri &c. R. Co. v. Simmons*, 12 Tex. Civ. App. 500.

The entry of a waiting room for the purpose of procuring a ticket establishes the relation. *Texas &c. R. Co. v. Jones*, (Tex. Civ. App.) 39 S. W. 124; *St. Louis &c. R. Co. v. Franklin*, (Tex. Civ. App.) 41 S. W. Rep. 701.

Mistaken entrance of the wrong train by one having a ticket does not prevent his being a passenger thereon. *Gary v. Gulf &c. R. Co.*, 17 Tex. Civ. App. 129.

A servant is a passenger although his fare be paid by his master. *Alton v. Midland R. Co.*, 19 C. B. (U. S.) 213; *Fairmouth R. Co. v. Steetler*, 54 Penn. St. 375.

Intention to take passage on train constitutes a person in defendant's depot a passenger. *Grimes v. Penn. R. Co.*, 36 Fed. Rep. 72.

One does not become a passenger because he holds a mileage ticket, where he does not go to the station or notify anyone of his intention to take passage, but, without going to the depot, starts across the tracks toward a train while at siding. *Southern R. Co. v. Smith*, 86 Fed. Rep. 292; s. c., 40 L. R. A. 746.

That fare had not been paid, is no bar to the relationship, where the conductor has not come for it. *Chicago &c. R. Co. v. Lee*, 92 Fed. Rep. 318.

#### (a). EXPRESS MESSENGERS.\*

An express messenger is a passenger and entitled to rights as such; nor is he chargeable with notice of an agreement between the express and the railroad companies throwing all liabilities upon the former, but he may recover from the railroad company. *Brewer v. N. Y. &c. R. Co.*, 124 N. Y. 59; s. c., 35 N. Y. St. R. 60.†

Express messengers and agents are entitled to the same protection as other passengers, unless otherwise unmistakably contracted. Unless an agent is privy to contract with express company, exempting the carrier from liability, it is liable. *Blair v. Erie R. Co.*, 66 N. Y. 313; *Penn. R. Co. v. Woodworth*, 26 Oh. St. 585; *Hammond v. N. E. R. Co.*, 6 Rich. (S. C.) 130; *Fordyce v. Jackson*, 56 Ark. 594; *Yeomans v. Contra Costa S. Nav. Co.*, 44 Cal. 71.

Where decedent, an express messenger, was killed while in express car but not on duty as messenger (thus violating a rule of the express company, and of the railroad company), his representatives did not recover. *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160.

Where an express agent is also a baggage master, he is only entitled to the rights of an employé as regards the railroad company. *Baltimore &c. R. Co. v. McCamey*, 12 Oh. C. C. 543.

An express messenger, who, in his contract of employment, ratified and confirmed a contract between the express company and railroad company relieving the latter from liability for negligence, was held not entitled to the immunity of a passenger from such contracts. *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 498; rev'g s. c., 79 Fed. Rep. 560.

See this case under "Carriers of Goods, Limitation of Liability," ante p. 237.

\* See "Common Carriers of Goods," p. 197.

† NOTE.—Railroad Companies are required to carry mails by sec. 56, chap. 565, Laws of New York, 1890.

But, where an agreement between the railroad and the express company, providing that messengers were to receive free transportation in consideration of their assuming all risk, was made without their knowledge, they were allowed to recover. *Chamberlain v. Pierson*, 87 Fed. Rep. 420.

#### (b). MAIL AGENTS.

The defendant owed to postal agent the same duty as to any other passenger. *Notton v. Western R. Co.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 id. 313.

See *Penn. R. Co. v. Price*, 96 Pa. St. 256.

A postal agent is a passenger, and a contract for carrying mail stipulating against damages to agents is void. The United States statute does not authorize it, and as the absolute duty to carry the mail is imposed, it cannot be qualified. *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562; aff'g 31 Hun, 100, and judg't for pl'ff.

Distinguishing *Penn. R. Co. v. Price*, 96 Pa. St. 256.

Carrier was not liable for injury to a mail clerk in one of its cars due to collision caused by the switching of a car by another company onto the track it was standing on in a terminal station. *Stoddard v. New York & C. R. Co.*, (Mass.) 63 N. E. Rep. 927.

A clerk in mail car on defendant's train, employed by the United States, may recover as a passenger for injuries received. *Mellor v. Missouri Pacific R. Co.*, 105 Mo. 455; *Magoffin v. Missouri Pac. R. Co.*, 102 id. 540.

Postal clerk is not a passenger, the same degree of diligence only being due to him as to employes; he is fellow servant with brakeman, within the meaning of a statute, by its terms inapplicable to passengers, giving to those not railroad employes, injured while at work on or about the railroad, only such rights as railroad employes would be entitled to. *Forman v. Pennsylvania R. Co.*, 195 Pa. St. 499.

Mail agent was contributorily negligent in not closing the side door of the mail car or putting up the safety bar. That he could not pull or kick the bar loose so as to put it in position was no excuse, where he did not attempt to get it loose by other means or close the lower part of the doorway. *Martin v. Philadelphia & C. R. Co.*, 200 Pa. St. 603.

A mail agent is a passenger and may recover for injuries negligently inflicted. *Gulf & C. R. Co. v. Wilson*, 79 Tex. 371; *Houston & C. R. Co. v. McCullough*, 22 Tex. Civ. App. 208.

A postal clerk is a passenger entitled to the comforts due them in-

cluding heating. *International &c. R. Co. v. Davis*, 17 Tex. Civ. App. 340.

A mail agent is a passenger and may recover for injuries received. *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. R. 165; *Norfolk &c. R. Co. v. Shott*, 92 Va. 34.

### (c). PERSONS IN CHARGE OF STOCK.

Person on stock car by right and in performance of his duty in caring for the stock, may recover for injury there received. *Florida R. &c. Co. v. Webster*, 25 Fla. 394.

Shipper riding with his cattle by consent of the company is a passenger and entitled to protection as such. *Illinois &c. R. Co. v. Beebe*, 174 Ill. 13; aff'g s. c., 69 Ill. App. 363; *Chicago &c. R. Co. v. Winters*, 175 Ill. 293; aff'g s. c., 65 Ill. App. 435.

Where shipper of stock got on freight train at the suggestion of a train hand to help signal, it was held that no recovery could be had for thus voluntarily exposing himself to danger. *Atchison &c. R. Co. v. Lundley*, 42 Kas. 714.

A shipper traveling with stock may recover for injuries as a passenger, though he had executed a release in consideration of free passage. *Louisville &c. R. Co. v. Bell*, 100 Ky. 203; *Memphis &c. Packing Co. v. Buckner*, (Ky.) 57 S. W. Rep. 482.

Though not passenger, a person in a stock car with permission of the company, and for the purpose of caring for his stock, is entitled to recover for injuries inflicted on him in a collision. *Orcutt v. Northern P. R. Co.*, 45 Minn. 368.

One in care of stock who mounted a train upon the statement of the conductor that it would be safe to do so, may recover for injuries received by the sudden starting of the same. *Olsen v. St. Paul &c. R. Co.*, 45 Minn. 536.

While a shipper of stock may have, under his contract, the right to go upon defendant's train, the same privilege does not extend to another helping him, and such other cannot recover as passenger for injuries sustained from jumping off the train under apprehension of a collision. *Richmond &c. R. R. Co. v. Burnsed*, 70 Miss. 437.

Degree of diligence of company corresponds with mode of conveyance: one entitled to ride on top of train may rely on careful management of the same, and can recover for injuries resulting from company's negligence. *Tibby v. Missouri &c. R. Co.*, 82 Mo. 292.

Drover traveling with stock must submit to all the inconveniences naturally incident to such passage. *Omaha &c. R. Co. v. Crow*, 47 Neb. 84.

Person in charge of cattle on a train and riding free is a passenger. *Railway v. Iry*, 11 Tex. 409; and this notwithstanding a provision regarding him as an employé and as assuming all risks. *St. Louis &c. R. Co. v. Nelson*, (Tex. Civ. App.) 14 S. W. Rep. 179.

United States Supreme Court held that however the law might be in respect to a strictly free passenger, a drover traveling on a stock train to look after his cattle, and having a free pass for that purpose, could recover for injuries sustained by reason of defendant's negligence. *Railroad Company v. Lockwood*, 17 Wall. 357.

A cattle drover, transporting cattle on defendant's train, and himself riding free thereon, was injured by negligence of defendant's employés, precipitating him between the cars, and recovered. *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291.

Plaintiff, in charge of stock on defendant's train, cannot recover for injuries received by falling between the cars when the same was due to the switching off of the caboose as he was about to step upon it, on the ground that the conductor's statement that the caboose would not be switched off, was not the proximate cause of his injuries. *Chicago &c. R. Co. v. Elliott*, 55 Fed. Rep. 949.

Plaintiff recovered for injuries received by him while walking along the top of a freight train from colliding with an overhead bridge. He was in charge of cattle and had gone forward to examine them. *Chicago &c. R. Co. v. Carpenter*, 56 Fed. Rep. 451; *Nelson v. Southern P. R. Co.*, 18 Utah. 244 (snow sheds too low).

#### (d). SERVANT OF CARRIER RIDING TO OR FROM HIS WORK.

Where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employé and not a passenger, and for injury to him through the negligence of a co-employé the company is not liable. *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267.

Citing *Russell v. H. R. R. Co.*, 17 N. Y. 134, where the person was injured while being taken home upon a gravel train at night, after his day's work was completed; *Gilshannon v. Stony Brook R. Corporation*, 10 Cush. 228, where the plaintiff was a laborer on the road and was conveyed in defendant's cars to and from the place of his work for a mutual convenience, and without contract for his transportation; *Seaver v. Boston & Maine R. Co.*, 14 Gray. 466; *Tunney v. Midland Ry. Co.*, L. R., 1 C. P. 291; and, distinguishing *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun. 488, affirmed 74 N. Y. 617, where an assistant surveyor, employed by the month, and having no duty to perform in connection with the running of the defendant's trains, nor in the care in reference thereto, was

killed while being transported on defendant's cars, free of charge, from his home to the place where he was to perform the work; and, disapproving *O'Donnell v. A. V. R. Co.*, 59 Pa. St. 239, which was said to be in conflict with the rule in the state of New York and not to be sound law.

This is the general doctrine. Wharton on Negligence, sec. 643, citing *Higgins v. R. Co.*, 36 Mo. 418; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Kansas R. Co. v. Salmon*, 11 Kan. 83.

A station agent, riding home after hours on a passenger train by permission of a conductor, was held to be a passenger. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Where the foreman of a gang of laborers had finished hauling dirt and was returning late at night, he was regarded as a passenger. *Dobson v. New Orleans &c. R. Co.*, 52 La. Ann. 1127.

Where a company issues certain tickets to employes living on the line of the road, possession thereof gives one the character of a passenger. *Doyle v. Fitchburg R. Co.*, 166 Mass. 492; s. c., 33 L. R. A. 844; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66.

Employes permitted to ride free of charge while in uniform were held to be passengers. *Dickinson v. West &c. R. Co.*, 177 Mass. 365; s. c., 52 L. R. A. 326.

A servant of a railroad company upon the company's business and having a right under contract to a seat in company's cars, cannot lawfully be compelled to leave a seat to which he has been assigned. *N. Y. &c. R. R. Co. v. Burns*, 22 Vroom. (N. J.) 340.

See "Master and Servant," negligence of co-employee, *post*, p.

An employé, whose contract gave him free passage, was held a passenger. *Simmons v. Oregon R. Co.*, (Or.) 69 Pac. Rep. 440.

Where an employé's contract entitles him to free transportation after the day's work, not obligatory as a part of his work, he is a passenger. *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479; s. c., 38 L. R. A. 376.

Free transit toward home after the day's work was held incidental to service and did not make employé a passenger. *Ionnoue v. New York &c. R. Co.*, 21 R. L. 452.

Customary carriage of an employé to his work, not being in the line of his duty, constitutes him a passenger though carried gratuitously. *Transit Co. v. Venable*, 105 Tenn. 460; s. c., 51 L. R. A. 886.

Where an employé, to be employed at a certain point, stipulated for free passage thereto, not in connection with such work, but for his own convenience, he was a passenger, though the pass was the ordinary employé's pass containing the usual exemptions which he had assented to. *Whitney v. New York &c. R. Co.*, 102 Fed. 850.

Where one was employed to work at a certain point, free passage thereto

entitled him to rights of a passenger and stipulations for exemption from negligence were unavailing. *Williams v. Oregon &c. R. Co.*, 18 Utah, 210.

(e). RIDING ON FREIGHT TRAINS, ENGINE, &c., BY INVITATION OR OTHERWISE.

Railroad companies have a right to make a complete separation between their freight and passenger business. Where this is done the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the nature and apparent division of the business.

The presumption is that a stranger riding upon a freight train is not legally a passenger, and is not lawfully upon the train; and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut this presumption.

*Plaintiff was invited by the conductor of a coal train upon defendant's road to ride upon the train, with a promise to get him employment as a brakeman. No passenger car was attached to the train, but, aside from the coal cars, simply a "caboose" for the carriage of train implements and the accommodation of defendant's employés, in which plaintiff was invited to and did ride. Through the negligence of defendant's employés the train was run into by another and plaintiff injured. In an action to recover damages it appeared that, by a regulation of defendant, printed for the use of employés, passengers were forbidden to ride on coal trains: of this plaintiff had no actual notice. It did not appear that passengers were either habitually or occasionally permitted to ride in the caboose. There was nothing in the attendant circumstances indicating an apparent authority in the conductor to create between the parties the relations of passenger and carrier, or to make an arrangement for plaintiff's employment as a brakeman; and the facts did not establish that plaintiff was lawfully upon the train.* *Eaton v. The D. L. & W. R. R. Co.*, 57 N. Y. 382, rev'g judg't for pl'ff and distinguishing *Dunn v. G. T. R. Co.*, 58 Me. 187; 10 Am. L. R. (N. S.) 623.

**From opinion.**—"In *Lygo v. Newbold* (9 Exch. 302) the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant, who, without the defendant's authority, permitted the plaintiff to ride in the cart. On the way the cart broke and the plaintiff was injured. It was held that the defendant had not contracted with the plaintiff to carry her, and that he was not liable. The Supreme Court of Maine have sought to weaken the force of this case by the assertion that it was not the case of a common carrier. *Dunn v. Grand Trunk Railway Co.*, 58 Maine 187; 10 Amer. Law Reg. (N. S.) 623. The criticism seems to be unfounded, as the

question here at issue does not respect the duties of a common carrier to a passenger, but is the preliminary one, whether the plaintiff is a passenger. This depends upon the law of agency, and to this the decision in *Lygo v. Newbold* is strictly applicable. *Elkins v. B. & M. R. R. Co.* (23 N. H. 275) is favorable to the defendant. The railway company in that case had a regulation prohibiting the carriage of freight on passenger trains. It was held that, as it had not authorized or acquiesced in any deviation from the regulation, and had received no compensation for the carriage of the goods, it was not liable. Reference may also be made to the authorities establishing the proposition, that wherever an agent has powers over a definite subject, he cannot by his own act extend his powers to other subjects, even of a cognate character. Notice to the person dealing with him is immaterial. (*Benedict v. Martin*, 36 Barb. 288; *Gilbert v. Beach*, 5 Bosw. 445; 8 N. Y. 222; 11 id. 432.) The case of *Lawrenceburgh & Miss. R. R. Co. v. Montgomery* (7 Ind. Port. 476) is not opposed to these views. The only point bearing on the present subject was, whether the court below erred in not instructing the jury that a railroad company is not liable for an injury which may happen to a person who takes passage on a train engaged in transporting gravel and not engaged in carrying passengers. The court properly held that the request for this instruction was too broad. It added: 'In the case of *Fitzpatrick v. New Albany and Salem R. R. Co.* (id. 436) we decided that a person riding on a gravel train might, under certain circumstances, recover for an injury occasioned by a collision. Besides, the last qualification of the proposed instruction was calculated to mislead the jury, as it appeared that the company had carried passengers in gravel trains in a number of instances.' (P. 477.) This decision, owing to the special grounds upon which it was placed, has no bearing on the present case, the facts being materially different. The case of *Dunn v. The Grand Trunk Railway Co.* (*supra*), in its precise facts, is not opposed to the theory adopted in the case at bar. The plaintiff had paid his fare and entered the 'saloon' car of a freight train, contrary to the regulations of the company, but with the knowledge of the conductor. The company was held liable. The case differs from the one at bar in two respects: Payment of fare and the attachment of a 'saloon' car. What that was is not precisely stated. It may be assumed to be one fitted up for the accommodation of passengers. It might thus, perhaps, be inferred that the defendant had assented to a relaxation of its rules. The reasoning of the case is disapproved by a well-known text writer upon railways (Judge Redfield), and is unsatisfactory. The principle there acted upon is not to be extended beyond the precise facts of the case." \* \* \* \* \*

**From dissenting opinion.**—"I think no authority can be found holding that a person, under such circumstances, is unlawfully or wrongfully upon a train; but there are numerous authorities in this and other states holding otherwise. This being so, there is abundant authority for holding that he was entitled to protection against the willful or negligent acts of the defendant or its agents. In the case of *Lackawanna & Bloomsburgh Railroad Co. v. Chenewith* (52 Penn. 382), at the request of the owner of a freight car, the agents of a railroad company attached his car to a passenger train, contrary to the rules and instructions of the company, and it was held that the car was not unlawfully on the road, and that the owner was entitled to compensation for injury from negligence to which the attaching his car did not contribute.

In *Philadelphia & Reading Railroad Co. v. Derby* (14 How. [U. S.] 468), the plaintiff below was the president of another railroad company and a stockholder



in the defendant, and he was invited by the president of the defendant to ride with him, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company; and he paid no fare for his transportation. It was held that he was lawfully in the car and that he could recover damages for injuries received by a negligent collision. \* \* \* \* \*

In *Carroll v. New York & New Haven Railroad Co.* (1 Duer 571) a passenger was riding in a baggage car, and although he would not have been injured if he had been in a passenger car, yet, as he took his place in the baggage car with the assent of the conductor, it was held that he was lawfully there, and that he was not a trespasser or wrong-doer, and that he could recover for injuries received in consequence of a collision. In *Tonawanda Railroad Co. v. Munger* (5 Denio 255) and *Munger v. Tonawanda Railroad Co.* (4 N. Y. 349) the action was to recover for two oxen killed upon the railroad by a passing train; and it was held that no recovery could be had because the oxen were unlawfully upon the railroad. If they had been lawfully there, no matter how they came there, the owner could have recovered by showing negligence on the part of the railroad company. In *Robertson v. The New York & Erie Railroad Co.* (22 Barb. 91) the plaintiff was badly injured while riding upon the engine, by reason of the negligence of the defendant. The plaintiff had no right to ride upon the engine and he knew it. It was held that he could not recover because he was unlawfully on the engine; and he was nonsuited. But it is said, in the opinion of the court, that if he had been lawfully there he could not have been properly nonsuited." \* \* \* \* \*

"It will thus be seen that there is a general rule that, wherever a person or his property may lawfully be, he is entitled to protection against the negligent acts of another, causing him injury or damage. If one be unlawfully in any place, and be injured in consequence of being there, by the carelessness of another, he is, generally, without remedy, because his own wrong contributed to the injury."

Although the caboose of the freight train was not properly a passenger car, passengers were carried thereon for hire, and the conductor received the plaintiff thereon and accepted his fare. This established plaintiff's right to ride as a passenger and he was entitled to the same care, as upon a passenger car. *Edgerton v. New York & Harlem R. Co.*, 39 N. Y. 227.

Where a boy is *sui juris*, he, it seems, by accepting the invitation of a street railroad employé to ride gratuitously, assumes the risk of injury from such employé's act of mere negligence. *Marks v. Rochester R. Co.*, 41 App. Div. 66.

A frequent relaxation of a rule forbidding a passenger to ride on freight cars does not abrogate it. *Hobbs v. Texas &c. R. Co.*, 49 Ark. 357.

That a train containing two empty coaches and the superintendent's car mixed with freight cars stopped at a station pursuant to signal, does not warrant one in assuming that it was intended to accommodate passengers. *Roberts v. Smith*, (Ariz.) 52 Pac. Rep. 1120.

Where one boards a freight train with the conductor's consent, who receives his fare, he is warranted in assuming that it is a local freight, compelled to carry passengers by statute and is entitled to rights of a passenger. *Arkansas M. R. Co. v. Griffith*, 63 Ark. 491.

Invitation by a motorman for a boy of ten to ride without fare is within the scope of his authority and the boy is entitled to the care due a passenger and not a trespasser. *Little Rock Traction &c. Co. v. Nelson*, 66 Ark. 494.

Motorman permitted a boy of 13 to play on the car and jump off while in motion to turn trolley; held negligence for which the company was liable. *Pueblo &c. R. Co. v. Shearman*, 25 Colo. 114.

Defendant company was liable where a conductor, of a gravel train, who had promised an employé of persons constructing a part of the road bed not to start the train till he had climbed aboard, started it, though knowing that the latter was in the act of doing so. *Florida &c. R. Co. v. Cain*, 100 Ga. 472.

Knowledge that a conductor has exceeded his authority in giving his consent to ride on a freight train against the rules of the company, prevents one becoming a passenger. *Cleveland &c. R. Co. v. Best*, 169 Ill. 301; rev'g s. c., 68 Ill. App. 532.

A trespasser on an engine cannot recover for injuries caused by the careless running of it, notwithstanding the servants of the company did not prevent him from doing it. *Barkley v. Chicago &c. R. Co.*, 37 Ill. App. 293.

Engineer has no authority to invite one to become a passenger and such invitation ordinarily does not create passenger relationship. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Where the defective car belonged to another company and defendant's only act in relation thereto was to switch it into the yards of a manufacturing corporation, defendant was not liable for an injury to one of its employés. *Atchison &c. R. Co. v. Bump*, 60 Ill. App. 444.

Where one was invited to ride on the "ice railway" at the world's fair on an experimental trip before it was opened for business the relation of carrier and passenger was held not to exist. *De La Vergne &c. Mach. Co. v. McLeroth*, 60 Ill. App. 529.

Where a conductor of a freight train has no authority to invite one to ride, his invitation and consent does not vest the one who accepts with the character of a passenger. *Stalcup v. Louisville &c. R. Co.*, 16 Ind. App. 584.

Where there are other passengers on a construction train, which looked like a freight train on which passengers were allowed, and plaintiff's ticket was accepted by the conductor though contrary to orders, he

was held a passenger. *Spence v. Chicago &c. R. Co.*, (Iowa) 90 N. W. Rep. 346.

A baggagemaster of a passenger train has no authority to invite a person to ride, and company is not liable to one riding on his invitation. *Peary v. Louisville &c. R. Co.*, 40 La. Ann. 32.

Riding on freight train, contrary to regulations, where fare was collected was not *per se* negligent. *Dunn v. Grand Trunk R. R. Co.*, 58 Me. 187.

See *Zump v. W. & M. R. Co.*, 9 Rich. (S. C.) 84; *Lawrenceburgh &c. R. Co. v. Montgomery*, 7 Port. (Ind.) 475; *Watson v. Northern R. Co.*, 24 Upp. Can. (Q. B.) 98; *Carroll v. N. Y. &c. R. Co.*, 1 Duer (N. Y.) 578; *Creed v. Penn. R. Co.*, 5 Nerr. (Pa.) 139; *Great N. W. R. Co. v. Harrison*, 26 Eng. L. & Eq. 443; *Collett v. London &c. R. Co.*, 6 id. 305; *Washburn v. Nashville &c. R. Co.*, 3 Head (Tenn.) 638.

If plaintiff knew that conductor had no authority to permit persons to ride free,\* notwithstanding solicited and obtained free passage his fraud robs him of the privileges of a passenger. *McVeety v. St. Paul &c. R. Co.*, 45 Minn. 268.

The invitation to ride and the collection of fare less than the regular rate by a brakeman of a freight train having no authority to do so, does not constitute one a passenger. *Janny v. Great Northern R. Co.*, 63 Minn. 380.

Invitation by defendant's conductor to ride free on an engine does not make company liable to plaintiff as a passenger. *Files v. Boston &c. R. Co.*, 149 Mass. 204; *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299.

Nor has engineer such authority. *Virginia M. R. Co. v. Roach*, 83 Va. 375; *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263.

A newsboy, who jumps on a car for the purpose of selling papers without intending to pay fare unless required to, is not a passenger. *Raming v. Metropolitan &c. R. Co.*, 157 Mo. 477; *Padgitt v. Moll*, 159 Mo. 143.

Defendant was not liable, where a boy of 12, without invitation, got upon the front platform of a street car and remained there till injured. Entrance was by the rear door only. He was held not a passenger. *Barlow v. Jersey City &c. R. Co.*, (N. J. L.) 51 Atl. Rep. 463.

One jumping on the steps of an engine without invitation for the purpose of stealing a ride is purely a trespasser. *Baltimore &c. R. Co. v. Railway Co.*, 3 Oh. N. P. 310; s. c., 3 Oh. Dec. 687.

It is not within the scope of the authority of a section foreman to carry persons on a handcar and one so riding was not allowed to recover for injuries inflicted by running an irregular train around a curve at high

\*NOTE.—A number of cases bearing on the authority of a trainman to invite a person to ride and the liability of the master therefore, have been collected under the head of "Agency," p. 1; and as to trespassers, see "Private Premises," post. As to gratuitous passengers, see p. 415.

speed without signals. *Rathbone v. Oregon R. Co.*, (Or.) 66 Pac. Rep. 909.

A person on a timber train without invitation of authorized agent cannot recover for injuries caused by a collision. *Railroad v. Meacham*, 91 Tenn. 428.

Boy riding on a freight train by collusion with brakeman is a trespasser. *Sands v. Southern R. Co.*, (Tenn.) 64 S. W. Rep. 478.

In the absence of evidence of knowledge that it is against the rules of the company to permit passage on freight trains, the acceptance of fare by the conductor does not make one a passenger. *St. Louis &c. R. Co. v. White*, (Tex. Civ. App.) 34 S. W. Rep. 1042.

Permission of brakeman to ride on freight train was without implied authority and did not operate as a suspension of the company's rules. *Galariz v. International &c. R. Co.*, 15 Tex. Civ. App. 61.

A railway company was held liable for injury to child without sufficient intelligence to appreciate the danger, while riding on a push car at invitation of employes, regardless of the fact that it was a violation of the company's rules and that the employes did not know that he was *non sui juris*. *Missouri &c. R. Co. v. Rodgers*, (Tex. Civ. App.) 39 S. W. Rep. 383.

Otherwise if the boy had such a degree of intelligence as to enable him to comprehend the danger of his act. *Missouri &c. R. Co. v. Tona-hill*, 16 Tex. Civ. App. 625.

One does not become a passenger by boarding a freight train knowing it is against the rules of the company which it is trying to enforce, though in the face of frequent violations. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631; *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 708.

One invited by a conductor to ride in the locomotive has no authority to invite another to ride; especially in a box car, and no passenger relationship is thereby established. *De Palacios v. Rio Grande &c. R. Co.*, (Tex. Civ. App.) 45 S. W. Rep. 612.

Where plaintiff paid a brakeman to be carried on a freight train, a proposed instruction that if he did so knowing it to be against the rules, defendant was not liable, was improper as failing to consider whether it was to his master's interest for the brakeman to do as he did; especially, where there was no evidence of collusion to defraud. *Texas &c. R. Co. v. Black*, 23 Tex. Civ. App. 119.

While a trespasser on a train was trying to climb across a tender, the engineer, with knowledge of his perilous position, suddenly put on more steam, which sent the car forward with a jerk and threw him off. The

railway company was held liable. *Claiborne v. Missouri &c. R. Co.*, 21 Tex. Civ. App. 648.

A person, not a workman, riding on a work train, which is against the rules of the company, is presumably a trespasser. *International &c. R. Co. v. Hanna*, (Tex. Civ. App.) 58 S. W. Rep. 548.

Where a person knows or has notice of such facts as would put a reasonable man upon inquiry as to whether a freight train was allowed to carry passengers, he becomes a trespasser in boarding. *Purple v. Union P. R. Co.*, 114 Fed. Rep. 123.

(f). PERSONS ESCORTING FRIENDS TO OR FROM TRAINS.

A person upon lawful business at a place, where passengers are received or discharged, but not for the purpose of becoming a passenger, is entitled to the observance of reasonable care on the part of those in control of such premises. This includes such persons as escort friends to or from the trains; but the carrier need not accommodate the arrival and departure of its trains to the safety of such persons, should they enter the car for the purpose of receiving or parting with friends. If, however, a passenger, through decrepitude, require the services of an escort for the purpose of entering or alighting, the carrier must use due care to prevent injury to such person.

See, also, "Entering and Leaving Vehicles," *post*, p. 437.

It is not necessary that a train be held at a station long enough to permit a man to escort a woman to her seat in a car and get off before it starts up again. *Railway Co. v. Lawton*, 55 Ark. 428.

Railroad company is liable to one coming to the depot, for the purpose of meeting a relative, in placing a baggage truck in a narrow space reserved for passengers. *Denver &c. R. Co. v. Spencer*, 27 Colo. 313.

Plaintiff, not a passenger, but on the train to look for his wife and child cannot recover if, while train is standing waiting for freight trains to be removed, he gets off the platform and falls into a culvert. *Stiles v. Atlanta &c. R. Co.*, 56 Ga. 370.

Fast mail train need not accommodate its stops to the convenience of persons who get on it to see passengers off; and if it starts before they can get out no action lies for the inconvenience suffered. *Coleman v. Georgia R. Co.*, 84 Ga. 1.

A person who has not placed himself in the care of the carrier is not a passenger, and failure to hold its train until such an one can get on does not subject it to liability. *Spannagle v. Chicago &c. R. Co.*, 31 Ill. App. 160.

A railroad company's duty to one going upon the train to assist a passenger is only that of ordinary care. *Louisville &c. R. Co. v. Espenscheid*, 17 Ind. App. 558.

An old woman standing on station platform to bid friends good-by

was injured by the careless handling of a trunk, and the company was responsible. *Atchison &c. R. Co. v. Johns*, 36 Kas. 769.

Where a person walking along a platform, constructed for the use of the public, is injured by projecting machinery of unusual width, he may recover. *Sullivan v. Vicksburgh &c. R. Co.*, 39 La. Ann. 801; *Moses v. R. Co.*, 39 id. 649; *R. Co. v. Thompson*, 1 So. (Miss.) 840; *Dobiecki v. Sharp*, 88 N. Y. 203; *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519; *Chicago &c. R. Co. v. Wilson*, 63 Ill. 167.

A man who is waiting at a depot to meet his wife is a customer of the railroad company, and may maintain an action for injuries sustained by falling into an unprotected excavation. *McKone v. Michigan Central R. Co.*, 51 Mich. 601; *Jeffersonville &c. R. Co. v. Riley*, 39 Ind. 568; *Tobin v. Portland &c. R. Co.*, 59 Me. 183; see, however, *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Allender v. Chicago &c. R. Co.*, 37 Iowa, 264; *Bennett v. R. Co.*, 102 U. S. 577; *Central &c. R. Co. v. Perry*, 58 Ga. 461.

Plaintiff, not a passenger, did not have time to escort a woman and child, in his charge to their seats, and leave the train before it started. Court held these facts fixed responsibility upon the company. *Doss v. Missouri &c. R. Co.*, 59 Mo. 27.

Though such a person is not entitled to the rights of a passenger, he is entitled to some degree of protection. *Whitley v. Southern R. Co.*, 122 N. C. 987.

See, also, *Daniel v. Railroad*, 117 N. C. 592.

One coming to meet his family is not a trespasser but a licensee entitled to the exercise of ordinary care, to whom the company is liable for failure to light an excavation made in levelling its station grounds. *Izlar v. Manchester &c. R. Co.*, 57 S. C. 332.

Plaintiff went to defendant's station to help two old and decrepit friends to get off the train, and was injured by a defect in the flooring of the station. Recovery was allowed. *Hamilton v. Texas &c. R. Co.*, 64 Tex. 251; *T. & P. R. Co. v. Best*, 66 Tex. 116.

See *Gillis v. R. Co.*, 59 Pa. St. 143; Wharton on Neg. sec. 642.

One coming to meet his family is not a trespasser but a licensee entitled to the exercise of ordinary care. *Gulf &c. R. Co. v. Williams*, 21 Tex. Civ. App. 466; *Gulf &c. R. Co. v. Wagley*, 15 Tex. Civ. App. 308.

Where train stopped a sufficient time to allow receipt and discharge of passenger, defendant was not liable to one boarding only to assist relatives with baggage, but giving no intimation of his intention to alight again. *Orsher v. Houston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 550.

Where plaintiff left her own train and went upon another at a junction to meet a sister, defendant was not liable in the absence of knowledge that her presence was but temporary. The permission of the conductor of her own train to visit the other did not make her a passenger on the latter. *Bullock v. Houston &c. R. Co.*, (Tex. Civ. App.) 55 S. W. Rep. 184.

Where a man had gotten on train to assist his wife, and after all passengers had gotten off, was injured by the sudden jerking of the cars while in the act of getting off, no recovery was allowed. *Griswold v. Chicago &c. R. Co.*, 64 Wis. 652.

Liability for injuries caused by defective depot platforms does not extend to the case of a person accompanying one in charge of stock who is about to take defendant's train. *Dowd v. Chicago &c. R. Co.*, 84 Wis. 105.

#### (g). WHEN PASSENGER CEASES TO BE SUCH.\*

Plaintiff, having been carried by his destination, remained on the car, without paying another fare, until he returned to it again on the round trip, and was injured, while attempting to alight, by the sudden starting of the car. It was held that, whether a passenger or a trespasser, he was entitled to the exercise of ordinary care to avoid injury to him, and a charge, which, while describing him as a passenger, at the same time stated that ordinary care was the measure of defendant's duty, was not prejudicial. The court were of opinion that plaintiff was a passenger on the return trip. *Rosenberg v. Third Avenue R. Co.*, 47 App. Div. 323; s. c. aff'd, 168 N. Y. 681.

The relation of passenger and carrier as such ceases when one leaves the depot platform for home, though on the tracks. *St. Louis &c. R. Co. v. Beecher*, 65 Ark. 64.

Plaintiff had just alighted and gone a few steps when he was shot by the conductor as the result of words between them. He was allowed to recover on the ground that, as he had not left the company's premises nor had reasonable time to leave, he was still a passenger. *Brunswick &c. R. Co. v. Moore*, 101 Ga. 684.

Relationship on a street car continues until passenger arrives at his destination and has had reasonable opportunity to alight. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

It ceases, where a passenger has actually left the train and gone to a hotel, though he intends to resume his ride later. *King v. Central &c. R. Co.*, 107 Ga. 754.

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\* NOTE.—See also "Entering and Leaving Vehicles," *post* p. 437.

It continues until he has had a reasonable time to alight. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; aff'g s. c., 68 Ill. App. 635.

But ceases upon alighting from a street car at a safe place. *West Chicago &c. R. Co. v. Walsh*, 78 Ill. App. 595.

By proceeding along a track instead of to the safe exit provided he becomes a trespasser. *Illinois &c. R. Co. v. Oberhoefer*, 76 Ill. App. 672.

A passenger is such until he has a reasonable opportunity to leave the car. *Chicago Terminal Transfer Co. v. Schmelling*, 99 Ill. App. 577.

Plaintiff was still a passenger while stepping from the platform of a car in motion, it having started before he had time to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

The relationship was held to continue while the train was waiting for dinner, and plaintiff, who had eaten dinner and returned to the car, had gone back on the platform. *St. Louis &c. R. Co. v. Coulson*, 8 Kan. App. 4.

Street car passenger does not cease to be such immediately upon alighting, but is entitled to the care due a passenger in management of cars on a parallel track. *South Corington &c. R. Co. v. Beatty*, (Ky.) 50 S. W. Rep. 239.

A person who has left a train at a place other than a depot, for the purpose of going home, ceases to be a passenger, and no recovery can be had if he is killed while crossing the tracks. *Buckley v. Old Colony R. Co.*, 161 Mass. 26.

Passenger getting off at an intermediate station surrenders his place as passenger: but he has the right to re-enter and resume his journey. *DeKay v. Chicago &c. Co.*, 41 Minn. 178.

One who gets on a wrong train, and upon its coming to a stop, leaves it voluntarily and starts back to the station, is not a passenger and cannot recover for injuries sustained by falling into a cattle guard. *Finnegan v. Chicago &c. R. Co.*, 48 Minn. 378.

Nor is one who, after alighting, crosses over to the opposite side of the train to see the engineer on private business. *Hendrick v. Chicago &c. R. Co.*, 136 Mo. 548.

The relationship continues until he has had time to leave the premises by the usual route. *Pittsburg &c. R. Co. v. Martin*, 3 Oh. Dec. 493.

Where train sometimes stopped at plaintiff's station, he was not a trespasser in boarding, though he would be after he refused to leave at an intermediate station on being told that it would not stop on that occasion. *Baldwin v. Grand Trunk R. Co.*, (Mich.) 87 N. W. Rep. 380.

Passenger ceases to be such by voluntarily leaving the train for a purpose not incident to the journey at a place not a regular station, when the



train was stopped on a side track to let another pass. *Chicago &c. R. Co. v. Sattler*, (Neb.) 90 N. W. Rep. 649.

One carried beyond his destination through failure of the conductor to notice his signal, is still entitled to the rights of a passenger. *Toledo &c. R. Co. v. Fuller*, 17 Oh. C. C. 562.

One who alighted from a street car in a safe place in the street, not under the control of the carrier, and attempted to cross the street behind the car, was held to be a pedestrian and not a passenger. *Smith v. City &c. R. Co.*, 29 Or. 539; *Street Railroad v. Boddy*, 105 Tenn. 666; s. c., 51 L. R. A. 885.

The relationship is not suspended while a car is waiting to be transferred from one train to another. *St. Louis &c. R. Co. v. Nelson*, (Tex. Civ. App.) 44 S. W. Rep. 119.

Temporarily getting off the train at an intermediate station is not an abandonment of one's rights as a passenger. *Missouri &c. R. Co. v. Overfield*, 19 Tex. Civ. App. 440.

The relation continues until the passenger has actually alighted, and does not terminate when destination is reached. *Ft. Worth &c. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654.

See, also, *Railway v. Finley*, 79 Tex. 80; *Railway v. Russell*, 8 Tex. Civ. App. 578.

Where plaintiff by his own negligence has been carried by his destination, there was no duty after alighting at the wrong destination to keep the depot warm for an hour after departure of the train. *St. Louis &c. R. Co. v. Ricketts*, 22 Tex. Civ. App. 515.

There is no duty to passenger as such at destination after a reasonable time to leave the premises has elapsed. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 59 S. W. Rep. 844.

The relationship does not cease while a passenger is alighting at an intermediate station for any reasonable purpose, as refreshment, exercise, or sending messages. *Alabama &c. R. Co. v. Coggins*, 88 Fed. Rep. 455.

Where, in order to complete an exit by the way customarily used, it is necessary to cross intervening tracks, one is a passenger during such transit. *Chesapeake &c. R. Co. v. King*, 99 Fed. Rep. 251.

That plaintiff had formed the intention of remaining at the depot until daylight, did not terminate the relation, where injury occurred immediately upon alighting. *Chicago &c. R. Co. v. Wood*, 104 Fed. Rep. 663.

The relation ceases after alighting and proceeding towards a section house on private business. *Krantz v. Rio Grande &c. R. Co.*, 12 Utah, 104.

It continues while passengers are being transferred from one train to another some distance away, on account of an accident. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

#### IV. Degree of Care Required in the Actual Transportation of Passengers.

In the actual transportation of passengers the carrier should use every precaution, that human skill and foresight can provide, in the selection and manufacture of the material used, the construction and maintenance of way and vehicles, and in the operation thereof, and should adopt any improved apparatus, known to have been tested and to practically contribute to safety, provided the adoption thereof be reasonable.

In the use of highly dangerous agencies and appliances, for the purpose of actual transportation, the slightest negligence causing injury, renders the carrier presumptively liable, and the slightest defect causing injury is presumptive evidence of negligence. (See "Evidence, Presumption of Negligence," *post*, p. 1095.)

A carrier is not required to take such precautions as, it is apparent after the accident, would have prevented it, but in the actual transportation of passengers, such as would be dictated by the utmost care and prudence of a very cautious person, before the accident and without knowledge, that it was to occur. The action was for damages sustained by the plaintiff in consequence of the negligence of the defendant and its servants in the construction of its railroad and machinery, failure to maintain fences and careless running of a train of cars in which he was a passenger. *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408; aff'g judg't for pl'ff.

See, also, *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442.

**From opinion.**—"After the onus had been cast upon them, they (the carriers) are bound to show that there has been no negligence whatsoever; and that the damage or injury had been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent. Story on Bailments, sec. 601a; 2 Greenl. Ev., 222; Angell on Carriers, sec. 569; *Christie v. Griggs*, 2 Camp. 79; *Laing v. Colder*, 8 Barr. 479; *Ingalls v. Bills*, 9 Mete. 15; *Hegeman v. Western Railroad*, 3 Kern. 24."

A common carrier of passengers is bound to use every precaution that human skill and foresight can provide (*Carrol v. S. I. R. Co.*, 58 N. Y. 126) and to do the same in adopting improvements to insure safety. The fact that the means of safety proven useful by science are not used by skillful manufacturers of machinery is not conclusive evidence against their adoption by carriers.

Plaintiff was a passenger on a steamboat; an explosion of the boiler

took place, and plaintiff was scalded. *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, aff'g judg't for pl'ff.

The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract, and is imposed by the custom of the realm; or, in other words, by the common law. *Carroll v. The Staten Island R. Co.*, 58 N. Y. 126.

*Bretherton v. Wood*, 3 Brod. & Bing. 54; *Philadelphia &c. R. Co. v. Derby*, 14 How. U. S. 483; *Allen v. Sewell*, 2 Wend. 338; *Bank of Orange v. Brown*, 3 Wend. 158; *Steamboat v. King*, 16 How. U. S. 474; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Gillenwater v. Mod. &c. R. Co.*, 5 Jude. 339; *Farwell v. Boston R. Co.*, 4 Met. 49; *Redfield on Railways*, 210; *Pierce Am. R. R. Law*, 477; *Lake Erie &c. R. Co. v. Acres*, 108 Ind. 548.

Charge that carrier was not an insurer, but was bound to use the utmost diligence and care, was, as a whole, proper. *Taber v. D., L. & W. R. Co.*, 71 N. Y. 489; aff'g judg't for pl'ff.

Hawser apparatus recoiled and injured passenger. This *ipso facto* raised the presumption of negligence. If the latent defect could have been discovered, it should have been; the consequences to be apprehended measures the care required; failure to give the usual warning of the intended use of hawser was evidence of negligence. *Miller v. Ocean S. S. Co.*, 118 N. Y. 199; judg't for pl'ff was aff'd.

Distinguishing *Kelly v. M. R. Co.*, 112 N. Y. 443.

During the great blizzard of March 12, 1888, a train on the elevated railway, on account of the ice and snow, was not stopped in sufficient time to prevent a collision with another train, that had been stalled at a station. The evidence showed, apparently without contradiction, that an attempt to stop the train was made at such a distance, or a greater distance, from the first train as had, in all practical experience on that railway, been previously found sufficient. The court refused to dismiss the complaint on the ground or to charge that, if the jury found that a proper effort was made to stop the train at a distance from the first train as great as or greater than had theretofore been found sufficient in the operation of that railway, the defendant would not be liable. Held, no error. The court submitted the question to the jury, whether it was negligence on the part of defendant to attempt to operate its railway at all under the circumstances. This was error. *Connelly v. Manhattan R. Co.*, 142 N. Y. 377, rev'g 68 Hun. 456, and judg't for the pl'ff.

Where a passenger was thrown from the platform of a horse car by its motion when driven upon a temporary switch on a bridge in process of repair, judgment for plaintiff was reversed for error of trial court

in charging that. "in respect to carrying passengers a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of its passengers." *Stierle v. Union R. Co.*, 156 N. Y. 70, 684.

**From opinion.**—Page 73. "The obligation of carriers of passengers to exercise the highest degree of care which human prudence and foresight can suggest, only exists with respect to those results which are naturally to be apprehended from unsafe road beds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking, (*Morris v. N. Y. C. & H. R. R. R. Co.*, 106 N. Y. 678; *Palmer v. Penn. Co.*, 111 id. 488; *Palmer v. D. & H. C. Co.*, 120 id. 170). In every case the degree of care to be exercised is dependent upon the circumstances and, if the accident is attributable to the existence of defects in the road, or in the mechanical appliances availed of for operation of the railroad, by reason of which there was a possibility of loss of life or limb to the traveling public, the strict rule requiring the highest degree of care and of human skill would be applicable." Page 685.—"In the present case, there was no situation of danger, and the accident occurred, whether under the plaintiff's or the defendant's theory of its occurrence, while the driver was simply changing his car from one track to another, over a switch, in order to cross the bridge. In doing so the duty imposed upon the defendant by law was that of exercising reasonable care; or such care as an ordinarily careful and prudent man would exercise under the circumstances, and that instruction had been, in fact and very correctly given, by the trial judge in his main charge. The strict rule, embodied in the plaintiff's subsequent request to charge, would be proper in a case where the accident resulted from a situation from which grave injury might be expected and which, therefore, imposed upon the carrier's servants, the duty to exercise the utmost skill and foresight to avoid it. Such was the situation in the *Maverick Case* (36 N. Y. 378), and in the *Coddington Case* (102 N. Y. 66)." \* \* "There is nothing in this application for a reargument other than an attempt to show that in our decision of the case we have changed a rule of care applicable to the carrier of passengers. We have done nothing of the kind; but have simply pointed out what the proper rule was under the issue and the circumstances disclosed by the record."

In the absence of evidence of excessive speed, proof that plaintiff received a violent wrench from the motion of a trolley car in rounding a curve was held insufficient to warrant submission of defendant's negligence to the jury. *Ayers v. Rochester R. Co.*, 156 N. Y. 104; rev'g s. c., 88 Hun. 613.

A locomotive was left standing upon a side track two tracks east of the main track with its fire banked and in charge of an employé, and had been in his charge in this condition for about six hours when such employé went several hundred feet away; while away the engine was moved by some means not disclosed across several switches and up to and upon the main track, and started north with no lights and at full speed, and after a distance collided with a passenger train injuring a passenger thereon. It was held that the defendant was not guilty of

negligence, as such a danger could not have been foreseen. The court charged that if the engine were started by some one other than an employé of the defendant, the defendant was not liable, but if the act were done by an employé, whether negligently or willfully, the defendant would be liable; and it refused to charge that if the act were done maliciously by one of the defendant's employés other than the one in charge, the defendant would not be liable. This refusal to charge was error, and it was held that if some wrongdoer, other than an employé in charge, criminally placed the engine on the south bound track and started it northward, the defendant was not liable. The absence of a watchman from the engine was not the proximate cause of the accident. *Mars v. D. & H. C. Co.*, 54 Hun, 625.

A motorman, learning of a wreck ahead, switched his car into the track used by cars going in the opposite direction, where his careless management of his car resulted in a head-on collision. A charge imposing on defendant the duty to exercise a very high degree of care and skill to see that no injury resulted, was held proper. *Koehne v. New York &c. R. Co.*, 32 App. Div. 419; s. c. aff'd, 165 N. Y. 603.

**From opinion.**—"There is no doubt that the first opinion in that case," (*Stierle v. Union R. Co.*, 156 N. Y. 70), "did give rise to a very general impression in the legal profession that the rule imposing the highest degree of care upon carriers for the protection of their passengers had been limited in its application so as to confine it to the maintenance of the roadbed, engines, cars and other appliances of a railway corporation, and that it was not to be applied to the conduct of the agents and servants of the corporation in the operation of the road. That this view of the decision was erroneous, however, has been made plain by the Court of Appeals itself in the opinion delivered upon the motion for a reargument (50 N. E. Rep. 834). In this opinion Judge Gray expressly declares that the court has not changed any rule of care applicable to carriers of passengers and affirms the correctness of the decisions in *Maverick v. Eighth Avenue R. Co.*, (36 N. Y. 378) and *Coddington v. Brooklyn Crosstown R. R. Co.*, (102 id. 66) in both of which cases it was held that the common carrier was bound to exercise the highest degree of care and prudence in the management of the vehicle in which it undertook to transport the injured passenger. In the case at bar the conditions of things on defendant's road at the time and place of the accident certainly called for the exercise of a very high degree of care on the part of the motorman in charge of the respective cars, which were rapidly approaching one another upon the same track, to avoid a collision and consequent injury to their passengers."

So, where a truck attempted to cross in front of a cable car, which continued at full speed until run into by the truck, it was held proper to charge "that the responsibility of a common carrier of passengers is such as to require a high degree of care for their safety and the discharge of this duty requires of such a carrier the exercise of all the care and vigilance that human foresight may suggest to secure the

safety of its passengers." *Keegan v. Third Ave. R. Co.*, 34 App. Div. 291; s. c. aff'd, 165 N. Y. 622.

Defendant's negligence was for the jury, where it appeared that a passenger's injury was received in a collision with a truck, due to the fact that driver started the car as a wagon ahead, loaded with boards, turned off the track up a grade onto a side street obstructed by wagons, some of which were coming toward it and impeding its progress. *O'Malley v. Metropolitan Street R. Co.*, 3 App. Div. 259; s. c. aff'd, 158 N. Y. 674.

Where defendant's driver might have seen a heavily loaded wagon coming down grade toward the track in time to have avoided collision, its negligence was for the jury, and a dismissal of the complaint was error. *Hurley v. New York & C. Brew. Co.*, 13 App. Div. 167.

Where the cause of the falling of an upper berth in a steamboat is unexplained, the defendant may properly be held negligent being bound to use the utmost care for the safety of its passengers. *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302.

It was held that there was no sufficient evidence of negligence by the defendant to go to the jury, where plaintiff was tipped over in her chair at a table in the dining car, while the train was rounding a curve, at average speed, though others were not disturbed, light articles were not thrown off the table, and no accident had ever before occurred, through the use of such chairs. *Nelson v. Lehigh Valley R. Co.*, 25 App. Div. 535; second appeal, 37 App. Div. 631; s. c. aff'd, 165 N. Y. 635.

It was for the jury to say whether defendant was negligent, where a passenger rose from his seat to signal the conductor and the rough motion of the car caused his body to sway outward and strike a trolley wire pole between the tracks. *Schmidt v. Coney Island & C. R. Co.*, 26 App. Div. 391.

A smoker on the front platform of a street car turned to pay his fare to the conductor through the front door when the car was rapidly driven on a temporary turnout and the violent motion threw him off upon the ground. Defendant's negligence was properly submitted to the jury. *Dillon v. Forty-second Street & C. R. Co.*, 28 App. Div. 404.

See, also, *Seelig v. Metropolitan Street R. Co.*, 18 Misc. 383.

So held also, where a passenger was thrown over the dash board of the front platform by the sudden and unusual application of the brakes. *Bradley v. Second Avenue R. Co.*, 31 App. Div. 281.

A charge that defendant's duty as to inspecting its cars must be "such as is sufficient to insure, or, rather, such as experience has shown to be sufficient to insure against accidents of this kind," was proper where it appears that the word "insure" was used in the same sense as the word

“secure” and not in the sense in which it is used in reference to carriage of goods. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125.

Where it appears without contradiction that a car left the track where there were several switch tracks and while it was going at a pretty good rate, there is sufficient evidence of negligence to take the case to the jury. *Hollahan v. Metropolitan Street R. Co.*, 73 App. Div. 164.

Evidence of jerking by a street car in rounding a curve is not *prima facie* negligence. Excessive speed or unusual jolt must be shown. *Merrill v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 122.

Plaintiff, a steerage passenger, while walking upon the upper deck of a steamer in port, among piles of baggage without objection from the deck hands or officers, was struck by falling pieces of baggage. In the absence of satisfactory evidence of the cause of the fall, the case was held to be within the rule of *res ipsa loquitur*. *Horowitz v. Hamburg-American Packet Co.*, 18 Misc. 24.

**From opinion.**—“The facts touching the fall of the baggage as narrated above bring the case squarely within the rule of *res ipsa loquitur*, (*Volkmar v. Man. R. Co.*, 134 N. Y. 418; 16 Am. & Eng. Encyc. of Law, 448; 2 Rice on Ev. 1099), which when applied to the relation of carrier and passenger is at least of undiminished intensity, (*Miller v. O. S. S. Co.*, 118 N. Y. 199; *Phila. W. & B. R. Co. v. Anderson*, 20 Am. St. Rep. 483, and note, also cases collated in note b. 15 L. R. Ann. 35).”

A plea, that employés believed that the course pursued to avoid a collision was the best under the circumstances, was held insufficient without alleging facts sufficient to show that such would have been the course of a reasonably prudent man similarly situated and possessing the requisite skill for the position. *Highland &c. R. Co. v. Swope*, 115 Ala. 287.

Street car driver was negligent in going upon a railroad crossing without stopping to look or listen in violation of a city ordinance. *Selma Street &c. R. Co. v. Owen*, (Ala.) 31 South. Rep. 598.

Defendant was negligent, where the escape of a trolley car was due to failure to furnish a man at each end of the car, or the failure of the motorman to shut off the current in front before going to the rear to adjust the trolley. *Redfield v. Oakland &c. R. Co.*, 110 Cal. 277; modified in *Banc*, 42 Pac. Rep. 1063 on another point.

Carrier of passengers owes them the highest degree of care in their transportation. Injury of passenger's hand caught in door swung to by the sudden jerking of a train stopped at a regular station, raised a presumption of negligence. *McCurrie v. Southern P. Co.*, 122 Cal. 558.

A charge requiring of a carrier of passengers the care of an extremely cautious person surrounded by similar circumstances was held not too exacting. *Bosqui v. Sutro R. Co.*, 131 Cal. 390.

It was not negligence to so arrange a train that it would climb a mountain and clear the track of snow, in order to make its schedule time. *Denver &c. R. Co. v. Pilgrim*, 9 Colo. App. 86.

Carrier was not liable for injuries from a snow slide, which derailed a train, in a place where there was no reason to anticipate it, and was not required to use a rotary plow when the test of years had shown an ordinary plow to have been sufficient under similar circumstances. *Denver &c. R. Co. v. Andrews*, 11 Colo. App. 204.

Plaintiff was not negligent *per se*, where he passed from one car to another while the train was in motion and was thrown by an unusual lurch in rounding a curve, and a direction of a verdict for defendant was held error. *McAfee v. Huidekoper*, 9 App. D. C. 36; s. c., 34 L. R. A. 720.

The "extraordinary" diligence required of carriers of passengers by statute, construed to mean "that extreme care and caution which every prudent and thoughtful person" exercises under like circumstances; a charge requiring the "utmost care and diligence" held error. *East Tennessee &c. R. Co. v. Miller*, 95 Ga. 738.

Defendant's trainman going through train slammed the door shut and caught the hand of passenger who was following, unknown to the trainman. Defendant not liable. *Ham v. Georgia &c. R. Co.*, 97 Ga. 411.

Though a conductor has carried a passenger past his station, he has no implied authority to direct a hotel keeper to keep such passenger over until the next train, and the company is not liable for negligence of the hotel keeper. *Central &c. R. Co. v. Price*, 106 Ga. 176.

A charge that carriers are required to use more than ordinary and reasonable care and diligence and that too much cannot be required, was held too strict. *Florida &c. R. Co. v. Lucas*, 110 Ga. 121.

While not an insurer it is bound to use, even towards a passenger on a freight train, extraordinary diligence. The duty is regarded as a public duty and one that cannot be waived by private contract. *Central &c. R. Co. v. Lippman*, 110 Ga. 665.

A woman and her children holding a first class ticket were made to ride in a smoking car, whereby she and her children were made sick. Company was liable, not being such accommodations as were usually provided. *Southern R. Co. v. Wood*, 114 Ga. 159.

Where the highest degree of care would have anticipated and provided against an accident, it was no excuse that its like had never occurred before. *Illinois &c. R. Co. v. O'Connell*, 160 Ill. 636; aff'g s. c., 59 Ill. App. 463.

But a passenger on a street car is not bound to use the highest degree,



but only ordinary care, for his own safety. *West Chicago &c. R. Co. v. McNulty*, 166 Ill. 203; aff'g s. c., 64 Ill. App. 549.

Charge that the highest degree of care must be used consistent with the practical operation of the road, held proper. *West Chicago &c. R. Co. v. Kromshinsky*, 185 Ill. 92; aff'g s. c., 86 Ill. App. 17; *West Chicago &c. R. Co. v. Luka*, 72 Ill. App. 60; *Chicago &c. R. Co. v. Morse*, 98 id. 662; *Chicago &c. R. Co. v. Murphy*, 99 id. 126.

Buggy, going along near the track in the same direction, came in contact with a car, injuring passenger. Refusal to charge that it was unnecessary to ring the gong when the party in the buggy knew of the position of the car, was sustained. *West Chicago Street R. Co. v. Tuerk*, 193 Ill. 385; aff'g s. c., 90 Ill. App. 105.

A charge that the highest degree of care should be used "proper and consistent with the efficient use and operation of the cars." was held error. "Practicable" instead of "proper" should have been used. *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397.

**From opinion.**—"The qualification should have been 'practicable' instead of 'proper.' What a jury might regard as 'proper' in this connection is problematical. The qualification of 'practical' should not have been omitted from this instruction, nor should the qualification of 'proper' have been substituted in lieu of it. The element of practicability is an essential to the rule. *Tuller v. Talbot*, 23 Ill. 357; *P. C. & S. L. R. Co. v. Thompson*, 56 Ill. 138; *C. & A. R. Co. v. Pillsbury*, 123 Ill. 9; *C. & A. R. Co. v. Arnol*, 144 Ill. 261; *C. C. R. R. Co. v. Engel*, 35 Ill. App. 490; *P. & P. R. Co. v. Greso*, 79 Ill. App. 127."

Evidence that plaintiff was caused to stumble and fall over a satchel in the aisle of a street car by a sudden jolt in starting it, held sufficient to sustain verdict for her. *West Chicago &c. R. Co. v. Nash*, 64 Ill. App. 548.

Those engaged in the operation of passenger elevators are carriers of passengers. *Western Union Teleg. Co. v. Woods*, 88 Ill. App. 375.

Where there is evidence as to negligence in a passenger allowing his finger to slip in the crevice of a door and in a conductor in shutting the door seeing the hand near it, the question of the negligence of each was for the jury. *Romine v. Evansville &c. R. Co.*, 24 Ind. App. 230.

Clause in an instruction that the carrier was bound to carry safely, held not objectionable when followed by another, defining its duty as the greatest degree of care consistent with the mode of transportation, and not the utmost conceivable care. *Chicago &c. R. Co. v. Grim*, 25 Ind. App. 494.

The highest degree of care is not required toward one boarding a moving street car without knowledge of the motorman and conductor, and, where they attempted to stop immediately on discovering his posi-

tion, the company was not liable. *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284.

Companies operating under a trackage agreement are jointly liable for injuries to which the negligence of each has contributed. *Chicago &c. R. Co. v. Martin*, 59 Kan. 431.

And one is not relieved of liability for its negligence resulting in injury to a passenger of the other by the fact that its train was subject to the latter's control in the use of the tracks. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

An instruction that "the railway company is, by law, chargeable with a higher degree of care and diligence in dealing with passengers than is exacted of individuals under similar conditions." held erroneous. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

A horsecar company is not bound "as far as human forethought and care shall enable it, to carry the plaintiff with safety." *Louisville &c. R. Co. v. Weams*, 80 Ky. 420.

Failure on part of carrier to use the utmost degree of care and skill which prudent men are accustomed to use under like circumstances, constitutes actionable negligence. *Louisville &c. R. Co. v. Berg*, (Ky.) 32 S. W. Rep. 616; *Brown v. Louisville R. Co.*, (Ky.) 53 S. W. Rep. 1041.

Degree of care required is determined by the law of the state where the injury occurred. Charge requiring "utmost human care and foresight known to prudent and careful men" held proper. *Louisville &c. R. Co. v. Harmon*, (Ky.) 64 S. W. Rep. 640.

Recent inspection by competent servants held not "the utmost care and skill which prudent men are accustomed to use," &c. Care required of passenger is such as "might be reasonably expected of a person of ordinary prudence situated as" plaintiff was. *Davis v. Paducah &c. R. Co.*, (Ky.) 68 S. W. Rep. 140.

Railroad company is not bound to stop and rescue a passenger thrown or pushed off without its fault, where it will endanger the safety of the other passengers by collision. *Reed v. Louisville &c. R. Co.*, (Ky.) 47 S. W. Rep. 591; s. c., 41 L. R. A. 823; rehearing denied in 48 S. W. Rep. 116; s. c., 44 L. R. A. 824.

Going from one car to another car while train is in motion held negligence and judgment for plaintiff, who was thrown from the platform by a sudden jolt, was set aside, though the jerk was caused by a defective coupling. *Bemiss v. New Orleans &c. R. Co.*, 41 La. Ann. 1671.

Passenger is charged with the exercise of ordinary care only. *Clerk v. Morgan's &c. R. Co.*, (La.) 31 South Rep. 886.

"Highest degree of care and diligence practicable under the circum-

stances" held a proper measure of carrier's duty. *Baltimore &c. R. Co. v. Nugent*, 86 Md. 349; s. c., 39 L. R. A. 161.

The highest degree of care consistent with the proper management of the road is required. *Jordan v. New York &c. R. Co.*, 165 Mass. 346; s. c., 32 L. R. A. 101.

Oily waste, used by a brakeman to smother a blazing lamp, caught fire and plaintiff, in the apprehension of danger, attempted to go to the next car and was injured while doing so. Defendant's negligence was properly submitted to the jury. *Gannon v. New York &c. R. Co.*, 173 Mass. 40; s. c., 43 L. R. A. 833.

Failure to take a seat was not negligence, where, after coming through seven coaches, plaintiff peered forward and the rest appeared to him to be crowded also. Neither the brakeman nor the conductor informed him that there were vacant seats. *Farnon v. Boston &c. R. Co.*, 180 Mass. 212.

Motorman was not *per se* negligent in letting go the brake without knowing whether the dog is set so as to hold it. *Etson v. Ft. Wayne &c. R. Co.*, 114 Mich. 605.

Error to refuse direction for defendant, where it appeared that derailment was due to the intentional removal of a rail from the track by third parties. *Whipple v. Michigan C. R. Co.*, (Mich.) 90 N. W. Rep. 287.

That a passenger in a freight train was taken off on an irregular side trip, without warning, for the relief of a snow bound train, and the exposure to cold resulted in injury, held sufficient to sustain finding of negligence. *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

Plaintiff was pushed from platform of street car owing to its overcrowded condition. The carrier held liable for negligence. *Reem v. St. Paul City R. Co.*, 77 Minn. 503.

In determining whether it was negligence to fail to provide two employés on a car, the expense thereof, the amount of traffic as well as the dangers to be encountered are elements of consideration. *Palmer v. Winona R. &c. Co.*, 78 Minn. 138.

That plaintiff signaled car to stop and started to run towards it, was not sufficient to require the motorman to anticipate that he might fall, so as to require him to have the car under control. *Winchell v. St. Paul City R. Co.*, (Minn.) 90 N. W. Rep. 1050.

Plaintiff contracted a severe illness from riding in cold weather in an unheated car. He neglected to take advantage of stops at stations to go forward to baggage car and procure from his baggage additional wraps. It was held error not to submit negligence of the company and contributory negligence of plaintiff to the jury. *Taylor v. Wabash R. Co.*, (Mo.) 38 S. W. Rep. 304; s. c., 42 L. R. A. 110.

Failure to employ a skillful conductor and gripman was negligence. *Olsen v. Citizens' R. Co.*, 152 Mo. 426; *Hausberger v. Sedalia R. & Co.*, 82 Mo. App. 566.

See, also, *Sweeney v. Kansas City & C. R. Co.*, 150 Mo. 385.

The attempt on the part of a shipper, permitted to ride in the box car with his stock, to come to the caboose in compliance with the conductor's instruction was not negligence *per se*. *Nurse v. St. Louis & C. R. Co.*, 61 Mo. App. 67.

Street car companies must exercise the very highest degree of care of a very prudent person. *Parker v. Metropolitan & C. R. Co.*, 69 Mo. App. 54; *Posch v. Southern & C. R. Co.*, 76 Mo. App. 601; *Choquette v. Southern & C. R. Co.*, 80 Mo. App. 515.

See, also, *O'Connell v. St. Louis & C. R. Co.*, 106 Mo. 482.

Where a brake, which is not obviously dangerous, has never been known to have kicked loose before, it is not negligent to continue its use. *Holt v. Southwest Missouri & C. R. Co.*, 84 Mo. App. 443.

The "utmost care and skill which prudent men would use and exercise in like business and under like circumstances," held applicable to passengers in freight cars. *Fullerton v. St. Louis & C. R. Co.*, 84 Mo. App. 498.

Where a belt line switches whole trains from point to point it is a common carrier being more than a mere switching company, and is charged with the corresponding degree of care. *Fleming v. Kansas City & C. R. Co.*, 89 Mo. App. 129.

"Criminal negligence" of plaintiff under a statute, making railway companies liable for injuries to passengers unless caused by latter's criminal negligence or violation of former's rules, construed to mean a flagrant and willful disregard of one's safety. *Chicago & C. R. Co. v. Hague*, 48 Neb. 97; *Chicago & C. R. Co. v. Hyatt*, 48 Neb. 161.

Such act is within the police power of the state; and is not amended by, or in conflict with, a statute giving to personal representatives of a decedent a right of action where the deceased would have been entitled to maintain one. *Chicago & C. R. Co. v. Zernecke*, 59 Neb. 689.

But such act does not apply to street railways so that lack of ordinary care on part of plaintiff in such cases is a bar. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672.

Street railways must use the utmost skill and diligence and foresight consistent with business. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672; *East Omaha & C. R. Co. v. Godola*, 50 Neb. 906.

Driver of stage was not negligent in stopping, on hearing scream from

within, nor in failing to give notice of his starting after stopping for a parade. *Haile v. Clayton &c. Co.*, 61 N. J. L. 197.

On a conflict of evidence as to unusual violence in the motion of the train, it was properly left to the jury to determine whether plaintiff used care in changing her seat in proportion to the increased risk. It was not error to refuse to charge that it was negligence *per se* to leave a seat while the train was in motion. *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

Due inspection of cars by a railroad company does not mean that it must be so continuous as to enable it to know the exact condition of a car at any moment. *Proud v. Philadelphia &c. R. Co.*, 64 N. J. L. 702; s. c., 50 L. R. A. 468.

The dangers which should be apprehended in the exercise of the high degree of care required, include those of overcrowding, especially the entrance and exit of trolley cars. *Hansen v. North Jersey &c. R. Co.*, 64 N. J. L. 686; rev'g s. c., 43 Atl. Rep. 663.

*Res ipsa loquitur* not applicable to an unexplained fall from a street car. *Payuter v. Bridgeton &c. Co.*, (N. J. L.) 52 Atl. Rep. 367.

Failure to apply the brakes in time to avoid collision in coupling was negligence. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 1031.

Approved appliances in general use are required but not "all known and approved machinery necessary to protect its passengers." *Witsell v. West Asherville &c. R. Co.*, 120 N. C. 557.

Failure to provide a conductor on a passenger car, where the train ran on schedule time and carried a good many passengers, was a breach of its duty. *Means v. Carolina &c. R. Co.*, 124 N. C. 574; s. c., 45 L. R. A. 164.

Driver of hack must use all reasonable care in keeping a careful and prudent lookout to avoid dangers in the street. *Fisher v. Tryon*, 15 Oh. C. C. 541.

A charge defining carrier's duty as "ordinary and reasonable care" held error; the highest degree of care is required. *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638; *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224.

Where plaintiff was injured by a collision between his train and some coal cars which had been set in motion by boys while the cars were standing braked on a siding, no recovery was allowed. *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103.

It was not *per se* negligence to run a car with a crowded platform around a sharp curve at 15 to 20 miles an hour, but the question of negligence was properly left to the jury. *Reber v. Pittsburg &c. T. Co.*, 179 Pa. St. 339.

Evidence that plaintiff was thrown from her seat in a street car by

the violent motion of the car in passing from the old rails to those of a new system in the course of installation, is sufficient to take the case to the jury. *Smedley v. Hestonville &c. R. Co.*, 184 Pa. St. 620.

Defendant's negligence was for the jury, where motorman left his post and jumped in among the passengers, leaving the power on and the controller in flames. *Dunlay v. United Traction Co.*, 18 Pa. Super. Ct. 206.

Fact of injury on a train raises presumption of negligence though it be not shown to have been the proximate cause of injury. *Doolittle v. Southern R. Co.*, 62 S. C. 130.

An instruction to the effect that the high degree of care which a very prudent and competent person would exercise under the circumstances, is the measure of care required of carriers of passengers, held correct. *St. Louis &c. R. Co. v. McCullough*, 18 Tex. Civ. App. 534; *Missouri &c. R. Co. v. Searsborough*, (Tex. Civ. App.) 51 S. W. Rep. 356; *McCarty v. Houston &c. R. Co.*, 21 Tex. Civ. App. 568; *Texas Midland R. Co. v. Brown*, (Tex. Civ. App.) 58 S. W. Rep. 44; *Houston &c. R. Co. v. George*, (Tex. Civ. App.) 60 S. W. Rep. 313; *Houston &c. R. Co. v. Greer*, 22 Tex. Civ. App. 5; *Dallas &c. Street R. Co. v. Broadhurst*, (Tex. Civ. App.) 68 S. W. Rep. 315; *Citizens' R. Co. v. Craig*, (Tex. Civ. App.) 69 S. W. Rep. 239.

Such degree of care applies as well to providing seats in cars as to roadbeds, etc. *International &c. R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

But requirement to use "the utmost degree of care" to provide for the safety of passengers is too strict. *Houston &c. R. Co. v. Greer*, 22 Tex. Civ. App. 5; *McCarty v. Houston &c. R. Co.*, 21 Tex. Civ. App. 568. But see *Fort Worth &c. R. Co. v. Rogers*, 24 id. 382.

A clause in an instruction, describing the carrier's duty as care proportionate to the nature and risk incurred and such as would be ordinarily used by persons of great care and prudence under similar circumstances, was held contradictory to another clause, which followed it, requiring ordinary care to provide railings, etc., which are reasonably safe for the purpose for which they are used, and judgment accordingly reversed. *Parvin v. International &c. R. Co.*, (Tex. Civ. App.) 54 S. W. Rep. 638.

Plaintiff was not negligent in taking passage while pregnant, where it was not ordinarily dangerous. *St. Louis &c. R. Co. v. Ferguson*, (Tex. Civ. App.) 64 S. W. Rep. 797.

In going from one car to another while the train is in motion one assumes only risks from ordinary causes and he is entitled to recover for being thrown by an unusual jerk. *San Antonio &c. R. Co. v. Choate*, 22 Tex. Civ. App. 618.

An instruction stating particular things a carrier must do to be dili-

gent, held error. That should be left to the jury. *Christie v. Galveston &c. R. Co.*, (Tex. Civ. App.) 39 S. W. Rep. 638.

Defendant was not negligent, where hot gruel was spilled by a steward when run against by another. *The Anchoria*, 77 Fed. Rep. 994.

Failure to use reasonable care and effort to provide food and accommodations for passengers aboard a steamer was actionable negligence. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

Carrier is bound to provide reasonable seating capacity for an unusual crowd, which it has notice of and has solicited. *Trumbull v. Erickson*, 97 Fed. 891.

Right of recovery under a statute imposing liability for injury to passengers not due to contributory negligence, being remedial and not penal in its nature, is substantial and may be enforced anywhere, once having arisen within the state. *Clark v. Russell*, 97 Fed. Rep. 900.

Plaintiff was on the point of opening the door of a forward car which he was passing to, at the direction of the trainman, from a rear car, which was being detached from the train, when the brakeman shouted "look out." In apprehension of danger ahead, he suddenly stepped back into the space left by the detached car and was injured. He was not allowed to recover. *Butts v. Cleveland &c. R. Co.*, 110 Fed. Rep. 329.

Misstep on part of passenger is not *prima facie* evidence of negligence. *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186.

That a method of starting a car which is dangerous is usual, is no excuse; and a charge that there was no liability, if the defendant's officers were satisfied in their own mind that the method used was reasonably safe, was erroneous. *Dickert v. Salt Lake City R. Co.*, 20 Utah, 394.

An instruction to the effect that defendant was not the insurer of the safety of its passengers, and not liable unless the injury resulted from a defect which could have been discovered by the usual and ordinary methods of inspection, held objectionable standing alone, but not misleading when taken in connection with one charging that "it was the duty of the defendant to use the utmost care and skill which prudent men" in the same kind of business would use under similar circumstances. *Major v. Oregon &c. R. Co.*, 21 Utah, 141.

Instruction that carriers must use the utmost care and diligence for safety of passengers and are liable for slightest neglect against which human prudence and foresight might have guarded, held correct. *Reynolds v. Richmond &c. R. Co.*, 92 Va. 400; *Norfolk &c. R. Co. v. Tanner*, (Va.) 41 S. E. Rep. 721.

It was not negligence *per se* to go from one car to another on a moving train in search of a seat. *Chesapeake &c. R. Co. v. Clowes*, 93 Va. 189.

The highest degree of care and skill which may be expected of intelligent and prudent persons engaged in the business, is the standard of care and a charge is erroneous, which requires simply such "ordinary care as" such persons usually use. *Payne v. Spokane Street R. Co.*, 15 Wash. 522.

Such extraordinary care does not include anticipation and provision against plaintiff's own conduct. *Brown v. Seattle City R. Co.*, 16 Wash. 465.

Failure to furnish proper seating accommodations, compelling passengers to ride on platforms, was negligence. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Requirement of the highest degree of care to "prevent injuries" construed not to mean that carrier is insurer. *Clukey v. Seattle Electric Co.*, (Wash.) 67 Pac. Rep. 379.

Inability, by the exercise of extraordinary care and prudence, to foresee an accident exonerates the carrier. *Davis v. Chicago &c. R. Co.*, 93 Wis. 470.

Where the journey is temporarily suspended by an accident, and, while plaintiff is waiting for another train, he is injured by voluntarily approaching the scene of the accident, the exercise of ordinary care and prudence only is due him, and it was held error to charge the carrier with a higher degree. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 31 L. R. A. 419.

"The highest degree of skill and care which a careful and vigilant man would observe in like circumstances" held erroneous as inconsistent with the proper standard, which is expressed as the highest degree of care reasonably to be expected from human vigilance and foresight in view of the circumstances consistent with the practical operation of the road. *Wanzer v. Chippewa Val. Electric R. Co.*, 108 Wis. 319.

#### (a). FREIGHT TRAINS, &c.

Passenger in freight train injured by a jolt such as is usual and necessary in coupling the cars cannot recover. *Crine v. East Tennessee &c. R. Co.*, 84 Ga. 651.

Passenger does not, by riding in a freight train, assume risks other than such as are incident to such mode of conveyance conducted with the utmost care, consistent with the practical operation of the train. *Southern R. Co. v. Crowder*, 130 Ala. 256.

A passenger on a train partially composed of freight cars to which some jolting and jerking is necessarily incident, is bound to exercise ordinary care to obtain a seat. *Macon &c. R. Co. v. Moore*, 108 Ga. 84.



The assumption of risk from the usual joltage incident to passage in a freight train does not relieve a carrier of the exercise of extraordinary care to prevent unusual joltage. *Central &c. R. Co. v. Lippman*, 110 Ga. 665; *Garland v. Southern R. Co.*, 111 Ga. 852.

Passenger on freight train is entitled to same care as on a regular passenger train. *Pennsylvania R. Co. v. Newmeyer*, 129 Ind. 401.

By riding in the caboose of a freight train a passenger does not assume the unusual jolts due to the negligent application of the air brake; and plaintiff is not *per se* negligent in leaving her seat to get a drink of water. *Indiana &c. R. Co. v. Masterson*, 16 Ind. App. 323.

Jury should say whether getting up and leaning forward in a moving caboose to spit in the stove was negligence. *St. Louis &c. R. Co. v. Burrows*, (Kan.) 61 Pac. Rep. 439.

But the mere fact of being thrown from a freight train is not evidence of an unusual movement thereof. *Cincinnati &c. R. Co. v. Jackson*, (Ky.) 58 S. W. Rep. 526.

It was negligence for a through freight train, going at 30 miles an hour, to follow in violation of rules a passenger train, running 23 miles an hour, within 4 to 11 minutes of it. *Louisville &c. R. Co. v. Richmond*, (Ky.) 67 S. W. Rep. 25.

Passenger in charge of live freight assumes the risks necessarily incident to passage on a freight train. *Heyward v. Boston &c. R. Co.*, 169 Mass. 466.

So a passenger in a combination car in a freight train assumes the risk from the ordinary jolting and jerking of the train. *Olds v. New York &c. R. Co.*, 172 Mass. 73.

The highest degree of care consistent in the practical operation of a freight train is required, though that does not equal the care required if it were a regular passenger train. *Moore v. Saginaw &c. R. Co.*, 115 Mich. 103.

So, where one rides on construction train he assumes the risks necessarily incident to its operation. *Rosenbaum v. St. Paul &c. R. Co.*, 38 Minn. 173.

The highest degree of care consistent with the practical operation of a freight train in view of the nature and purpose thereof is required. *Schilling v. Winona &c. R. Co.*, 66 Minn. 252; *Steele v. Southern R. Co.*, 55 S. C. 389.

If a railroad company receive a person on a special train not used for transporting, it assumes the duties of carrier to him, and is liable for the negligent running of the train over a poorly constructed piece of road. *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512.

While the highest degree of care must be used regardless of the kind

of vehicle, *Mith v. St. Louis &c. R. Co.*, 87 Mo. App. 422; the passenger takes the risks necessarily incident to that method of travel. *Wait v. Omaha &c. R. Co.*, 165 Mo. 612; *Erwin v. Kansas &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 88.

Though one in charge of stock was compelled to ride on the top of the cars by reason of the disconnection of the caboose, he took the risk of stepping from one car to another while in motion. Failure to direct for defendant was held error. *Neville v. St. Louis &c. R. Co.*, 158 Mo. 293.

By riding in a freight train under a pass to care for his stock, one assumes the risk naturally incident to that method of travel, otherwise the railroad is under the duty of a carrier for hire. *Missouri &c. R. Co. v. Tietken*, 49 Neb. 130; *Omaha &c. R. Co. v. Crow*, 47 id. 84.

More care is required of one traveling on a freight train than on a passenger train. *Wallace v. Western &c. R. Co.*, 98 N. C. 494.

Negligence of a shipper in riding on a train with his stock does not prevent recovery, where the conductor, knowing of the imminence of a collision and the plaintiff's ignorance thereof, fails to warn him. *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Passenger left the caboose and went to the platform with knowledge that the train had broken in two. His negligence was for jury. *Ft. Worth &c. R. Co. v. Riggs*, (Tex. Civ. App.) 60 S. W. Rep. 61.

Where one in charge of stock on a drover's pass is informed that the train will remain standing for some time and is directed to attend to his stock, he may assume that it will not start without notice to him and that it is therefor safe and he is free to assume a position otherwise dangerous. *Missouri &c. R. Co. v. Jahn*, 18 Tex. Civ. App. 74.

The mere jolting incident to passage on a freight train is not negligence as to passenger thereon. *Runnels v. Houston &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 172.

Defendant was not negligent, where it had posted notices in its cabooses, stations, etc., forbidding carriage of passengers on freight trains under penalty of discharge, and had taken constant measure to detect violations and to enforce the rule. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

The duty toward one riding on a freight train in charge of stock does not depend on the question of the payment of fare. *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 945.

The highest degree of care possible on that kind of a train is the measure of care required. *Sprague v. Southern R. Co.*, 92 Fed. Rep. 59.

Failure to warn one in charge of stock on a freight train of his inability to pass under a snow shed, while standing erect on top of the

cars, was a question of negligence for the jury. *Saunders v. Southern R. Co.*, 13 Utah, 215.

Ticket holder who boards freight train by mistake is not a trespasser and may recover for forcible removal. *Boggess v. Chesapeake &c. R. Co.*, 31 W. Va. 219.

It was for the jury to say whether plaintiff was negligent in momentarily standing in the aisle of a caboose with back toward the door, knowing a coupling was to be made sometime soon. *Harden v. Chicago &c. R. Co.*, 102 Wis. 213.

### (b). VEHICLES, TRACKS, &c.

Whether a company buys or manufactures cars and machinery, the utmost care and skill must be used to render them safe. If latent defect could only have been discovered in the process of manufacture and not at all by external examination, the carrier is liable from injury therefrom. Whether the carrier was negligent in not adopting improvements for safety is for the jury. *Hegeman v. Western Railroad Corporation Co.*, 13 N. Y. 9, aff'g judg't for pl'ff.

A railroad company is liable for injury to a passenger for failure to use any improved apparatus, which is known to have been tested and to practically contribute to safety, and the adoption of which is reasonable and practical. *Smith v. N. Y. & N. H. R. R. Co.*, 19 N. Y. 127.

A carrier is bound absolutely to provide road-worthy vehicles, and is liable for the defect of the axle *not* discoverable by any practicable mode of examination. *Alden v. N. Y. R. R. Co.*, 26 N. Y. 102, aff'g judg't for pl'ff.

Enlarging the strictness of the rule as laid down in *Hegeman v. The Western Rd. Corporation*, 3 Kern. 9.

A boat was surrounded by bulwarks three or four feet high with gangways closed by rails hinged to the bulwarks and of the same height and leaving space beneath open. A passenger's hat blew off and he sprang to get it, slipped under the rail and was drowned. The boats had been so made for many years. Defendant was not liable. *Dougan v. C. T. Co.*, 56 N. Y. 1; 6 Lansing, 430.

The master of a ship is liable for acts done by a person under him, whether he hires him or not. A cup used in fumigating a ship, by order of health officer, was left where a child, a passenger, drank out of it and died. The master was liable. *Kennedy v. Ryan*, 67 N. Y. 379, rev'g nonsuit.

The plaintiff, in the under berth of a vessel, was partially paralyzed by screams, and also by the noise caused by an upper berth falling, and

was taken from her berth to allow mending of the upper berth and was thrown by the rolling of the ship against a door and picked up by a steward and left in a wet place. The defendant was bound to use ordinary care and skill in the construction and erection of the berths in the ship, and to use materials of sufficient strength and so far as practicable, such as would be safe and secure against the commotion of the elements, and the violence occasioned thereby. The defendant was liable for the resulting injuries. *Smith v. British & N. Am. R. M. S. Packet Co.*, 86 N. Y. 408, aff'g judg't for pl'ff.

In a suit by a passenger, a latent defect, as in the spindle of a draw-bar, will only relieve from liability where no reasonable degree of skill and foresight could guard against or discover it. This duty is not discharged without the utmost care and diligence, which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road and appliances used in operating it, are and remain in good condition and free from defects. *Palmer v. Pres't &c. D. & H. C. Co.*, 120 N. Y. 170, aff'g 46 Hun. 486, and judg't for pl'ff.

A company with whose car a collision took place was also made a party to this action and the witness was allowed, under proper objection, to state whether the inspection made of the brake rod was an adequate way for the examination of these rods, and whether this examination was a proper and adequate one. It was held that the evidence was improper and that the case was different from asking an expert witness whether a vessel was properly loaded, as that was a question requiring the opinion of an expert. It was also held that the question as to whether the inspection was adequate depended upon very many other conditions and that the exercise of the greatest diligence was not required in behalf of this plaintiff who was not this defendant's passenger. The question whether the inspection was adequate will be controlled and modified by a variety of circumstances respecting the use and observation of brakes, the previous experience of the company with them, and the jury were to determine the question from all the facts. *Schneider v. Second Ave. R. Co.*, and the *Houston &c. R. Co.*, 133 N. Y. 583, reversing judgment for plaintiff on account of the admission of evidence.

Where some companies leave the backs of the steps of their omnibuses open, while others close them, there being advantages and disadvantages in both methods, it was held not negligent to use the former method instead of the latter, especially where no accident similar to the one complained of had ever occurred before. *Frobisher v. Fifth Ave. Transp. Co.*, 151 N. Y. 131; rev'g s. c., 81 Hun. 544.

Plaintiff on defendant's ship, through the alleged imperfect lighting

of the dining saloon, tripped and fell on a socket in the floor used to secure the tables against the rolling of the sea. The plaintiff's evidence would not have justified a finding that there was a want of sufficient light in the saloon, and even had there been a lack of light, that could neither have caused nor prevented the accident, and the court erred in charging the jury that the defendant was bound to use the utmost care and diligence, as it was bound to use only ordinary care in a case where no question arose as to defects in machinery or in the mechanical appliances for the transportation of passengers. In this case the sockets, if the proximate cause of the accident, were visible defects. *Bruswitz v. Netherlands Am. S. Nav. Co.*, 64 Hun, 262, rev'g judgt for plff.

The failure of a railroad corporation to place a chain or similar barrier across the opening in the railing at the end of the platform of a passenger coach in a train, when a freight car is next to such coach, is a fact from which a jury, in case of an accident, may impute negligence to the corporation. *Newton v. The Central Vermont R. Co.*, 80 Hun, 491; s. c., aff'd, 151 N. Y. 624.

Defendant was liable for failure to repair upon request, a defective port in a steamship, whereby plaintiff's berth became wet and unhealthy. *Barker v. Cunard S. Co.*, 91 Hun, 495.

Carrier was held liable, where, owing to the failure of a defective brake to operate, a street car collided with a cart and the jar threw a passenger from the platform and injured him. *Weber v. Metropolitan Street R. Co.*, 22 App. Div. 628.

Car switched on a siding was blown back on the main track; except for a defect in the brake, it would not have moved. Brake was the paramount cause of collision with train on main track. *France v. Rome &c. R. Co.*, 25 App. Div. 315.

The duty of a carrier in respect to the rod holding the curtains of an electric car, not being the very highest degree of care, it is not liable, where they were blown down under pressure of a very high wind, when they were such as were in common use, made by reputable makers and no defect would have been revealed, had an inspection been made. *Leyh v. Newburgh &c. R. Co.*, 41 App. Div. 218; s. c. aff'd, 168 N. Y. 667.

Defendant was held not negligent in respect to an appliance called a plunger on the platform of one of its cars, where it appeared that there were no better or safer cars made than those used by defendant. *Smith v. Kingston &c. R. Co.*, 55 App. Div. 113; s. c. aff'd, 169 N. Y. 616.

Where plaintiff was injured through the car catching fire by reason of the defective insulation of the cables beneath the car, the court was requested to charge "that the care required of defendant is not extraordinary care, but only the care that is necessary in reference to the

use of the appliances, and the danger incident to their becoming out of order." The court's reply, "that is true; in the use of motive power like electricity, power of such appalling possibilities, it should be a very high degree of care," was held correct. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125.

A shock received by plaintiff from controller box in flames, held evidence of negligence. *Buckber v. Third Ave. R. Co.*, 64 App. Div. 360.

Defendant held not liable because the side bar was not down on the left side of the car, from which plaintiff was thrown while rounding a curve, as the bar was not designed to keep people from falling out. *Whitaker v. Staten Island &c. R. Co.*, 65 App. Div. 451.

Held error to dismiss complaint, where it appeared that plaintiff was struck by fall of a small fire extinguisher fastened to sides of car by old worn wire. *Allen v. United Traction Co.*, 67 App. Div. 363.

Defendant was not liable, where folding doors were thrown down by the action of the sea upon plaintiff's foot, which was thrust under a rail into the opening made for the doors. *Leroy v. North German Lloyd S. Co.*, 16 Misc. 162.

Or where door catch which caught plaintiff's dress, was new, in good order and similar to that in general use from which no such accident had happened before. *Atwood v. Metropolitan Street R. Co.*, 25 Misc. 758.

See, also, *Langley v. Metropolitan Street R. Co.*, 36 Misc. 804.

Duty of railroad company is performed if it use such machinery and appliances as other well regulated railroad companies use. *Louisville &c. R. Co. v. Jones*, 83 Ala. 376.

Carrier was not negligent, where a defect in the air brake was due to a latent defect or interference by a third party without its knowledge or consent. *Western R. Co. &c. v. Walker*, 113 Ala. 267.

Failure to provide the front wheels of a street car with guards was evidence of negligence for the jury. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

The injury complained of was sustained in an accident caused by the breaking of the flange of a car wheel while the car was going at excessive speed. The fact that the latent defect which caused the break was undiscoverable by the best known tests, was not ground for reversing a verdict for plaintiff, as the question whether the defect or the speed was the proximate cause was for the jury. *Johusen v. Oakland &c. R. Co.*, 127 Cal. 668.

Measure of care and liability are not lessened by the crudeness of the train. *Green v. Pacific Lumber Co.*, 130 Cal. 135.

Though defects are undiscoverable after a car is turned over to a carrier, it is liable if they could have been discovered by the exercise of the

utmost care &c., while in the hands of the manufacturer. *Siemens v. Oakland &c. R. Co.*, 131 Cal. 494.

A car is not negligently constructed because a *bolt* projects beneath the platform steps so as to strike the leg of one who accidentally falls and is dragged under it. *Posten v. Denver &c. T. Co.*, 11 Colo. App. 187.

As to negligence in a railroad, where a car wheel broke while running at high speed, see *Chesapeake &c. R. Co. v. Howard*, 14 App. D. C. 262, 287.

Where the distance between car tracks is the minimum authorized by law, defendant cannot be held negligent in the construction of its tracks as matter of law. *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60.

Measure of care required of a carrier held to apply as much to coach accommodations as to safety in carriage. *Chicago &c. R. Co. v. Dumsen*, 161 Ill. 190; aff'g s. c., 60 Ill. App. 93.

Raising and leaving the iron flanges upon the platform of a car without notice, so as to endanger passengers passing from one car to another, is negligence; and it was contributory negligence to fail to see them by the aid of artificial light, where the place had been passed in safety only a short time before. *Chicago &c. R. Co. v. Gates*, 61 Ill. App. 211; s. c. aff'd, 162 Ill. 98.

Fall of railroad trestle, caused by sudden and unexpected rising of waters, does not subject defendant to liability. *Wabash &c. R. Co. v. Koenigsaw*, 13 Ill. App. 505.

In case of latent defects in roadbed, a charge that the carrier was negligent, if by the exercise of the highest degree of care it might have discovered and repaired the defect, though it had not sufficient time to repair after actual discovery held proper. *West Chicago Street R. Co. v. Stephens*, 66 Ill. App. 303.

Failure to provide a mat to cover the space between car platforms was not negligence. *Louisville &c. R. Co. v. Stout*, 66 Ill. App. 298.

Where plaintiff, while riding on the foot board of an overcrowded trolley car, was injured by an obstruction near the track, the questions of negligence and contributory negligence were properly submitted to the jury. *West Chicago Street R. Co. v. Marks*, 82 Ill. App. 185.

Injury to a passenger in the act of alighting from a train, caused by the fall of a lantern, held to raise a presumption of negligence and make it error for trial court to direct a verdict of defendant. *Cramblet v. Chicago &c. R. Co.*, 82 Ill. App. 542.

It was for the jury to say whether a derailment was due to a broken axle. *Brownfield v. Chicago &c. R. Co.*, 107 Iowa, 254.

Train on which plaintiff rode fell through a bridge undergoing repairs and the court held, that unless some cause were shown for the disaster against which the company could not have guarded, it would be

liable to the imputation of negligence. *Louisville &c. R. Co. v. Pedigo*, 108 Ind. 481.

It was not actionable negligence to carry an extra vestibule car with locked doors, where it was 60 feet from the platform, as the train was drawn up to the depot. Plaintiff, who boarded the front platform of the locked car as the train started, after ample opportunity to enter the other cars, was injured in an attempt to pass from it to them. *Cleveland &c. R. Co. v. Wade*, 18 Ind. App. 346.

Where plaintiff remained at a window while there were plenty of other seats, he could not complain because the window was defective and could not be lowered. *O'Donnell v. Louisville &c. R. Co.*, (Ky.) 42 S. W. Rep. 846.

Where the defect in a trolley wire could not have been discovered by means of a reasonable examination, the company was not liable for its breaking. *Baltimore &c. R. Co. v. Nugent*, 86 Md. 349; s. c., 39 L. R. A. 161.

Failure to have gates on platforms of street car, held not negligence. *Byron v. Lynn &c. R. Co.*, 177 Mass. 303.

See, also, *Kingman v. Lynn &c. R. Co.*, (Mass.) 64 N. E. Rep. 79.

Company was not liable, where a passenger, in order to go from one part of the train to another, and unable to pass through the crowded aisles stepped off on the ground at a place he knew to be dangerous. *Kellog v. Smith*, 179 Mass. 595.

The breaking of a pin in a switching apparatus of the most approved design, purchased from a reputable maker, due to a defect that could not have been discovered by the most careful inspection, was held no evidence of negligence. *Buckland v. New York &c. R. Co.*, (Mass.) 62 N. E. Rep. 955.

The fact that there was no bell rope on a train made up of freight and passenger cars does not fix the liability upon company. *Oriatt v. Dakota &c. R. Co.*, 43 Minn. 300.

Negligence was for the jury, where a temporary track was constructed by spiking 50-pound rails on ties placed without ballast on a well worn cedar pavement, and a car was derailed by a broken rail. *Ellund v. St. Paul City R. Co.*, 78 Minn. 434.

Failure to inspect a bridge before crossing after a severe storm, which was liable to injure it, was held negligence. *Cobb v. St. Louis &c. R. Co.*, 119 Mo. 609.

Failure to have a headlight was negligence. *Cleveland &c. R. Co. v. St. Bernard*, 15 Oh. C. C. 588.

Negligence was for the jury, where an accident on a curve was caused by a broken rail that had been used for 16 years and had been reduced



by wear five pounds to the yard and had been broken and patched with splices. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339.

In the absence of evidence that lack of a signal caused the accident in which plaintiff was injured, direction of verdict for defendant was held proper. *Foreman v. Pennsylvania R. Co.*, 195 Pa. St. 499.

Failure to have a third step to a car will not permit recovery where plaintiff steps down without looking. *Coburn v. Philadelphia &c. R. Co.*, 198 Pa. St. 436.

Where drainage was insufficient in ordinary weather, the company was liable. *Philadelphia &c. R. Co. v. Anderson*, 94 Pa. St. 351; *Sullivan v. R. Co.*, 6 Cas. (Pa.) 231; *Laing v. Colder*, 8 Barr. (Pa.) 479; *Meier v. R. Co.*, 14 P. F. Smith (Pa.), 225; *Grote v. Chester &c. R. Co.*, 2 Exch. 251; *Francis v. Cockrell*, L. R., 5 Q. B. 184.

Company not relieved from liability for injuries caused by the washing away of an embankment, due to insufficient drainage, although a competent engineer had approved of the same. *Philadelphia &c. R. Co. v. Anderson*, 13 Norr. (Pa.) 351.

Test of liability is, whether company used that degree of care and prudence which cautious persons would have used under the apparent circumstances of the case. Company not bound to provide, in constructing roadbed, against extraordinary floods unknown to common experience. *R. Co. v. Halloren*, 53 Tex. 46.

A tree stood so near a track that it was blown upon it, and as a consequence a train was derailed. The company should have cut it down, notwithstanding it stood on land of another, because of the likelihood of it proving to be an obstruction. *I. & St. L. R. Co. v. Vallie*, 60 Tex. 481.

Railroad company should cut down bushes near the track, to avoid possibility of cattle suddenly stepping out from them upon it. *Eames v. T. & N. O. R. Co.*, 63 Tex. 660.

No recovery is allowed a passenger for injuries caused by the malicious act of a third person in derailing car. *Houston &c. R. Co. v. Lee*, 69 Tex. 556.

If a culvert breaks as the result of the breaking of a dam, liability attaches, providing the culvert was defective. *Bonner v. Wingate*, 78 Tex. 333.

A latent defect not discoverable by a competent and skilled person on reasonable inspection, does not charge a carrier with negligence. But continued wet weather and a fall of snow does not excuse a failure to keep a track in repair. *Missouri &c. R. Co. v. Johnson*, 72 Tex. 95.

Prior proper inspection not revealing a defect, was no defense to an action for an injury from an accident resulting from a subsequent im-

proper one which should have revealed it. *Houston &c. R. Co. v. Summers*, (Tex. Civ. App.) 49 S. W. Rep. 1106; s. c. aff'd, 92 Tex. 621.

Failure to completely reverse the seats in a car so that one is liable to catch his fingers in the bars thereof, was evidence of negligence to go to the jury. *Missouri &c. R. Co. v. Dill*, (Tex. Civ. App.) 40 S. W. Rep. 347.

Carrier is not negligent where the most careful inspection would not have revealed the defect which caused the accident. *Texas &c. R. Co. v. Buckalew*, (Tex. Civ. App.) 34 S. W. Rep. 165; *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 108.

Plaintiff cannot recover for injuries from the fall of a car window, where it appears that he raised it and there was no evidence of any defect in the apparatus for holding it up. *Texas &c. R. Co. v. Johnson*, (Tex. Civ. App.) 65 S. W. Rep. 388.

Passenger's negligence in remaining on a train, cold and crowded, when he was aware of its condition and could have left it before it started, was for the jury. *Texas &c. R. Co. v. Rea*, (Tex. Civ. App.) 65 S. W. Rep. 1115.

Shock as plaintiff took hold of handhold to board a car raised presumption of negligence. *Dallas &c. R. Co. v. Broadhurst*, (Tex. Civ. App.) 68 S. W. Rep. 315.

Failure to warm cars is negligence especially when used by women with children. *Ft. Worth &c. R. Co. v. Hyatt*, 42 Tex. Civ. App. 435.

Defendant was chargeable with notice of the cold condition of car, where its servants had passed through it while in such condition. *Texas &c. R. Co. v. Kingston*, 68 S. W. Rep. 518.

Brakes on the rear car were not as effective as those on the forward cars, though sufficient when the car was coupled to the train. A drunken person uncoupled the rear car while the train was in motion, automatically setting the brakes on the whole train: the forward stopped more suddenly than the rear car, causing a collision which injured plaintiff. It was for the jury to say whether it was bound to anticipate such a contingency. *Texas &c. R. Co. v. Storey*, (Tex. Civ. App.) 68 S. W. Rep. 534.

Plaintiff recovered for injuries caused by fall of window, though the window catches were in good order, where it was a new car and it was at times difficult to raise the window up to the catches. *International &c. R. Co. v. Phillips*, (Tex. Civ. App.) 69 S. W. Rep. 107.

Carrier was obliged "to use that high degree of care which would have been exercised by very cautious, prudent and competent persons under similar circumstances," in heating cars and providing seating accommodations. *St. Louis &c. R. Co. v. Campbell*, (Tex. Civ. App.) 69 S. W. Rep. 451.

Carrier was held liable for failure to provide accommodations for a woman with children other than in a car with men who drink and smoke, besides being filthy and indecent. *Texas &c. R. Co. v. Hughes*, (Tex. Civ. App.) 41 S. W. Rep. 821.

A charge which required defendant to secure the reasonable safety of a bridge in time of danger, held error, as the measure of its duty was the exercise of that high degree of care which very prudent and cautious persons would use under the circumstances. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

Carrier failed to furnish safe means of alighting, where the step box, besides being too small, was too far under the step and slanting from the unevenness of the ground. *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424.

The duty of a railroad company, to exercise a high degree of care for the safety of its passengers, requires that degree of care to be exercised in providing seats in its cars, as well as in providing the cars or the road-bed or in running its trains. *International &c. R. Co. v. Anthony*, (Tex. Civ. App.) 57 S. W. Rep. 897.

The best appliances obtainable are not required, but only such as are approved by use. *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

A latent defect in a rail, not discoverable by any degree of foresight, not chargeable to company. *Anthony v. Louisville &c. R. Co.*, 27 Fed. Rep. 724.

See *Brignoli v. Chicago &c. R. Co.*, 4 Daly, (N. Y.) 182; *Heazle v. Indianapolis &c. R. Co.*, 76 Ill. 501.

Though under no obligation to furnish vestibuled trains, by undertaking to do so, the carrier assumes the obligation of keeping them in reasonably safe condition. *Bronson v. Oakes*, 76 Fed. Rep. 734.

Failure to provide an ash can for engine, which will not permit the escape of sparks to the injury of passengers on a station-platform while passing, was held negligence. *Philadelphia &c. R. Co. v. Young*, 90 Fed. Rep. 709.

It was negligence to run a train down grade at such a speed on slippery tracks that its control could not be secured by locking the brakes. *Danville Street Car Co. v. Payne*, (Va.) 24 S. E. Rep. 904.

Escape of electricity into the iron handles on dash board of an electric car, by reason of which plaintiff was injured, attributable to the company's negligence. *Burt v. Douglas &c. R. Co.*, 83 Wis. 229.

### (c). DEFECTIVE PASSENGER.

A sick person is entitled to more care than a well one, in getting off a

car, or in crossing a street. *Sheridan v. Brooklyn City and Newtown R. Co.*, 36 N. Y. 39.

A carrier owes a passenger who becomes unfit to travel by reason of sickness, the duty of placing him in charge of an officer of the law, authorized to take charge of persons in his condition, or otherwise securing his safety. And, where such a one was ejected from a waiting room by a policeman at the request of the station agent and was killed while wandering upon the tracks, the carrier was held liable. *Wells v. New York &c. R. Co.*, 25 App. Div. 365.

If a railroad company contracts to take a sick passenger it must afford him time and assistance in getting off. *Louisville &c. R. Co. v. Trunk*, 119 Ind. 542.

Knowledge of abnormal sensitiveness does not increase measure of the care required, but increases the measure of liability in case of injury. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488.

Plaintiff was taken sick in a trolley car. The conductor paid no attention to her repeated requests to stop the car and let her get off. She arose, staggered toward the door and fell in a faint. The defendant's liability was held properly submitted to the jury. *Newark &c. R. Co. v. McCann*, 58 N. J. L. 642; s. c., 33 L. R. A. 127.

An infirm passenger is not negligent *per se* in carrying bundles or in holding on to the back of the seat while his child is passing on ahead of him. *Tillell v. Norfolk &c. R. Co.*, 118 N. C. 1031.

A woman of 63 and crippled was negligent in leaving her seat in a freight train caboose at a time when she should have expected a coupling of the cars. *Fellon v. Horner*, 97 Tenn. 579.

More care required of carrier where passenger is decrepit or in feeble health. *East Line &c. R. Co. v. Cushing*, 69 Tex. 306.

Failure to give personal announcement of a station, as requested, in the absence of notice of passenger's sickness, did not bind the company. *Chicago &c. R. Co. v. Boyles*, 11 Tex. Civ. App. 522.

Railroad company was liable for carelessness of a brakeman in carrying an invalid out of the car. *International &c. R. Co. v. Anderson*, 15 Tex. Civ. App. 180.

It was negligent to start a train before one known to be a cripple has had time to gain a seat. *Central Texas &c. R. Co. v. Holloway*, (Tex. Civ. App.) 54 S. W. Rep. 419.

Intoxication does not relieve a passenger of the care due from a sober man. A drunken passenger, who obstinately persisted in riding on the platform in spite of the conductor's protests, was thrown from the train, while rounding a curve, and run over. A verdict for the plaintiff was set aside. *Fisher v. West Virginia &c. R. Co.*, 42 W. Va. 183; s. c., 33 L. R. A. 69.

## (d). GRATUITOUS PASSENGER.\*

The carrier owes the same care to a gratuitous passenger as to one making compensation.

Where a railroad corporation voluntarily undertakes to convey a passenger upon its road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, the latter is liable, in the absence of an express agreement exempting it.

Where a passenger is carried gratuitously, the liability of the carrier for an injury caused by gross negligence, arises not from any implied contract, but from the violation of a duty imposed by the circumstances. *Nolton v. Western Railroad Corporation*, 15 N. Y. 444, aff'g judg't for pl'ff.

**From opinion.**—"The law always imposes upon every one who attempts to do anything, *even gratuitously*, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject is that of *Coggs v. Bernard*, 1d. Ray. 909. There the defendant had undertaken to take several hogsheads of brandy belonging to the plaintiff, from one cellar in London, and to deposit them in another; and in the process of moving, one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was, nevertheless, held liable by the whole court. \* \* \* The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either are injured through the culpable carelessness of a carrier, he is liable."

Where a passenger riding on a pass was killed, the company would have been liable but for stipulation on pass exempting it from liability. *Perkins v. New York Central R. Co.*, 24 N. Y. 196, rev'g judg't for pl'ff.

**From opinion.**—"Assuming that the pass on which the deceased was riding is to be regarded as a free ticket, and that the defendants were carrying the deceased gratuitously, independently of the question whether Mr. Perkins (injured person) expressly agreed to assume all risk of accidents upon the trip, the defendant would be clearly liable for any injury sustained by him, if he had survived the same; and in this action, on the same ground, would be liable also to the plaintiff."

This is the accepted doctrine. Wharton on Negligence, sections 355, 436, 437, 641.

A person lawfully on defendant's cars, but refusing to pay fare, may be ejected; but if injured while thus a passenger he may recover in damages. *Ohio &c. R. Co. v. Muhling*, 30 Ill. 9.

\* NOTE.—See "Common Carriers of Goods," p. 197.

To one riding on a free pass, a railroad is liable for gross negligence. *Illinois R. Co. v. O'Keefe*, 63 Ill. App. 192.

An employé on a pass is entitled to the same care as other passengers. *St. Louis &c. R. Co. v. Waggoner*, 90 Ill. App. 556.

Plaintiff, who was employed in building a bridge on defendant's railroad and was injured while riding to his work free on defendant's cars, could recover for such injuries. *Gillenwater v. Madison &c. R. Co.*, 5 Ind. 339.

A person riding on a free pass may recover for injuries received in a collision on defendant's road. *Louisville &c. R. Co. v. Gaylor*, 126 Ind. 126.

The court held that payment of fare was not a prerequisite towards establishing the relation of carrier and passenger, and negligence of defendant's employés fixed liability on the company for plaintiff's injuries, notwithstanding he rode upon a free pass. *Rose v. Des Moines Valley C. Co.*, 39 Iowa, 246.

Where the ride is free by invitation of conductor, though against the rules of the company, the same care is due as to passengers for hire. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Where one is permitted by conductor to ride to a certain point if he would throw a switch there, he becomes a trespasser upon returning to the train after that object was accomplished. *Cincinnati &c. R. Co. v. Jackson*, (Ky.) 58 S. W. Rep. 526.

The plaintiff, a girl of nine years of age, got upon the front platform of defendant's street car, on invitation of the driver, became a passenger without hire, and recovered for injuries caused by driver's negligence. *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

Passenger on a free pass containing stipulation limiting liability, is held to that provision. *Quimby v. Boston &c. R. Co.*, 150 Mass. 365.

*Contra* *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.

In an action against a *carrier of goods*, it is not necessary to allege that a compensation was agreed upon. *Hall v. Cheney*, 36 N. H. 26.

Where passage on freight caboose was permitted the duty was the same to passengers free and for hire. *Dorsey v. Atchison &c. R. Co.*, 83 Mo. App. 528.

If usage implies payment to carrier for transfer of goods he will be liable for any loss, notwithstanding absence of contract for payment, unless caused by inevitable accident or through public enemies. *Kirtland v. Montgomery*, 1 Swan, (Tenn.) 152.

Wife and child of company's employé riding without tickets to where employé is at work, are not trespassers, and recovery may be had for in-

juries to child from derailment of the car. *Galveston &c. R. Co. v. Sneed*, 4 Tex. Civ. App. 31.

Where plaintiff was on a work train without the knowledge of defendant's officers, who had at all times used reasonable efforts to enforce its rule forbidding carrying anyone but employes thereon, he was a trespasser. *International &c. R. Co. v. Hanna*, (Tex. Civ. App.) 58 S. W. Rep. 548.

The plaintiff, a *stockholder*, carried free on defendant's boat, was injured in a collision, and recovered. *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

Plaintiff, although carried free as a "steamboat man," was allowed to recover for injuries received by him, due to the collision of defendant's boat with another boat. *Steamboat New World v. King*, 16 How. (U. S.) 469.

Person invited to ride on a train on a logging road, is entitled to proper and adequate care, though not a passenger for hire. *Albion Lumber Co. v. DuNobra*, 72 Fed. Rep. 139.

One riding on a free pass is entitled to same rights as passenger for hire. *Farmers' L. &c. Co. v. Baltimore &c. R. Co.*, 102 Fed. Rep. 17.

Passenger on a free pass assuming risk of acts of negligence cannot recover, though the giving of the pass is contrary to law. *Duncan v. Maine C. R. Co.*, 113 Fed. Rep. 508.

A child of three years and six months of age riding free on defendant's train recovered for injuries received notwithstanding acts 7 and 8, Viet. chap. 85, sec. 6, providing for free passage of children on railway train under the age of three, and carriage of children of between three and twelve years of age for half rate. *Austin v. R. Co.*, 2 Q. B. 442.

A steamboat captain undertaking, without charge, to carry money for passengers is bound to use a degree of diligence adequate to the performance of the trust. *Jenkins v. Hottow*, 1 Sneed. (Ky.) 248; *Eddy v. Livingston*, 35 Mo. 487; *Tracy v. Wood*, 3 Mason, 132.

#### (c). TRESPASSERS.

Dr. Wharton extends the same doctrine to trespassers on cars where the carrier does not eject them. Wharton on Negligence, sec. 354.

On this subject that learned author says:

"If a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser supposing him to continue such, is not withdrawn from the protection of that law, which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the car-

riage. If the carrier *omits to do this*, and if the person in question remains voluntarily with the carrier's consent, then the trespass passes into a *quantum meruit* contract of carriage on the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage, on the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence and skill of a good carrier in that particular kind of transport: in other words, the particular kind of diligence, prudence and skill which the carrier is bound to exercise towards all other passengers."

This position does not seem to harmonize with the authorities. Why should a carrier stop and delay its train to expel a trespasser? If the carrier's servants neglect to eject a tramp, it would simply be a wrongful permission given by the agent to the trespasser to steal a ride with the full participation of the latter in the wrong doing.

Failure to take precautions in operating cars along a street to prevent children getting on, was not negligent, where the cars were small and ran at a slow rate. *Jefferson v. Birmingham R. &c.*, 116 Ala. 294: s. c., 36 L. R. A. 458.

Brakeman, with authority to eject tramps, acted within scope of his employment in ejecting for insufficient fare. *Southern R. Co. v. Wildman*, 119 Ala. 565.

The only duty a street railway owes trespassing boys is not to wantonly injure them after discovering their peril. *Little Rock Traction &c. Co. v. Nelson*, 66 Ark. 494.

That one is a trespasser does not justify wilful and unnecessary violence in his expulsion. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

In the absence of an assumption of the risk of negligence a passenger on a free pass has the same rights as one paying fare. *In re California Nar. &c. Co.*, 110 Cal. 670.

A trespasser wantonly pushed from a moving car has a right of action within Ga. Co. sec. 2321, though the act was not within the scope of the authority of the brakeman doing it. *Smith v. Savannah &c. R. Co.*, 100 Ga. 96; *Savannah &c. R. Co. v. Godkin*, 104 Ga. 655; *Fink v. Ash*, 99 Ga. 106.

But a trespasser cannot recover for an expulsion unless it was accompanied by wantonness. *Wabash R. Co. v. Kingsley*, 177 Ill. 558; rev'g s. c., 78 Ill. App. 236.

Forceful expulsion of one not a passenger from a waiting room was justified in the case of an intoxicated person, who not only conducted himself improperly, but vomited upon the floor. *Chicago &c. R. Co. v. Randolph*, 65 Ill. App. 268.

Where a boy stealing a ride, when struck at by the driver, jumped and fell under another car, his negligence was for the jury. *Hagerstrom v. West Chicago Street R. Co.*, 67 Ill. App. 63.



That one was a trespasser does not prevent recovery for willfully ejecting him with unnecessary force and while the train was in motion. *Illinois C. R. Co. v. Davenport*, 15 Ill. App. 519; s. c. aff'd, 177 Ill. 110.

Failure of a conductor of a pay car, whose platforms are enclosed by gates, to keep a lookout to prevent persons getting thereon, was not negligence. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453.

A trespasser may recover for the wilful acts of defendant's brakeman and conductor in ejecting him while the train was moving at the rate of 12 to 15 miles an hour; having implied authority as to ejection, defendant was liable for its abuse by them. *Sanders v. Illinois C. R. Co.*, 90 Ill. App. 582.

Brakeman was acting beyond the scope of his employment in expelling a trespasser with unnecessary violence. *Lake Shore &c. R. Co. v. Peterson*, 144 Ind. 214.

But conductor has such authority, and defendant is liable for wilful injury in the expulsion of a trespasser. *Baltimore &c. R. C. v. Norris*, 17 Ind. App. 189.

That one was negligent in boarding a freight train, not carrying passengers, does not relieve defendant of liability for the wilful acts of its employes in using excessive force in expelling him. *Lake Erie &c. R. Co. v. Matthews*, 13 Ind. App. 355.

One, boarding a caboose without defendant's knowledge or consent to visit a passenger, was only entitled to the rights of a trespasser. *Earl v. Chicago &c. R. Co.*, 109 Iowa, 14.

It was for the jury to say whether it was negligence to eject a boy of 14 while the train was going at the rate of nine or ten miles an hour. *Union P. R. Co. v. Mitchell*, 56 Kan. 324.

But a conductor is under no obligation to stop and put a boy of 11 off short of the place most convenient for it; and defendant was not negligent for leaving piles of coal upon the side of the track, upon which he jumped to his injury. *Louisville &c. R. Co. v. Webb*, 99 Ky. 332.

It was held error to direct a verdict for plaintiff, where defendant's brakeman loosed plaintiff's grasp while attempting to board a freight train beginning to move and going at about four or five miles an hour. *Louisville &c. R. Co. v. Bernard*, (Ky.) 37 S. W. Rep. 811.

A carrier was held liable for ejection of a trespasser from a moving train at a dangerous place at night. *Young v. Texas &c. R. Co.*, 51 La. Ann. 295.

Brakeman was not negligent in uncoupling the cars after telling a trespasser who had a foot on each car to let go. *Leonard v. Boston &c. R. Co.*, 170 Mass. 310.

That a boy of 11 jumped from a slowly moving freight train in obedi-

ence to command of brakeman, did not make defendant liable, where his fright was not such as to deprive him of self control. *Mugford v. Boston &c. R. Co.*, 173 Mass. 10.

Judgment reversed for refusal to charge that railroad company was not liable for injuries to a trespasser ejected by a brakeman without authority to eject trespassers. *Hartigan v. Michigan &c. R. Co.*, 113 Mich. 122.

See, also, *Randall v. Chicago &c. R. Co.*, 113 Mich. 115.

A trespasser is entitled to notice of the dangerous speed at which the forward part of a train, broken in two, is backing to meet the latter, where the train hands know of his peril and are in a position to warn him or avoid it. *Pettit v. Great Northern R. Co.*, 62 Minn. 530.

In the absence of rule withholding it, a brakeman was held to have apparent authority to eject a trespasser, though he does not act under it where he was bribed to allow the party to ride, but nevertheless ejects him without subsequent express authority, and the railroad company was not responsible for his act. *Brevig v. Chicago &c. R. Co.*, 64 Minn. 168.

Where plaintiff was on the train through collusion with the conductor to cheat defendant out of a portion of its fare, he could not complain of being pushed off while the train was in motion by other employes on refusal to make it up. *Williams v. Mobile &c. R. Co.*, (Miss.) 19 South. Rep. 90.

Where a flagman forcibly ejects a boy from a rapidly moving train contrary to rules, defendant was liable for his injuries. *Southern R. Co. v. Hunter*, 74 Miss. 444.

See, also, *Howell v. Illinois C. R. Co.*, 75 Miss. 242; s. c., 36 L. R. A. 545; *Yazoo &c. R. Co. v. Anderson*, 77 id. 28.

Where a brakeman had authority to eject and was in a position to enforce his commands to get off, a trespasser was permitted to recover for injuries received in jumping while the train was in motion under such threats. *Farber v. Missouri P. R. Co.*, 139 Mo. 272.

Where defendant had tried to keep news boys off its cars it was not liable to one struck by the tongue of a wagon while riding on the running board to sell papers. *Padgitt v. Moll*, 159 Mo. 143.

The general authority to keep trespassers off includes the specific authority to eject. *Brennan v. Santa Fe Receivers*, 72 Mo. App. 107.

The implied authority of a brakeman to eject trespassers was not affected by the fact that such authority was given expressly to conductors. Defendant was liable for brakeman's use of unnecessary force in ejecting trespasser. *West Jersey &c. R. Co. v. Welsh*, 62 N. J. L. 655.

While a licensee assumes the risk incident to travel on a hand car, he does not deprive himself of a right of recovery for gross negligence in

running a train at high speed out of schedule on a dark stormy night without a head light or notice to the foreman of the hand car. *Willis v. Atlantic &c. R. Co.*, 122 N. C. 905.

Defendant was liable for a wanton assault in ejecting one from a train, though he may have been there unlawfully. *Toledo & R. Co. v. Marsh*, 17 Oh. C. C. 379.

A person who boards a train through collusion with the brakeman paying only part of the fare, and without knowledge of the conductor, is trespasser entitled only to protection from wantonness. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41.

So, also, a newsboy on train in violation of defendant's rule. *Duff v. R. Co.*, 91 Pa. St. 458.

*Flower v. Penn. R. Co.*, 69 Pa. St. 210; *Kirby v. Penn. R. Co.*, 76 id. 506; *Towanda Coal Co. v. Neeman*, 86 id. 418.

Motorman was negligent in frightening off a boy, too young to be regarded as a trespasser, who was stealing a ride, instead of taking him in or stopping to put him off. *Levin v. Second Ave. Traction Co.*, 194 Pa. St. 156.

A boy of six, stealing a ride on the side step of a moving car, became frightened and fell off, when the conductor on discovering him shook his finger and told him to get off, but without making any show of force. A verdict for the company was sustained. *Feingold v. Philadelphia Traction Co.*, 7 Pa. Dist. R. 445.

Nor was defendant liable when, upon being commanded to leave a car, a boy of eight ran through it on to the steps, and around the dashboard, dropping to the ground in the middle of the track, where he was injured by the sudden start of the car. *Pope v. United Traction Co.*, 30 Pittsb. L. J. (N. S.) 62.

Compelling one to jump from a moving train is not excused because he boarded it while moving. *Martin v. Southern R. Co.*, 51 S. C. 150.

Defendant was not liable for injury through mistake of its servants in executing a practical joke upon a boy riding with their consent. *International &c. R. Co. v. Cooper*, 88 Tex. 607.

Defendant was not liable to one stealing a ride in a dangerous position where he was not discovered in time to avoid injury. *Southerland v. Texas &c. R. Co.*, (Tex. Civ. App.) 40 S. W. Rep. 193.

Otherwise, where it might have been avoided after discovery of peril, but no effort was made to do so. *De Palacios v. Rio Grande &c. R. Co.*, (Tex. Civ. App.) 45 S. W. Rep. 612.

Riding on a switch engine, knowing it to be against the company's rules, is such negligence as to prevent recovery, notwithstanding defendant's

gross negligence in running it at excessive speed. *Wilcox v. San Antonio &c. R. Co.*, 11 Tex. Civ. App. 487.

Defendant was liable for the willful act of its engineer in ejecting a boy by throwing hot water over him, regardless of any question of negligence in stealing a ride or in trying to escape from the hot water. *Galveston &c. R. Co. v. Zantzinger*, (Tex. Civ. App.) 49 S. W. Rep. 677; s. c. aff'd, 53 S. W. Rep. 379.

Railroad must use reasonable and ordinary care in ejecting a trespasser. *Texas &c. R. Co. v. Lyons*, (Tex. Civ. App.) 50 S. W. Rep. 161; *Houston &c. R. Co. v. Grigsby*, 13 Tex. Civ. App. 639; *Texas &c. R. Co. v. Black*, 23 Tex. Civ. App. 119.

Though carrier was grossly negligent it was not liable to one who was a trespasser and not known to be on the train. *Crawleigh v. Galveston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 140.

Defendant was held entitled to an instruction for a verdict where plaintiff's fall, while train was going 15 to 20 miles an hour, was caused by a trainman's stepping on his fingers, and kicking him in the back of the head. He was told to get off at the next stop but persisted in getting on again after the train had started. *Johnson v. Chicago &c. R. Co.*, 94 Fed. Rep. 413.

Brakeman as such has no implied authority to eject trespassers, but such authority may be inferred from a course of action. Where, however, the company's rules required brakemen to report trespassers to the conductor, prior acts of expulsion by the brakeman in the presence of the conductor and with his consent, furnish no evidence of authority in the brakeman to expel of his own motion. *Chesapeake &c. R. Co. v. Anderson*, 93 Va. 650.

An infant trespasser was allowed to recover of a railroad company for increasing the speed of its train to a dangerous rate and then compelling him to jump. *Washington &c. R. Co. v. Quayle*, 95 Va. 741.

It was not an act of willful negligence in a trainman to command a trespasser, used to boarding and leaving slowly moving trains, to get off, where nothing was done calculated to cause him to lose his self control. *Bolin v. Chicago &c. R. Co.*, 108 Wis. 333.

## V. Approaches to Stations and Cars—Construction and Maintenance of.

In respect to approaches to stations, stairways, station platforms, removal and treatment of ice on platforms of cars, cinders from locomotives, the carrier is not bound to use the high care and skill required in actual transportation, but only that ordinary care and skill that a man of ordinary prudence would use under the circumstances; and the existence of the

defect does not usually raise a presumption of negligence, although as in other relations, such defect may appear to have been so dangerous in its nature or to have existed for such a length of time as to place the burden on the defendant of showing that it did not exist by his default. *Kelly v. Manhattan R. Co.*, 112 N. Y. 443.

Gross negligence to leave hole in floor of platform where passengers alight, whereby their landing is rendered unsafe.

Plaintiff had a right to rely upon the floor being free from holes, without taking special pains to ascertain whether it was or not before she stepped upon it. *Ferris v. Union Ferry Co.*, 36 N. Y. 312; *Davenport v. Ruckman*, 37 id. 568, 573; *Liscomb v. J. R. Trans. Co.*, 6 Lansing, 75, aff'g judg't for pl'ff.

The plaintiff's intestate was, through the neglect of the conductor's promise to awaken him, carried past his station and the conductor advised him to go to station "N." and then to take a train back to his station. The train that he was on stopped two hundred and fifty feet west of station "N" and the returning train was two hundred and fifty feet east of that station. The passenger attempted to walk from one train to the other, and fell into a cattle guard and was killed. There was evidence, that passengers sometimes took the return train, where it stood, and it was doubtful whether it drew up to and stopped at the station. Defendant was held liable. (See Reporter's notes, p. 154.) *Hulbert v. N. Y. C. R. Co.*, 40 N. Y. 145.

There was a brass plate on each step of the stairway of a steamboat. Where the plate turned over the nose of the step, it was smooth and slippery. A passenger slipped thereon and was injured. It was the usual way of covering such steps and no accident had happened before. The defendant was not liable. *Crocheron v. North Shore S. I. F. Co.*, 56 N. Y. 656.

In an action for injuries while ascending the stairs of defendant's boat, the claim was that the stairs were too slippery to be safe. The steps were covered with brass plates raised in the form of stars and no accident had happened thereon although many thousand passengers had been carried during that year. An expert testified that the stairs were of the best form constructed. The brass was raised with some kind of device, the plaintiff's foot when he slipped was on the step only to the hollow of the foot. Defendant was not liable. *Hughes v. The New Jersey Steamboat Company*, 11 Misc. 65.

The plaintiff, going from the car to a highway, fell in a cattle guard outside of the limit of the highway and on the depot grounds. For jury. *Hoffman v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 605, affirming 13 Hun. 589.

The company must provide a passenger with a safe way to the train, and must use reasonable care not to expose him to danger on the prem-

ises, and must use the utmost vigilance against interference or violence from another. The plaintiff, on the station platform, was injured by a bag thrown from the train by the postal clerk pursuant to a long custom. *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494, rev'g 24 Hun, 104.

Citing *Nolton v. Western R. Co.*, 15 N. Y. 444; *Blair v. E. R. Co.*, 66 id. 313; *Penn. R. Co. v. Price*, 23 Alb. L. J. 69; *Muster v. C. M. St. P. Ry. Co.*, 21 N. W. 223. (See post, "Injuries from Negligence of Third Persons," p. 533.)

Plaintiff, defendant's passenger, was injured while going on defective station platform to telegraph office in station. *Clussman v. L. I. R. Co.*, 9 Hun, 618, aff'g judg't for pl'ff; s. c. aff'd, 73 N. Y. 606.

There was sidewalk alongside of the defendant's depot leading to the street; depression in stone caused an outgoing passenger, in the evening, to break her ankle. Same rule of care applies to the defendant as to a municipality. Evidence that stone was replaced after the accident was proper to show that the defendant had control of the sidewalk. For jury. *Bateman v. N. Y. C. & H. R. R. Co.*, 47 Hun, 429, aff'g judg't for pl'ff.

Citing *Clemence v. Auburn*, 66 N. Y. 334; *Goodfellow v. Mayor*, 100 N. Y. 19.

A passenger, in the dark, descending stairway to the walk, felt her way, until she supposed that she had reached the bottom of the steps, and then stepped off and was injured. For jury. *Flugg v. Manhattan R. Co.*, 49 N. Y. Supr. Ct. 251; s. c. aff'd, 101 N. Y. 624.

On account of the wreckage in the way the passengers were transferred, under the guidance of a brakeman, with a lantern, to another train beyond the wreck, and the plaintiff, being infirm, became nervous and exhausted, fell behind the others, stumbled and fell. A recovery was sustained. *Weld v. N. Y., L. E. & W. R. Co.*, 68 Hun, 249.

Defendant was negligent, where, with knowledge of the practice of mail clerks to throw mail bags upon platform, which might become a source of danger to its passengers in boarding trains, it failed to keep such platform sufficiently lighted to enable them, by the use of diligence, to avoid injury. *Ayres v. Delaware &c. R. Co.*, 4 App. Div. 511; s. c. aff'd, 158 N. Y. 254.

It was for the jury to say whether defendant was negligent in allowing the employes of another on its premises to obstruct a passageway to its ticket office with his legs; and whether plaintiff was negligent in allowing her attention to be diverted from the passage in front of her while getting out her money. *Lyceff v. Manhattan R. Co.*, 12 App. Div. 326; s. c., second appeal, 48 id. 624.

Defendant was negligent in continuing to sell tickets, where the platform was so crowded already that the admission of more people might

push those along the edge off, where there was no railing. *McGearty v. Manhattan R. Co.*, 15 App. Div. 2.

A passenger, who attempted to cross tracks through a gateway in a fence, used only by employes, at a station where an overhead crossing was provided, was held negligent as a matter of law. *Riester v. New York &c. R. Co.*, 16 App. Div. 216.

Plaintiff was negligent in stumbling over a hose three or four inches in diameter on the wharf in plain sight, in broad daylight, and with plenty of room. *Strutt v. Brooklyn &c. R. Co.*, 18 App. Div. 134.

Rule of *res ipsa loquitur* held not to apply, where a passenger was injured by the explosion of a heating apparatus of the kind in general use, while in the waiting room of a hotel temporarily used by a railroad company as a depot, and, in the absence of evidence of negligence, defendant was not liable. *Kirby v. Delaware &c. Canal Co.*, 20 App. Div. 413; s. c., second appeal, 48 id. 636; s. c. aff'd, 169 N. Y. 579.

Defendant was not negligent in failing to light the steps to its platform, where there were large electric lights upon the platform and within the station, whose light was obstructed by plaintiff's body as he came out of the doorway, and a shadow thereby cast upon the steps: especially where plaintiff was not a passenger or intending to become one, but came to get a meal at the station restaurant. *Hauk v. New York &c. R. Co.*, 34 App. Div. 434.

Plaintiff failed to establish defendant's negligence or his own freedom from negligence, where, in alighting from a train to a platform, which was 14 inches below the last step of the car and about six inches away from it, he felt for it with his cane and put his left leg, which was shorter than the other, upon it, and stepped into the space between the steps and the platform with his right leg and was injured. *Gabriel v. Long Island R. Co.*, 54 App. Div. 41.

Company was not liable where the rubber on a stairway had been out of order only a few minutes. *Foley v. Manhattan Elev. R. Co.*, 89 Hun. 606.

Defendant was not bound to anticipate that a passenger would so heedlessly and violently push open a swinging door as to injure another passenger. *Kiernan v. Manhattan R. Co.*, 28 Misc. 516, rev'g 27 Misc. 841.

Platforms need not be absolutely safe: carrier is only bound to use ordinary care. *St. Louis &c. R. Co. v. Barnett*, 65 Ark. 255.

Carrier held liable for failure to open and heat waiting-room. *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136.

Carrier is not bound to insure a safe exit, as, where passenger voluntarily left the train several hundred yards from the station and was run

over by another train. *Central R. v. Thompson*, 76 Ga. 770; *Raben v. Central Iowa R. Co.* 74 Iowa, 732.

A petition charging a railroad company with negligence in leaving a large splinter of wood projecting on a platform so as to catch in one's foot and cause injury, held to state a cause of action. *Wilkes v. Western &c. R. Co.*, 109 Ga. 794.

Where defendant had drawn up its car in front of a slope in a platform on which grease had been spilled, and plaintiff slipped and fell while trying to enter the car, it was held error to charge that plaintiff was "not bound to be looking to see whether he is going to tread into a hole or stumble over an obstacle when he is passing along a platform to a train." *Savannah &c. R. Co. v. Flaherty*, 110 Ga. 335.

Peremptory instructions for defendant properly refused, where plaintiff caught her dress on a coupling pin three inches above car platform, though such was the customary position of the pin and a like accident had never happened. *Illinois C. R. Co. v. O'Connell*, 160 Ill. 636; aff'g s. c., 59 Ill. App. 463.

There is no duty as such to light car vestibules or close the door thereto or light grounds not in the immediate vicinity of the station. *Ward v. Chicago &c. R. Co.*, 165 Ill. 462; rev'g s. c., 61 Ill. App. 530.

Where a platform was not obviously dangerous, and has for years proved sufficient, the continuation of its use was not negligence. Cinder platform 20 to 23 inches below car step. *Illinois C. R. Co. v. Hobbs*, 58 Ill. App. 130.

Changing a depot from one side of its tracks to the other without notice was not negligence; nor failure to light grounds where there was no station. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

Deceased approached a station without overhead or underground crossing and, while crossing defendant's tracks on the surface to take a train standing at the station, was killed by cars suddenly switched onto the track she was crossing. Defendant was held negligent. *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

It was negligence not to provide guards to handle a crowd which there was reasonable cause to anticipate. *Illinois C. R. Co. v. Treat*, 75 Ill. App. 327.

Where defendant has used ordinary care to make the approaches to its station safe, it is not liable to a licensee in the use thereof. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Where the caboose carrying plaintiff as a passenger had stopped reasonably near a station platform long enough to permit her to alight, defendant was not liable for carrying her beyond her destination. *Chicago &c. R. Co. v. Stonceipher*, 90 Ill. App. 511.



That one is intoxicated is no excuse for maintaining a dangerous stairway from defendant's platform. *Chicago &c. R. Co. v. Lawrence*, 96 Ill. App. 635.

To protect itself from liability for injuries from particular exit, carrier must prevent its use. *Chicago &c. Transfer Co. v. Schmelling*, 99 Ill. App. 577.

A passenger, who on hearing the name of his station called out, steps out in the night after the train has come to a stop, and alights in a culvert, may recover for injuries received. *Columbus &c. R. Co. v. Farrell*, 31 Ind. 408.

Platform need not be such as to enable one to get off either end of the train. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

Ordinary and reasonable care to secure safety is the rule applicable to platforms and not the highest degree of diligence. *Hiatt v. Des Moines &c. R. Co.*, 96 Iowa, 169.

A person was injured by a trunk, the accident occurring by reason of an employe's negligence and by the platform being coated with ice, and recovered. *A. T. &c. R. Co. v. Johns*, 36 Kas. 769.

Plaintiff was not negligent *per se* in going out upon a platform again, during a stop for refreshments, after he had eaten and returned to the car. *St. Louis &c. R. Co. v. Coulson*, 8 Kan. App. 4.

A platform is sufficiently lighted where it is such as to enable passengers to ascertain by the exercise of reasonable care that the platform and not the ground opposite is to be used as a means of exit. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 37 S. W. Rep. 952.

See, also, *Louisville &c. R. Co. v. Ricketts*, 93 Ky. 116.

It was held error in a charge to present the issue as to whether there was sufficient light to make a platform safe, when plaintiff was injured by getting off on the side opposite the platform and the issue raised was whether the platform was sufficiently lighted to show him which was the proper side to get off on. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939.

Railroad company was negligent in obstructing the passage from its trains to the waiting-room by a freight train, where no other way out was practicable, so that plaintiff was exposed to a storm. *Louisville &c. R. Co. v. Keller*, (Ky.) 47 S. W. Rep. 1072.

Failure to sufficiently light a platform was held not the proximate cause of injury to plaintiff who left the train while in motion. *Berry v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 699.

Plaintiff was negligent in passing dangerously near a baggage car while passing to an eating house at a meal station, where a safe and

equally convenient route had been provided. *Duverniet v. Morgan's &c. S. Co.*, 49 La. Ann. 484.

Reasonable diligence in providing a safe steamboat landing is all that is required. *Bacon v. Casco Bay &c. Co.*, 90 Me. 46.

It was held negligence to leave a dangerous hole in a dark toilet room with an open door from it leading into the waiting-room of a depot, open for the sale of tickets. *Jordan v. New York &c. R. Co.*, 165 Mass. 346; s. c., 32 L. R. A. 101.

Plaintiff was himself negligent in walking off the end of a platform, invisible on account of insufficient light. *Bradley v. Grand Trunk R. Co.*, 101 Mich. 243.

Plaintiff, coming to a depot to see a friend off, at dusk ascended the steps of a platform. During a half hour's wait it had become dark and on her return she forgot the steps, stepped off the platform and fell. The lamp at the steps was not lighted. Judgment for defendant notwithstanding a verdict. *Emery v. Chicago &c. R. Co.*, 77 Minn. 465.

A passenger who alights at a flag station and on account of extraordinary rains is obliged to step into a pool of water has no action for injuries resulting from wetting her feet. *Alabama &c. R. Co. v. Stacy*, 68 Miss. 463.

Conductor had promised to transfer passenger from one train to another, at a safe place, but, instead, stopped the train near a deep waterway into which passenger fell: recovery was allowed. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 160.

It was negligent as a matter of law to leave unguarded and unlighted for four days in a station platform four feet above the ground, a hole six feet long and eight inches wide. *Fullerton v. Fordyce*, 144 Mo. 519.

Invitation by company's employes charges it with greater responsibility. *Chance v. St. Louis &c. R. Co.*, 10 Mo. App. 351.

One making his way back to the station, after alighting from train, fell into a cattle guard and recovered. *Winkler v. St. Louis &c. R. Co.*, 21 Mo. App. 99. See *Lewis v. Flint &c. R. Co.*, 54 Mich. 58.

A railroad's duty as to station platform requires only the exercise of ordinary care to keep it in a reasonably safe condition. *Robertson v. Wabash R. Co.*, 152 Mo. 382.

Inclination of  $\frac{1}{2}$  inch to a foot from platform to "crossover," held not negligent construction. *Newcomb v. New York &c. R. Co.*, (Mo.) 69 S. W. Rep. 348.

Defendant was negligent, where, notwithstanding plaintiff's negligence in placing himself in a dangerous position on a platform, by the exercise of reasonable care it could have discovered his danger in time to have avoided injury. *Zumwalt v. Kansas City &c. Air Line*, 71 Mo. App. 670.

Defendant was negligent, where the train was not drawn up to its platform and the gate of the car was opened for plaintiff to get out upon the ground. *Talbot v. Chicago &c. R. Co.*, 72 Mo. App. 291.

Knowledge that an approach to a platform was constructed on a steep incline did not make plaintiff negligent in using it. *Union P. R. Co. v. Evans*, 52 Neb. 50.

Failure to open a station as a waiting room, as required by statute, imposes liability for damages resulting therefrom. *Boothby v. Grand Trunk R. Co.*, 66 N. H. 342.

That there was another safe way did not make it negligent for plaintiff to use a customary passage between a ticket office and a baggage room which is apparently safe; defendant was negligent where it knew or should have known of the danger and failed to remedy it. *Exton v. Central R. Co.*, 62 N. J. L. 7; s. c. aff'd, 63 id. 356.

Where a safe exit has been provided a railroad is not liable for passage at any other place, which it has not invited a passenger to use. *Abbott v. Delaware &c. R. Co.*, 65 N. J. L. 310.

Failure to light and guard a freight platform did not relieve plaintiff of consequences of his negligence in using it, without knowing whether it was safe or not. *Railroad Co. v. Aller*, 56 Oh. St. 754.

Failure to light a walk over a street temporarily erected for the use of passengers during a fresher was not negligence *per se*. *Finseth v. Suburban R. Co.*, 32 Or. 1; s. c., 39 L. R. A. 517.

The presence of a step on depot platform, upon which plaintiff fell, was not in itself proof of negligence in the company. *Graham v. Penn. R. Co.*, 139 Pa. St. 149.

Plaintiff, while standing on a platform, was struck by the body of a woman hurled against him by a passing train, while she was negligently on an adjacent crossing. He was not allowed to recover. *Wood v. Pennsylvania R. Co.*, 177 Pa. St. 306; s. c., 35 L. R. A. 199.

That the track was 20 inches below the level of the platform did not permit recovery, where plaintiff jumped off the second step of the car. *Kurfess v. Harris*, 195 Pa. St. 385.

The duty as to reasonable safety extends throughout the grounds leading to the station. Defendant held liable for leaving cut, made in process of grading, at the edge of its grounds without light or guard. *Izlar v. Manchester &c. R. Co.*, 57 S. C. 322.

A railroad company cannot avoid a statutory duty to light a platform by contracting with another to do it. *Texas &c. R. Co. v. Reich*, (Tex. Civ. App.) 32 S. W. Rep. 817.

Railway held liable for injuries received by falling in an unguarded

hole in the floor of a station closed. *Texas &c. R. Co. v. Neal*, (Tex. Civ. App.) 33 S. W. Rep. 693.

The lighting of the platform must be sufficient to enable persons to board or alight from trains in safety. *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

Refusal to charge that plaintiff could not recover for failure to open, warm and light a station, where he would not have used it if it had been, was held error. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 41 S. W. Rep. 499.

Failure to sell tickets at a station is no evidence of abandonment, where they are sold to it and trains stop there. *Gulf &c. R. Co. v. Williams*, 21 Tex. Civ. App. 466.

Only reasonable care is required as to the keeping of a station platform in a condition of safety. *Trinity &c. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690.

Carrier was not liable for injury to plaintiff on a dark night by falling through a hole in a part of the platform known to him to be reserved exclusively for freight. *Houston &c. R. Co. v. Grubbs*, (Tex. Civ. App.) 67 S. W. Rep. 519.

Carrier was not obliged to keep a place 130 feet from its station, to which passengers have no occasion to go, lighted and in a safe condition. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 733.

Defendant was bound to use extraordinary care to prevent passengers from alighting upon a narrow platform between two tracks so constructed as to be dangerous to passengers. *Illinois C. R. Co. v. Davidson*, 76 Fed. Rep. 517.

Defendant was held liable to an owner of baggage, permitted or invited to enter a baggage room to point out baggage wanted, for injuries from a defective door. *Illinois C. R. Co. v. Griffin*, 80 Fed. Rep. 278.

It was negligence *per se* to use, deliberately and in spite of warning, a wet and dangerous slippery entrance to a steamer, where a safe gang-plank is provided. *Plant Invest. Co. v. Cook*, 85 Fed. Rep. 611.

It was negligence *per se* to go to the edge of an unlighted platform on a dark rainy night to sit down, assuming that it is level with the ground. *Missouri &c. R. Co. v. Turley*, 85 Fed. Rep. 369; rev'g s. c., (In. Terr. App.) 37 S. W. Rep. 52.

Failure to take steps to prevent the practice of throwing mail bags upon a platform from a moving train, is negligence, provided the company has notice, express or implied, of the practice. *Southern R. Co. v. Rhodes*, 86 Fed. Rep. 122.

The duty towards those who come upon a platform to deliver parcels to passengers, as to its safety, is no greater than that of a municipality as to its sidewalks. *Clark v. Howard*, 88 Fed. Rep. 199.

Whether a railroad company has performed the duty it owes the public about its grounds in a given case is a question for the jury; it is not necessarily limited by the company's rules. *New England R. Co. v. Hyde*, 101 Fed. Rep. 401.

Where a woman in the night-time and while the lamp on the platform was being trimmed, walked out upon the platform and fell off, no recovery was allowed. *Reed v. Artell*, 84 Va. 231.

A railroad company is responsible to one who was injured by reason of its failure to provide a safe approach to its mail car where it was shown to be a custom for people to deposit mail on the train. *Hale v. Grand Trunk R.*, 60 Vt. 605.

Negligence in approaching an unlighted platform was for the jury. *Sullivan v. Delaware &c. Canal Co.*, (Vt.) 47 Atl. Rep. 1084.

Passenger may assume platform of station is safe. She is not required to go beyond ordinary care in looking out for dangers. Not negligent in stepping backward on platform while assisting children to get on. *Barker v. Ohio River R. Co.*, (W. Va.) 41 S. E. Rep. 148.

It is negligence *per se* to leave a hole unguarded where it is likely passengers will fall into it. *Green v. Penn. R. Co.*, 36 Fed. Rep. 66.

Plaintiff was a passenger and entitled to recover for injuries received by the falling of a lantern on defendant's boat, if his purpose was to take passage, although he did not prepay his fare, nor purchase a ticket. *Mellquist v. The Wasco*, 53 Fed. Rep. 546.

A passenger has a right to rely upon directions of a conductor as to the best way of getting on train. *Irish v. Northern Pac. R. Co.*, 4 Wash. 48.

It was negligence in a passenger to leave a platform at a safe distance away and go within dangerous proximity to a burning oil tank. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

The fact that there was no station platform and plaintiff injured her knee in alighting from defendant's train did not make the company liable, it being shown that her knee had been weak before. *McGinney v. Canadian Pac. R. Co.*, 7 Manitoba L. R. 151.

Railroad companies are bound to furnish lights, and other facilities for passengers on depot platforms. *Peniston v. Chicago &c. R. Co.*, 31 La. Ann. 777; *Quaife v. C. & N. W. R. Co.*, 48 Wis. 513; *Beard v. Connecticut &c. R. Co.*, 48 Vt. 101; *Stewart v. International &c. R. Co.*, 53 Tex. 289; *Nicholson v. Lancashire &c. R. Co.*, 3 Hurls. & Colt. (Exch.) 534; *Buenemann v. St. Paul &c. R. Co.*, 32 Minn. 390; *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124.

Railroad companies must provide means for safe egress. *Stewart v. I. & G. &c. R. Co.*, 53 Tex. 289; *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124; *Patten v. Chicago &c. R. Co.*, 32 Wis. 533; *Imhoff v. Chi-*

cago &c., 20 id. 364; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 211; *Columbus &c. R. Co. v. Farrell*, 31 Ind. 408; *Jeffersonville &c. R. Co. v. Parmelee*, 51 id. 42; *St. Louis &c. R. Co. v. Cantrell*, 31 Ark. 519; *Ensley R. Co. v. Chewaing*, 93 Ala. 242; *Stokes v. Suffolk &c. R. Co.*, 107 N. C. 178; *East Tenn. &c. R. Co. v. Watson*, 98 Ala. 634.

(a). INJURIES FROM OPENINGS BETWEEN PLATFORM AND CARS.

The plaintiff, about to enter the defendant's car from the depot platform, was preceded by a lady whose dress covered the space between the platform of the station and the platform of the car, and plaintiff stepped without looking; her foot passed through the space and she was injured. The fact that similar accidents had happened at other stations was properly received and was sufficient to call the attention of the defendant to the danger of such a condition, yet, as there must be some space between the cars and the platform, the fact that other accidents had happened would not render the defendant negligent, for the passenger, by the use of reasonable care in boarding cars, could have avoided the accident. She was familiar with the station and took no pains to avoid the opening and she was guilty of contributory negligence. *Hanrahan v. M. R. Co.*, 53 Hun. 420, setting aside verdict for the plaintiff; *aff'd*, 130 N. Y. 658.

The plaintiff stood on the platform, not connected with the depot but used to take certain trains; a train not stopping at the platform, and the sides of whose cars protruded over the platform from three to five inches, hit and hurt the plaintiff. He was not obliged to guard against the improper construction of the defendant's cars and his own negligence was for the jury. *Dobieck v. Sharp*, 88 N. Y. 203; distinguishing *Rigg v. M. S. &c. R. Co.*, (Part 1,  $\frac{1}{2}$  2 Jurist, N. S.) 525; *Watkins v. Great Western R. Co.*, 31 L. T. (N. S.) 193.

A passenger fell between the car and the station, where there was a space of eleven inches. The plaintiff did not take hold of the rail of the car, nor pay attention to the station platform. Such platform had been in use for many years without accident. Where a structure has proven adequate for many years it may be continued.

On the evening when this accident happened, the evidence tends to show that it was dark, that the platform was not plainly visible. It was somewhat lighted by light, which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing, until her foot touched the platform, and

then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car. *Lafflin v. B. & S. W. R. Co.*, 106 N. Y. 136, rev'g judg't for pl'ff.

If, on account of a curve of the track at the terminal station, a space, several feet long, between the platform of the car and the platform of station is necessary, a plank or some device to make it safe should be used or the passengers should be warned or assisted or at least the place should be well lighted.

While some light came through the car windows, it did not reach the hole, which was in the shadow of the end and lower part of the cars.

If plaintiff had known of the hole, or if it had been light enough for her to see by the exercise of ordinary care, a different question would have been presented. Under the circumstances, which she had the right to assume, existed, she was under no obligation, as matter of law, to look before she put her foot down, but it was a question of fact for the jury to decide, not only, whether she should have been more vigilant, but, also, whether, if she had looked, she could have seen the hole in the surrounding darkness. *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; affirming 22 J. & S. 286, and judg't for pl'ff; as to lighting such places see *Fox v. Mayor*, 70 Hun, 181.

A station was located on a curve convex toward the track, causing an inevitable opening of from five to seven and three-quarter inches (plaintiff and her witnesses so guessed) between the station and the ends of the car. The fact of its existence was not evidence of negligence.

But, if the necessary opening is so wide at a given station, as to exceed the ordinary natural step of a passenger, it may become a source of danger and require further precaution on the part of the company. *Ryan v. Manhattan R. Co.*, 121 N. Y. 126, rev'g judg't for pl'ff, distinguishing, *Boyce v. Manhattan R. Co.*, 118 N. Y. 314, as in that case, no negligence was imputed to the company for the existence of the opening, but for leaving it unguarded and unlighted.

**From opinion.**—"In her testimony she (plaintiff) estimated by the eye that the width of the opening was fourteen to fifteen inches. *She did not* notice the opening at all, until just as she was lifted out of it, and was looking straight at the car and not at the opening when she stepped in. This was contrary to her habit and without any apparent reason. No one else stepped into the opening. The other passengers seem to have found no difficulty and encountered no risk. She alone, paying no attention to her steps, went blindly into the opening. If she had exercised even ordinary care there is no reason to suppose that her safety would have been endangered."

A platform of a station was on a curve whereby the ends of the car were, by plaintiff's statement, eighteen to twenty inches from the platform, and the center of the car from four to seven inches therefrom, and

by the defendant's statement the ends of the car were eleven and one-half inches and the center one inch therefrom. The plaintiff usually got off at the center of the car, but on this occasion alighted at the end of the car and fell into the opening. The evidence was conflicting as to whether the station was dark or brilliantly illuminated. Under the same conditions a large number of persons had boarded and alighted from the cars without similar accident. There was no evidence that appliances for covering such openings were in general use. A recovery was reversed on the ground that the question of negligence depended wholly upon the proper lighting of the place and not upon the existence of the space. The plaintiff's claim that she was jostled by other passengers did not enlarge the defendant's liability. *Fox v. Mayor*, 70 Hun. 181.

Where defendant's platform was so constructed as to leave a space between its edge and the edge of its car platform of from 8½ to 12 inches, which passengers in a crowd could not see, though the platform was well lighted, it owed its passengers the duty of warning them of the danger, though a general one was sufficient and specific warning to each was not called for. *Langin v. New York &c. Bridge*, 10 App. Div. 529.

Defendant was not liable to a passenger, who, on alighting from a car, the last step of which was 14 inches above the platform, catches his foot in a space six inches wide between the car and the platform. *Gabriel v. Long Island R. Co.*, 54 App. Div. 41.

Negligence in leaving space of 26 inches between cars and station guardrail was for the jury. *Barth v. Kansas City &c. R. Co.*, 142 Mo. 535.

### (b). SNOW AND ICE.

It is the duty of a railway company to remove snow and ice from the station platform, or protect the passengers by covering it with ashes, &c. It is no excuse that servants appointed to do this neglected their duty. A passenger may assume that the platform is safe. The charge "that the defendant was not bound to keep its platform in such condition, that it would have been impossible for any passenger to slip, but in such condition that a person, using the ordinary care which people use, when not apprised of danger, would not slip" is correct. The degree of care imposed upon the defendant in respect to passengers is quite different from that imposed upon one, who simply permits the public, by bare license to go upon his premises. *Weston v. N. Y. Elevated R. Co.*, 73 N. Y. 595. aff'g judg't for pl'ff.

A snow storm ended at 4 A. M. and the accident occurred at 5:30 A. M. There was a covered stairway with a projecting roof, a hand rail and rubber on the stairs. The plaintiff, "B's" intestate, slipped and was killed.



The defendant was only bound to use ordinary care and was not liable; it could not properly be charged with negligence for a failure to throw on the steps ashes, sawdust, or something of that character during the storm, or between the time of its stopping and the happening of the accident; and that, therefore, the motion for nonsuit should have been granted. In the approaches to the cars, such as platforms, halls, stairways and the like, a less degree of care is required than in the actual operation of trains, and for the reason, that the consequences of a neglect of the highest skill and care, which human foresight can attain to are naturally of a much less serious nature. The rule, in such cases, is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, rev'g judg't for pl'ff.

Plaintiff slipped on icy and steep gangplank of defendant's boat, which he was crossing to take passage: defendant's employé seized him while falling and pulled him so violently on the deck, that he fell and broke his leg. Employé acted within the scope of his employment. *Simonin v. N. Y., L. E. & W. R. Co.*, 36 Hun, 214, aff'g judg't for pl'ff.

Plaintiff's wife fell on steps of defendant's station; snow the day before. The day of the accident, it had thawed in the middle of the day, and the dripping from the roof falling on the stairs froze during the night and became slippery; no ashes or sand were sprinkled on the steps, although some was sprinkled on the platform. Question of reasonable care was for the jury. *Ainley v. M. R. Co.*, 47 Hun, 206, aff'g judg't for pl'ff.

Passenger slipped on station platform, while alighting from the defendant's cars. There had been snow the day before. Day of accident there was snow and sleet and hard wind, and the platform was slippery; no sand or ashes on platform. For jury. A different rule is applicable to the portion of the platform where passengers must alight from that relating to parts of platform, that passengers had option to use or not. *Timpson v. Manhattan R. Co.*, 52 Hun, 189, aff'g judg't for pl'ff.

No recovery was allowed where plaintiff, while going down a flight of steps slippery from a fall of snow, slipped on a step slightly worn from use, in the absence of evidence to show how long the snow had been allowed to remain or that the worn condition of the step contributed to the accident. *Rusk v. Manhattan R. Co.*, 16 App. Div. 100.

Permitting ice to accumulate on a platform from dripping eaves without an effort to remove it is negligence; but it is contributory negligence, knowing of its existence, to step back upon it without looking. *Waterbury v. Chicago &c. R. Co.*, 104 Iowa, 32.

Plaintiff was not negligent in assuming that a car was at the platform

when snow so covered a ditch as not to indicate the contrary. *Chesapeake &c. R. Co. v. Friel*, (Ky.) 39 S. W. Rep. 704.

Failure to warn passenger, alighting at a place beyond the station on invitation of brakeman, of the slippery condition of a rail of a side track covered by snow, was negligence. *Mensing v. Michigan C. R. Co.*, 117 Mich. 606.

Where the accumulation of ice was upon steps at the end of the platform obviously designed for the use of employes only, plaintiff could not recover. *De Blois v. Great Northern R. Co.*, 71 Minn. 45.

Where one or more safe and convenient planked crossings had been provided for access to trains over intervening tracks, a company was not liable for accident caused by stepping on a rail in crossing in the snow elsewhere. *Cincinnati &c. R. Co. v. Waguer*, 15 Oh. C. C. 395.

Knowledge that a sloping platform was slippery with an accumulation of ice and snow did not make it negligent *per se* to use it, though steps were provided. *Rathgebe v. Pennsylvania R. Co.*, 179 Pa. St. 31.

Failure to light platforms to enable passengers to alight in safety is negligence. *Texas &c. R. Co. v. Lee*, 21 Tex. Civ. App. 174.

Mere slipperiness, caused by the elements, did not permit recovery by one going upon the platform to deliver parcels to a passenger. *Clark v. Howard*, 88 Fed. Rep. 199.

### (c). SNOW AND ICE—PLATFORM OF CAR.

A thin covering of snow on platform of a car, and some slight spots of ice, along the edges of the platform, were gathered during the trip. It had snowed during the night, and the weather was cold. The platform was well constructed with the proper steps and rail.

The plaintiff fell from the platform and was hurt. It was held that the defendant was not obliged to remove snow that had fallen through the night, or sand the platform at once. The rule holding railroad corporations to the use of the utmost care in discovering defects has regard only to such appliances as will be likely to occasion great danger if the defects exist therein.

It appeared, that the plaintiff was aware of the condition of the platform, having passed over it two or three times, previous to the accident, and slipped thereon. It was held, that if the defendant were negligent, the plaintiff was negligent also. *Polmer v. Pennsylvania R. Co.*, 111 N. Y. 488, rev'g judg't for pl'ff.

From opinion.—“The rule laid down by the trial court in *Weston v. New York Elevated Railroad Company*, as approved in 73 New York, 595, in reference to a permanent platform at an elevated railroad station in the city of New York, was that ‘the defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a con-

dition that a person using ordinary care, which people use when not apprised of danger, would not slip.' This was applied in a case where the snow had fallen long before the accident, and an effort had been made by the railroad company to remove it, but it had imperfectly performed that duty. We think even such a rule is not applicable to the removal of snow and ice on cars attached to a railroad train in course of transit, traveling in the night, during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes, in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers.

We are not referred to any case laying down the precise degree of care and diligence required of such corporations under such circumstances, but we think it must be somewhat analogous to that imposed upon municipal corporations, in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred; but they are not to be deemed negligent if they do not remove all traces of such obstructions, when they do not constitute something more than the presence of a danger, arising alone from their inherent quality of being slippery. *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 id. 570; *Kaveny v. City of Troy*, id. 572."

The duty as to the safety of platforms does not extend to the front end of an express car. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Negligence is not proven where there is a rain and snow storm and it does not appear how long the steps have been slippery. *Pittsburg &c. R. Co. v. Aldridge*, 27 Ind. App. 498.

Failure to remove snow on a step likely to cause one to slip was negligence; a warning given as she fell was ineffectual to charge plaintiff with contributory negligence. *Gilman v. Boston &c. R. Co.*, 168 Mass. 454.

The degree of care as to keeping platform and steps of cars free from ice, is the utmost care in view of the natural conditions met with. *Herbert v. St. Paul &c. R. Co.*, 85 Minn. 341.

## VI. Entering and Leaving Vehicles.

### (a). WHERE PASSENGER MAY DO SO.

The carrier should provide stations at which passengers may enter and leave cars, and should use reasonable and ordinary care to make the same safe, and a passenger should only use the places so appropriated and prepared by the carrier. However, the direction or invitation of the carrier's agent, the necessities of the occasion, or the custom of the carrier, or other circumstances may justify such entry or alighting at other places. The passenger should use the reasonable care that a man of ordinary prudence would observe under the circumstances.

Unless permitted to do so, by the custom of the company, a passenger may only enter or leave a train, at the station, provided by the company.

But when the company has been in the habit of receiving and discharging passengers at other places, it is not negligence for passengers to get on or off, at those places, while the train is standing still, and there is no apparent danger in so doing. *Keating v. N. Y. C. & H. R. Co.*, 49 N. Y. 673; aff'g 3 Lansing, 469, judg't for pl'ff.

It was for the jury to say whether plaintiff was negligent, upon the announcement of the arrival of his train by a doorman, in rushing out of a station with other passengers and across a track to a platform preparatory to boarding the train there without looking or listening for other trains. *Beecher v. Long Island R. Co.*, 161 N. Y. 222; aff'g s. c., 35 App. Div. 292.

The plaintiff purchased an excursion ticket issued in the name of the defendant from Norwood to Jersey City and return. Returning, she went beyond Norwood to Sparkill with the intention of returning to Norwood by another train. She attempted to take such train while standing at a place, not a station, and was injured by the starting of the train. Held, that at time of taking the train at Sparkill she held no contractual relation to the defendant and could not recover, and that under the circumstances stated, where a person attempts to take a train with no conductor or brakeman in sight, the defendant is not liable for the consequences. *Phillips v. N. R. Co. of N. J.*, 62 Hun, 233, aff'g judg't for def't.

See *Hulburt v. N. Y. C. R. Co.*, 40 N. Y. 145.

A railway company is bound to provide a reasonably safe place at which its passengers may leave its cars, and to have its train stop long enough to permit a diligent passenger to do so.

A passenger leaving the cars of a railway company is bound to use caution, and the question of contributory negligence should be submitted to a jury to determine. *Onderdonk v. The New York and Sea Beach Railway Company*, 14 Hun, 42; s. c., aff'd, 148 N. Y. 756.

Where a car is in its accustomed position at the platform of a railroad station, open and apparently ready to receive passengers, it is an invitation to persons desiring to take the train to enter the car. *Daley v. The Port Jervis, Monticello and New York Railroad Company*, 80 Hun, 111.

As to its stations, a railroad is bound only to provide a reasonably safe place and to guard against accidents reasonably to be apprehended by prudent men. *Kirby v. Delaware &c. Canal Co.*, 20 App. Div. 473; second appeal, 48 id. 636; s. c., aff'd, 169 N. Y. 575.

It was for the jury to say whether defendant, who had carried plaintiff past her station, was negligent in stopping at a place, where there was a steep embankment, for the purpose of allowing her to alight and whether

she was negligent in alighting there and sliding down such embankment. *Minor v. Lehigh Valley R. Co.*, 21 App. Div. 397.

See, also, *Flack v. Nassau &c. R. Co.*, 41 App. Div. 399.

Where defendant had been accustomed to allow passengers to board its freight trains while standing some distance away from stations; it was for the jury to say whether plaintiff was negligent in backing its engine up to such a train so as to injure one who was in the act of entering at such a place and whether plaintiff was negligent in attempting to board under such circumstances. *Jones v. New York &c. R. Co.*, 46 App. Div. 470.

When chains, used to keep passengers from boarding a particular side of a car platform are down, this constitutes an invitation to enter on that side. *Gaffney v. Brooklyn City R. Co.*, 6 Misc. (N. Y.) 1; s. c. aff'd, 148 N. Y. 725.

It is negligence *per se* for a passenger, on leaving a train, to crawl between cars. *Memphis &c. R. Co. v. Copeland*, 61 Ala. 376.

*Smith v. Chicago &c. R. Co.*, 55 Iowa, 33; *Baltimore &c. R. Co. v. State*, 63 Md. 135.

Stoppage of a train, after name of station is called, is reasonable ground upon which to suppose that the stoppage is for the purpose of allowing passengers to alight; but if it occur in a deep cut two hundred yards from the platform no recovery will be allowed one who is injured while alighting. *Smith v. Georgia &c. R. Co.*, 88 Ala. 538.

Where plaintiff has been induced to board by carrier's immediate invitation, it is not sufficient to hold the train a reasonable time for her to do so; but it must be held till she has actually done so, though her attempt to board was unknown to the conductor. *Alabama Midland R. Co. v. Horn*, (Ala.) 31 South Rep. 481.

Carrier was liable for stopping car for plaintiff to alight in the dark at a place where it had left a pile of lumber in the street during repairs on a bridge. *Montgomery Street R. Co. v. Mason*, (Ala.) 32 South Rep. 261.

A statute, imposing upon railroads the duty to carry passengers on local freight trains to and from all stations, requires carriage to some point within the station yards not unreasonably distant from its platform. *St. Louis &c. R. Co. v. Neal*, 66 Ark. 513.

Passenger may rely on directions of a conductor as to getting off, though addressed to the passengers in general, where she does as they, in the exercise of reasonable prudence, might have done. *St. Louis &c. R. Co. v. Baker*, 67 Ark. 531.

Where station is announced, carrier must warn passengers that a stop before it reaches the station is not the station; especially where the ap-

pearances of the place are deceptive. *St. Louis &c. R. Co. v. Farr*, (Ark.) 68 S. W. Rep. 243.

Getting on a platform car surrounded by a railing on the side opposite the depot by putting a foot on the bumper, when proper facilities and opportunity to board are furnished on the depot side, is negligence. *Wardlow v. California R. Co.*, (Cal.) 42 Pac. Rep. 1075.

Crossing a track from a depot to board a train on a farther track, without looking to see if other trains are approaching, on the one crossed, held negligence *per se*. *Warner v. Baltimore &c. R. Co.*, 7 App. D. C. 79.

Failure to assist one in alighting was not negligent in the absence of knowledge of his infirmity. *Daniels v. Western &c. R. Co.*, 96 Ga. 786.

The flagman at a flag station was acting within the scope of his employment in attempting to assist a passenger on, where the car stopped at a place so low that she could not get on without it. *Western &c. R. Co. v. Voiles*, 98 Ga. 446; s. c., 35 L. R. A. 655.

Passenger was not negligent *per se* in leaving a street car on the side adjoining the next track without looking for a car thereon. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

Voluntary promise of assistance in alighting, does not require a conductor to go inside to the seat, in the absence of knowledge of facts requiring it. *Western &c. R. Co. v. Earwood*, 104 Ga. 127.

Leaving the caboose of a freight train open and at a place where people had been in the habit of boarding it, constitutes an invitation by the company to enter the same. *Illinois Cent. R. Co. v. Axley*, 47 Ill. App. 307.

But passenger before attempting to get off, should know that the stoppage is for that purpose, or make his intention to get off known. *Chicago &c. R. Co. v. Mills*, 91 Ill. 39.

*Davis v. Oregon &c. R. Co.*, 8 Ore. 172; *Stiles v. Atlanta &c. R. Co.*, 65 Ga. 370; *Frost v. Grand Trunk &c. R. Co.*, 10 Allen, (Mass.) 387.

But where this is done by invitation of the conductor, the question of contributory negligence is for the jury. *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162.

Conduct of employes, inducing one to alight at an unsafe place, is negligence. *Ward v. Chicago &c. R. Co.*, 165 Ill. 462; rev'g s. c., 61 Ill. App. 530.

Where a car stops, though at the nearest crosswalk instead of the furthest as required by ordinance, one may assume that it was done to enable her to alight. *West Chicago Street R. Co. v. Manning*, 170 Ill. 417; aff'g s. c., 70 Ill. App. 239.

Where a train stopped regularly before going over a crossing to receive passengers, it was for the jury to say whether the company had

induced the public to believe that they were invited to board there. *Chicago &c. R. Co. v. Doan*, 195 Ill. 168; aff'g s. c., 93 Ill. App. 247.

Freight train need not proceed to station platforms for passenger's accommodation before it does the necessary switching. *Cleveland &c. R. Co. v. Maxwell*, 59 Ill. App. 673.

It was not negligence to pile gravel along the track in a place where there was no reason to suppose anyone would get off. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

Leaving at the rear entrance, where the brakeman and conductor are at the front is not negligence *per se*. *Pierce v. Gray*, 63 Ill. App. 158.

Passenger is entitled to rely on conductor's advice as to when and where to alight. *Chicago &c. R. Co. v. Winters*, 65 Ill. App. 435.

A passenger was not justified in refusing to alight from caboose of a freight train because it was not drawn up to the platform. *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

It is not *per se* negligence to board a passenger train at a point other than the depot platform. *Stoner v. Penn. R. Co.*, 98 Ind. 384.

Plaintiff was warranted in attempting to step from the ground to car, a distance of 3 feet, relying on assistance of employé promised her. *Illinois C. R. Co. v. Check*, 152 Ind. 663.

Where a train does not stop before the platform designed for the reception and discharge of passengers there is no implied invitation to board it. *Cleveland &c. R. Co. v. Wade*, 18 Ind. App. 346.

Brakeman was acting within the scope of his authority in assisting a passenger to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

It was held negligence for plaintiff to walk in the dark within three feet of the train he had just left, knowing it will soon move on. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939.

Where plaintiff, instead of requiring that the train back to the platform, chose to alight where it stopped, she took the risk of the attending dangers. *Louisville &c. R. Co. v. Keith*, (Ky.) 58 S. W. Rep. 168.

The jury should decide the question of a railroad company's negligence, in failing to notify a passenger, about to alight from the wrong side of the train, that his act was dangerous. *McKimble v. Boston &c. R. Co.*, 139 Mass. 542.

See, also, *McLean v. Burbank*, 11 Minn. 277; *Maury v. Talmadge*, 2 McLean, (U. S.) 157; *Laing v. Colder*, 8 Pa. St. 479; *Stokes v. Saltonstail*, 13 Peters (U. S.) 192; *Montgomery &c. R. Co. v. Boring*, 51 Ga. 582; *Penn. R. Co. v. White*, 88 Pa. St. 327.

One is not justified in alighting from a train without using one's senses to see if the station is reached, relying solely on the announcement of the

station by the guard followed by the stopping of the train. *Barry v. Boston &c. R. Co.*, 172 Mass. 109.

Where the street was fairly level and plaintiff in good health, it was not negligence to permit her to alight slightly beyond the crossing. Plaintiff stepped on a rolling stone between the car and side walk and fractured her ankle. *Conway v. Lewiston &c. R. Co.*, 90 Me. 199.

There is no rule of law that passengers shall get off the front platform of cars; therefore, it is not negligence for a woman to alight from a rear platform and if she is injured by reason of the company's failure to provide facilities, she may recover for her injuries. *Cartwright v. Chicago &c. R. Co.*, 52 Mich. 606.

Citing Penn. R. Co. v. White, 88 Pa. St. 327; Baltimore &c. R. Co. v. State, 60 Md. 449; Cockle v. London &c. R. Co., 27 L. T. R. (Eng.) 320; Nicholson v. Lancashire &c. R. Co., 3 H. & C. 534; Foy v. London &c. R. Co., 18 C. B. (N. S.) 225.

Negligence to permit passenger to alight at unfamiliar place 250 feet from station without warning. *Kral v. Burlington &c. R. Co.*, 71 Minn. 422.

Negligence in getting off when the car stopped at a crossing instead of waiting till it reached the station was for the jury. *Larson v. Minneapolis &c. R. Co.*, 85 Minn. 387.

See, also, Schilling v. Winona &c. R. Co., 66 Minn. 252.

One may assume on the stopping of the train after a reasonable time from the announcement of the station, in the absence of knowledge to the contrary, that the train is there. *Hooks v. Alabama &c. R. Co.*, 73 Miss. 145; Talbot v. Chicago &c. R. Co., 72 Mo. App. 291.

A passenger who was told that a car was not ready to be used, and going out upon the platform of the car alighted, and while standing near it was injured, did not recover. *Henry v. St. Louis &c. R. Co.*, 76 Mo. 288.

Carrier is under no duty to assist passenger in leaving train unless he is sick or infirm to its knowledge. *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152.

Getting off, as the train is on a bridge, in spite of warnings not to do so, is criminal negligence preventing recovery within a statute making carrier liable for injuries unless caused by criminal negligence of plaintiff. *Chicago &c. R. Co. v. Hague*, 48 Neb. 97.

Inviting one to alight in the dark, where step is 26 inches from the ground, was negligent. *Delaware &c. R. Co. v. Perret*, 60 N. J. L. 589.

One who alights on invitation of conductor has the right to rely upon his judgment and is not negligent if he does so rely. *Lambeth v. North Car. &c. R. Co.*, 66 N. C. 499.



St. Louis &c. R. Co. v. Cantrell, 37 Ark. 519; Stewart v. I. & G. &c. R. Co., 53 Tex. 289; see, however, Chicago &c. R. Co. v. Hazzard, 26 Ill. 373; Georgia R. Co. v. McCurdy, 45 Ga. 288.

One who was injured while attempting to get a seat before the train was lighted or ready for occupants, cannot recover. *Hodges v. Transit Co.*, 107 N. C. 576.

A regulation requiring passengers for a car on freight train to mount the same at a place other than the station platform, is reasonable providing safe means of approach are afforded. *Browne v. Raleigh &c. C. Co.*, 108 N. C. 34.

Where the station has been twice announced, and the door open, a passenger was justified in relying on the porter's exclamation "all right." *Hodges v. Southern R. Co.*, 120 N. C. 555.

That one regards the place as dangerous, did not make it negligent *per se* for him to alight at the direction of the conductor. *Hinshaw v. Raleigh &c. R. Co.*, 118 N. C. 1047.

One may assume, in the absence of knowledge to the contrary, that a train has reached the station, when it stops after the announcement of the station. *Pittsburg &c. R. Co. v. Martin*, 3 Oh. Dec. 493.

A shipper in the caboose of a freight train was held negligent in relying on the statement of one having nothing to do with the running of the train, that it has reached its destination, especially when there were no station lights in sight. *Blevins v. Atchison &c. R. Co.*, 3 Okla. 512.

Where plaintiff testified that train stopped 15 seconds and started again before she could get off, she was not, as matter of law, negligent in not alighting within that time. *Smitson v. Southern P. Co.*, 37 Or. 74.

Where a passenger walked out in his sleep, stepped off the unguarded end of a car, and was injured, it was held that his negligence precluded recovery, notwithstanding the company was negligent. *Railroad Co. v. Aspell*, 23 Pa. St. 147.

Passenger was negligent in leaving the station by a space planked across the track for the use of employes instead of by the overhead crossing provided for passengers; especially where the train that struck him was going at moderate speed and could have been seen when 60 feet away. *Flanagan v. Philadelphia &c. R. Co.*, 181 Pa. St. 237.

It was not negligent to get on at the front end of a car where facilities were provided at both ends. *Peterson v. Delaware &c. R. Co.*, 9 Kulp. 552.

Plaintiff was not negligent *per se* in jumping  $2\frac{1}{2}$  feet to the ground, upon the conductor's announcement "all off for ——" where no other

facilities for alighting were furnished. *Brodie v. Carolina &c. R. Co.*, 46 S. C. 203.

Where defendant failed to assist a woman with heavy bundles, her husband has a right to enter the train to render the service, and defendant, having notice of his intention, is bound to stop to let him off, where he was an old man and had not had an opportunity to leave after giving the required assistance. *Johnson v. Southern R. Co.*, 53 S. C. 203.

The recovery of a penalty for violation of a statutory duty to announce a station, being a *qui tam* action, does not cover injuries from alighting. *Louisville &c. R. Co. v. Collier*, 104 Tenn. 189.

It is not negligence *per se* for a passenger to alight from a train when he had reason to suppose that the stop was made for the purpose of discharging passengers. *Texas &c. R. Co. v. Garcia*, 62 Tex. 285.

*Southern R. Co. v. Kendrick*, 40 Miss. 384; *C. & I. &c. R. Co. v. Farrell*, 31 Ind. 408; *Cockle v. South Eastern &c. R. Co.*, 27 L. T. R. (Eng.) 320; *Robson v. North Eastern R. Co.*, L. R. 10 Q. B. 271; *Curtis v. Detroit &c. R. Co.*, 27 Wis. 158; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441; *Terre Haute &c. R. Co. v. Buck*, 96 id. 346; *Philadelphia &c. R. Co. v. McCormick*, 124 Pa. St. 427.

Plaintiff was not negligent in jumping obliquely, to avoid a ditch in alighting, with valises in each hand, upon the conductor's announcement, "all aboard," others having done so in safety. *Texas &c. R. Co. v. McLane*, (Tex. Civ. App.) 32 S. W. Rep. 776.

A conductor is not authorized to bind the company by an agreement to assist one from the train. *St. Louis &c. R. Co. v. McCullough*, (Tex. Civ. App.) 33 S. W. Rep. 285.

See, also, *International &c. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663.

The highest degree of care which a very cautious, prudent and competent person should exercise is required as to alighting. *Houston &c. R. Co. v. Dotson*, 15 Tex. Civ. App. 73.

Where notice has been given a brakeman of a stranger's intention to board in order to assist a passenger, it was not necessary to notify the conductor, to entitle him to protection in getting off again, where the conductor acted on the brakeman's signal in starting the train. *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

Failure to have a platform on the proper side for boarding did not permit recovery for injury while attempting to board from the opposite side, the ground being level on both. *St. Louis &c. R. Co. v. Casseday*, (Tex. Civ. App.) 10 S. W. Rep. 198.

Whether negligent announcement of station was proximate cause of injury received on alighting in the dark before station was reached, was for the jury. *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643.

Only a reasonably safe place for alighting must be furnished, not one absolutely so. Defendant not responsible for injuries caused by jumping at direction of third person, when train had stopped after passenger was carried past station. *Texas &c. R. Co. v. Woods*, 15 Tex. Civ. App. 612.

Where a train stands at a station ready for passengers, there need be no express invitation to warrant one's attempting to board. *Texas Midland R. Co. v. Brown*, (Tex. Civ. App.) 58 S. W. Rep. 44.

The high degree of care used by a very cautious, prudent and competent person, under similar circumstances, entitles one who has entered a train by mistake to have it stopped and to have an opportunity to alight at a suitable place. *Gary v. Gulf &c. R. Co.*, 17 Tex. Civ. App. 129.

Where defendant had notice that plaintiff only boarded to assist a passenger, it was bound to give him sufficient time to accomplish his purpose and get off; and he was not negligent in attempting to get off after the train had started. *International &c. R. Co. v. Satterwhite*, 19 Tex. Civ. App. 170.

Failure to give proper assistance in alighting, placing the step box, which was too small, too far under the steps and on uneven ground, was negligence. *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424.

It is not sufficient to hold a train long enough to enable one to alight but it must be held till she has actually alighted, where those in charge in fact know that she is in the act of alighting. *Louisville &c. R. Co. v. Harmon*, (Tex. Civ. App.) 64 S. W. Rep. 610.

One, getting aboard to assist passengers notifying conductor of his intentions, was not negligent, where the train started before he had time to get off and he was thrown by a sudden lurch in attempting to do so. *Texas &c. R. Co. v. Funderburk*, (Tex. Civ. App.) 68 S. W. Rep. 1006.

Failure to light, or warn passengers of, a dangerous gang plank, was negligence, though defendant had no control over the wharf. *Scanlan v. Tenney*, 12 Fed. Rep. 225.

It was negligent to go towards a train, which had run past a station before it could be stopped, when it was so dark that it could not be seen which way it was moving, or whether moving at all. *St. Louis &c. R. Co. v. Whittle*, 74 Fed. Rep. 296.

Defendant's duty was not discharged by providing a safe platform on side intended for passengers' use; but, where platform on the other side is dangerous, it must give warning not to alight on that side. *Illinois C. R. Co. v. Davidson*, 76 Fed. Rep. 517.

Where a passenger walked out in his sleep, stepped off the unguarded end of a car, and was injured, it was held that his negligence precluded recovery, notwithstanding the company was negligent. *Richmond &c. R. Co. v. Morris*, 31 Grattan (Va.) 200.

Defendant's duty is not discharged by properly securing the boat to a gang plank, but it must see that it continues so. *Croft v. Northwestern S. Co.*, 20 Wash. 115.

Where it was customary to stop at a certain place, though a few feet from the platform, it was not negligent to alight there. *Carroll v. Burleigh*, 15 Wash. 208.

A passenger by the direction of a watchman walked toward caboose, at some distance from the station, and fell into cattle guard. The company was negligent. *Hartwig v. Chicago &c. R. Co.*, 49 Wis. 358; *Delamatyr v. Milwaukee &c. R. Co.*, 24 id. 578; *Curtis v. Detroit &c. R. Co.*, 27 id. 158.

Brakeman invited plaintiff, a woman of 53, weighing 216 pounds, to alight on frozen ground 26 inches from the step, and in assisting her off, gave her a slight pull, causing her to lose her balance and fall. Company held negligent. *Werner v. Chicago &c. R. Co.*, 105 Wis. 300.

#### (b). INJURIES FROM OTHER CARS.

A carrier should not, while receiving or discharging passengers from a train, allow another train to approach the station, so as to endanger the safety of passengers; but a passenger should not, except within the rule last above stated, alight from or enter the cars on the side of the train away from the station or platform, or in a manner not provided by the carrier.

A person, knowing that the caboose of a freight train was taken at a point one-quarter of a mile from the depot, and familiar with the locality, walked toward it on the main track, where his view was unobstructed, and, stopping on the way for pressing necessity, stepped behind some empty cars on the next track, against the other end of which, some empty cars were propelled, whereby the person was run over and killed. Held, that such person was *per se* negligent and should have been nonsuited. *Van Schaick v. H. R. R. Co.*, 43 N. Y. 527, rev'g judg't for plff.

A passenger train came to the station and stopped: the engineer of a freight train coming in the opposite direction ran between the passenger train and the station, whereby a passenger starting to take the passenger train, was killed. The statutory signals did not relieve the defendant, and the rule as to looking and listening had no application. Contributory negligence was for the jury. *Terry v. Jewett*, 78 N. Y. 338; affirming 17 Hun. 395.

Citing *Klein v. Jewett*, 26 N. J. Eq. 474; affirmed, 27 id. 550, and distinguishing *Warren v. Fitchburg R. Co.*, 8 Allen, 227, where it seemed to be held that something beyond looking might be required of a passenger.

The plaintiff's intestate, a girl of seventeen, with an old lady, alighted from the defendant's train at East Syracuse and started to walk across many tracks, without looking to see if there were any trains and was killed by a train on one of the tracks. The defendant was held liable because a passenger taking or leaving a car may assume, that the carrier will provide a safe passage to and from the train. *Brussell v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 241.

Citing *Terry v. Jewett*, 78 N. Y. 338.

There were two car tracks in the street and the plaintiff stood between the two to enter a car, which he had stopped, when he was hit by a car which he had seen fifty or seventy-five feet away, and to which he then paid no further attention. He was negligent. *Davenport v. Brooklyn City R. Co.*, 100 N. Y. 632.

Where a railway company, by its own conduct and published regulation, has led the public to believe that trains will not be run at specified times, persons having occasion to cross its tracks can rely on doing so safely.

A person who had been a passenger stepped off from the car, and, while going across the track, was killed. It did not appear for what purpose the deceased was going across the westerly track, away from station, but it was stated that he sometimes got off and communicated with relatives and friends, living near by on the west side. He had not ceased to be a passenger. *Parsons v. N. Y. C. & H. R. R. Co.*, 113 N. Y. 355; affirming 31 Hun, 128 and judg't for pl'ff.

The plaintiff alighted at a depot from the defendant's train on the side thereof away from the depot, and, in passing over another track, was struck by another train moving at a speed not exceeding two or three miles per hour and ringing a bell. Neither the engineer nor the fireman saw the plaintiff and he did not see the train because the steam from the other train, starting from the depot, obstructed his view. Defendant was not negligent.

A rule of the defendant, prohibiting trains from approaching stations, when other trains were discharging passengers had no application, as the train from which the plaintiff alighted had discharged its passengers and both trains were moving. *Goldberg v. N. Y. C. & H. R. R. Co.*, 133 N. Y. 561, rev'g judg't for pl'ff.

Plaintiff's intestate was walking between two tracks to take a train standing at the depot, and on the side away from the depot was struck by a gravel train approaching without signal, and was killed. Contributory negligence. *Elwood v. N. Y. C. & H. R. R. R. Co.*, 4 Hun, 808, affirming nonsuit.

Passenger, alighting from defendant's west bound train, was obliged

to cross the east track to reach the depot, and did so without looking on such east track, whereon, without signal, a train approached and killed him. For jury. Although the plaintiff was negligent, yet, as the defendant could with reasonable care have prevented the accident, it was for jury. *Green v. Erie R. Co.*, 11 Hun, 333, reversing nonsuit.

Deceased fourteen years and seven months old, was killed by a pusher in the defendant's depot, when she was about to take a train. One of the defendant's employes thought she was about to go in front of the train and he seized her, and, she, misunderstanding the attention, wheeled around in front of the pusher and was killed. For jury. *Pinco v. N. Y. C. & H. R. R. Co.*, 34 Hun, 80, aff'g judg't for pl'ff; s. c. aff'd, 99 N. Y. 644.

Passenger alighted from train at defendant's depot just before its motion ceased, and was struck by a train on the adjoining track, which he might have seen by looking. If the jury found that leaving the train, while moving, contributed nothing to the injury, the same would not preclude recovery. *Van Ostran v. N. Y. C. & H. R. R. Co.*, 35 Hun, 590, aff'g judg't for pl'ff.

Citing on subject of defendant's liability, *Gonzales v. N. Y. & H. R. R. Co.*, 39 How. 407; *Terry v. Jewett*, 17 Hun, 395; affirmed, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 241. And on contributory negligence, *Gonzales v. N. Y. C. & H. R. R. Co.*, 39 How. 407; *Dickens v. N. Y. C. R. R. Co.*, 1 Keyes, 23; s. c., 1 Abb. Ct. App. Dec. 504; *Green v. Erie Ry. Co.*, 11 Hun, 333; *Terry v. Jewett*, 78 id. 395; affirmed, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. Co.*, 84 id. 241; *Armstrong v. N. Y. C. & H. R. R. Co.*, 66 Barb. 437.

**From opinion.**—"In *Mitchell v. Chicago & Grand Trunk Railway Company* (12 Am. & Eng. R. R. Cases 163), the train on which the plaintiff was a passenger stopped, as was usual, at a crossing just before reaching the station (the name of which having been called out), the plaintiff left her seat, went out, and as she was getting off, the train started and she fell and was injured. There was nothing at that spot to indicate a landing place, and the statute, as well as usage, required trains to come to a stop there. The Michigan court held that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course is improper; that the starting of the train after such stoppage was contemplated by the law, "and that passengers must take the responsibility of informing themselves concerning the every day incidents of railway traveling." That case and *Michigan Central Railroad Company v. Coleman* (28 Mich. 440), and *Pennsylvania Railroad Company v. Zebe* (33 Penn. St. 318; id. 37 id. 420) are distinguishable from the one at bar, although they may not be entirely in harmony with some cases in this state. And the same may be said of *Baneroft v. B. & W. Railroad Company* (97 Mass. 275.) There the plaintiff's intestate came into the station of defendant's double track railroad in a train, and was landed on the side of the track required of trains going in that direction, and after the train left he started to go across the tracks at an unusual place, although facilities were furnished by the company for persons to cross, and before he reached the platform he was struck by a train going in the opposite direction on the other track and killed. It appeared that the

habit and place of crossing were known to him. The court held that the defendant, *having provided a convenient and accessible place of egress from the platform on which he stepped upon leaving the train, was not liable, and that when a person unnecessarily goes upon a track, he voluntarily incurs the risk of consequences, etc.*

In *Wheelwright v. Boston & Albany Railroad Company* (135 Mass. 225), the plaintiff resided near and north of the defendant's road, which was a double track with landing platforms on either side, that for the east bound trains was on the south side and she to take such train, about the time it came in, proceeded to cross over the tracks from the north to the south side and was struck by a train going west. She did not go at the crossing provided by planking; but people frequently, without objection, had been in the habit of so crossing. The court held that "she was attempting to cross at a place not designed or adapted for crossing, at which the defendant held out no invitation or inducement for her to cross," and that she could not recover. That case is also distinguishable from this one, in respect to the question under consideration, and apparently so. There may seemingly be some difference in the view of the courts in the different states in respect to the measure and application of duty on the part of railroad companies required to protect persons proceeding to take and depart from the trains as passengers, but that the *relation of passenger is assumed when he gets his ticket and is properly proceeding to take the train, and does not terminate when he leaves the car, but continues until he has reasonable opportunity to leave the train and roadway of the company after the train reaches the station to which he is entitled to be carried, is a generally adopted proposition.* *Warren v. Fitchburg R. R. Co.*, 8 Allen 227.

The case of *Siner v. Great Western Railway Company* (L. R. 3 Exch. 150; s. c., 4 id. 117), has not necessarily any application. There the passenger in alighting from a car at a place beyond the landing platform received an injury, and it was held that it was chargeable to the negligence of the plaintiff. It was daylight, and if it was a safe place to get off the injury was needless, and if she could not do so with safety it was apparent to her, and she was in fault in making the attempt to do so."

Railway excursion train, on which was a regiment of soldiers, with open cars for Creedmoor, stopped at switch, where was a switch house, to let another train pass. Plaintiff got off to get water, and, hearing signal to start hurried back and was hit by the opposite train. For the jury to say whether defendant was negligent, in not giving warning of coming of another train, as soldiers are likely to get off; in running opposite train on intervening track; in using speed of thirty-five to forty miles an hour; in attempting to pass without stopping or whistling; in ringing bell and summoning passengers for waiting train just as opposite train was passing. Jury could say whether placing and leaving train on the switch was negligence. *Wandell v. Corbin, as Receiver*, 38 Hun, 391, reversing nonsuit.

The defendant's trains on its elevated railway were blocked, and after some moment's delay the conductor announced to the passengers, some of whom were laboring men, "all who are afraid of being late for work,

get off." Thereupon over fifty got out upon an adjoining walk thirty inches wide, provided by the company for its employes, and proceeded quietly "laughing and talking" to the station platform. Many of these reached the platform, and some had stepped on the tracks in order to ascend to the platform of the station, when the train they had just left, without notice or warning, was moved towards and upon them; those on the track tried to save themselves by getting on the walk, and others pressed outward and backward and a panic ensued. There were cries and shouts and as a result eleven men, including the plaintiff, fell to the pavement below. The evidence was sufficient to impute negligence to the defendant and lack of contributory negligence on the part of the plaintiff. The proximate cause of the injury was not the leaving of the train by the plaintiff, under the circumstances disclosed. The defendant was bound to exercise ordinary care. *Weiler v. M. R. Co.*, 53 Hun. 372, aff'g judg't for pl'ff, aff'd, 127 N. Y. 669.

Action for personal injuries. The plaintiff, after purchasing a ticket for passage on the defendant's railroad, waited for his train going east, which, at that point, according to schedule time, was past due. While waiting, a fast train, eastward bound, passed the station, which the plaintiff supposed was his train, and he passed from the depot over some of the tracks of the defendant's road for the purpose of boarding it. The fast train passed without stopping, and the plaintiff, to avoid a westward-bound train, which at that time was approaching, stepped back and was hit and injured by a freight car which was in process of being switched, and was moving slowly, either from gravity or its own momentum, detached from any engine. For jury. *Hempstall v. N. Y. C. & H. R. R. Co.*, 82 Hun. 285.

Plaintiff was negligent *per se* in starting to walk from a train to a station several hundred feet away along a track shut in on one side by his train and on the other by adjoining buildings; where, to escape an approaching train, which he knew to be about due and which could have been heard, but for the noise in such building, he had to walk a distance of 95 feet, unless he happened to be opposite a three-foot door on one side or the steps of his train on the other. *Mills v. New York & C. R. Co.*, 5 App. Div. 11.

Verdict for plaintiff was not sustained, where he got off one car and crossed an adjoining track in full view of a car approaching thereon, even if defendant had not complied with its rule forbidding one car to pass another while the latter is stopping. *Doyle v. Albany R. Co.*, 5 App. Div. 601; second appeal, 32 id. 87 (judgment for plaintiff reversed as against weight of evidence)

Where, in such a case, plaintiff testified that, after alighting from and



passing around rear of car on up track, he crossed the down track and did not see the car until he stepped upon the track, the conclusion was unavoidable that, had he used the ordinary prudence required in looking, he would have seen it. *Landrigan v. Brooklyn &c. R. Co.*, 23 App. Div. 43.

Where defendant maintains a path along and across its tracks for the convenience of passengers in reaching its station, they are not bound in using it to exercise the same duty to look and listen as travelers are in using a highway crossing. *Warfield v. New York &c. R. Co.*, 8 App. Div. 479.

Plaintiff was negligent *per se* in either standing on the track or attempting to pass through a picket fence separating the different tracks, while a train was in plain sight for 900 feet. *Riester v. New York &c. R. Co.*, 16 App. Div. 216.

Plaintiff, a passenger on an open street car, was allowed recovery where, having lost his hat between the track on which his own car was standing and the adjoining track, he looked, and seeing no car coming on the other track, though his view of that track was partially shut off by standing cars and a curve in the track, started to pick it up, but, before he could get away, a car came along on the adjoining track and injured him. *Thomas v. Union R. Co.*, 18 App. Div. 185.

Defendant was grossly negligent in running its express train between a train in the act of stopping and its station. It was not negligent *per se* for the plaintiff, hearing the announcement of his station, to alight and proceed toward the station without looking across the track he had to cross as he might assume that defendant would afford him safe passage. *Jewell v. New York &c. R. Co.*, 27 App. Div. 500.

See, also, *Beecher v. Long Island R. Co.*, 35 App. Div. 292; s. c. aff'd, 161 N. Y. 222.

Negligence to run a train 30 miles an hour, seven minutes ahead of time, past a local taking on passengers at a station. *Barkley v. New York &c. R. Co.*, 35 App. Div. 228.

A usual speed of 30 miles an hour past a station is not negligence, where the train is on schedule time, the track is straight, and there are no other conditions making it peculiarly dangerous. *St. Louis &c. R. Co. v. Denty*, 63 Ark. 177.

If one train is allowed to pass another while the latter is stopping to receive and discharge passengers, appropriate signals must be given. *Capital Traction Co. v. Lusby*, 12 App. D. C. 295.

The extraordinary diligence for the protection of passengers is due by one street car toward passengers of another alighting dangerously near it on a parallel track. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

Where one is required to cross a track in order to board a train he may assume that the movement of trains thereon will be regulated accordingly. *Chicago &c. R. Co. v. Ryan*, 165 Ill. 88; aff'g s. c., 62 Ill. App. 264.

So, in alighting, he may assume that he will not be exposed to danger by passing trains. Where passengers were accustomed to alight on side opposite the station without hindrance or warning it was not negligence *per se* to do so. *Pennsylvania Co. v. McCaffrey*, 113 Ill. 169; aff'g s. c., 68 Ill. App. 635.

Car going north stopped at both street crossings. The running of the car going in the opposite direction at 12 miles an hour past it, was not negligent, or in violation of rules against going fast past a car stopped or about to stop, as it might be assumed that all passengers had alighted at the first crossing. *Ackerstadt v. Chicago &c. R. Co.*, 194 Ill. 616.

It was negligent to run a fast train on a track, over which passengers are going to or coming from another train standing at a depot. *Chicago &c. R. Co. v. Czaja*, 59 Ill. App. 21; *Chicago &c. R. Co. v. Ryan*, 62 Ill. App. 264; *Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490; *Chicago &c. R. Co. v. Kelly*, 182 Ill. 267; aff'g s. c., 80 Ill. App. 615; *Chicago &c. R. Co. v. Jennings*, 89 Ill. App. 335; *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

Duty of providing a safe opportunity to alight extends to a stockman accompanying his cattle; it was negligence to induce him to alight just as another train, running at excessive speed, was passing. *Chicago &c. R. Co. v. Winters*, 65 Ill. App. 435.

Otherwise where the width between the tracks is such to allow one to protect himself by the exercise of reasonable care, which he fails to exercise through heedlessness. *Chicago &c. R. Co. v. Weir*, 91 Ill. App. 420.

In absence of statute or ordinance, negligence *per se* cannot be predicated of any rate of speed on depot grounds. *Heiss v. Chicago &c. R. Co.*, 103 Iowa, 590.

Passengers to board a train may assume that the tracks necessary to be crossed will be kept clear. *Weeks v. New Orleans &c. R. Co.*, 40 La. Ann. 806.

A passenger who is obliged to pass over an intervening track to reach his train need neither look nor listen, but may assume the way to be safe. *Baltimore &c. R. Co. v. State*, 60 Md. 449.

*Warren v. Fitchburgh R. Co.*, 8 Allen 227; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 208; *Klein v. Jewett*, 26 N. J. Eq. 474; *Weeks v. New Orleans &c. R. Co.*, 40 La. Ann. 806.

A passenger alighting from a train on the track furthest from the

depot has no right to assume that trains would not pass on the other tracks. *Connolly v. N. Y. &c. R. Co.*, 158 Mass. 8.

See *Atchison &c. R. Co. v. Shean*, 18 Colo. 368.

Plaintiff was negligent in crossing tracks to reach a station to wait for a train, where the view was obstructed by a train on the first track, but between it and the second track she had six feet in which the view was unobstructed. *Winslow v. Boston &c. R. Co.*, 165 Mass. 264.

Where one has been invited to enter a train, he is not *per se* negligent in failing to see if other cars are backing towards it. *Moore v. Saginaw &c. R. Co.*, 119 Mich. 613.

It was negligent *per se* to pass through a space of four feet between the rear ends of two trains to gratify curiosity as to cause of delay, especially where there was a safe opening at a street crossing 50 yards away. *Illinois C. R. Co. v. Strauss*, 15 Miss. 367.

Carrier was negligent in backing north-bound cars along a south-bound track, without light or signal at the end thereof. *Fleming v. Kansas City &c. R. Co.*, 89 Mo. App. 129.

Question of plaintiff's negligence was for the jury, where in order to reach his car he was compelled to get off the platform because it was crowded, and was injured by a passing train. *Union Pac. R. Co. v. Sue*, 25 Neb. 112.

Having the right to presume that a rule of the company prohibiting one train passing another while standing to receive or discharge passengers will not be violated, it was not negligence *per se* to fail to look or listen before crossing a track between a train and the station after alighting. *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394.

Reasonable notice that a passenger, who has just alighted from a street car, must cross an adjoining track, imposes on the car coming in the opposite direction on that track the duty of giving reasonable warnings of its approach. *Cincinnati Street R. Co. v. Snell*, 54 Oh. St. 197; s. c., 32 L. R. A. 216.

But failure of one getting off to look before crossing the other track, is negligence. *Toledo &c. R. Co. v. Lutterbeck*, 11 Oh. C. C. 279.

When about to board a train known to be approaching it was negligent to stand so near as to be hit by locomotive. *Penn. R. Co. v. Bell*, 122 Pa. St. 58.

No recovery was allowed a person injured by the backing of a coal train, when he stood between the tracks instead of on the platform. *McGeehan v. Lehigh Valley R. R. Co.*, 119 Pa. St. 188.

Though one has looked for a car from the opposite direction, his view being obstructed by the car he alighted from, he is negligent in crossing

behind it after hearing a shout of warning. *Gray v. Fl. Pitt Traction Co.*, 198 Pa. St. 184.

Plaintiff was not negligent *per se* in jumping from a stalled car where he sees that there is danger of another colliding with it. *Quinn v. Shamokin &c. R. Co.*, 1 Pa. Super. Ct. 19.

Whether it is negligence to run one train at high speed past a station near the time at which another is discharging passengers, is for the jury. *Girtou v. Lehigh Valley R. Co.*, 17 Pa. Super. Ct. 143.

Judgment for plaintiff was sustained, where, in crossing in front of a train at a station, his position prevented his accurately judging the speed of the train and he gauged his distances, on the assumption that it was going at the rate prescribed by ordinance. *Gulf &c. R. Co. v. Wagley*, 15 Tex. Civ. App. 308.

See, also, *St. Louis &c. R. Co. v. Casseday*, 92 Tex. 525.

The conductor of a train on a siding at a depot called out, "all aboard," whereupon plaintiff, unable to see on account of the crowd, stepped in front of a second train approaching on the main track, which, though proceeding at unusual speed, had signalled. Defendant was held negligent. *Gulf &c. R. Co. v. Morgan*, (Tex. Civ. App.) 64 S. W. Rep. 688.

A train passing at a speed of twenty miles an hour, another train which was stopped to let passengers off, is proof of negligence. *Chicago &c. R. Co. v. Lowell*, 151 U. S. 209.

The implied invitation to cross a track and board a train waiting to receive passengers, warrants one in assuming that trains thereon will be so regulated as not to expose him to danger. The rules in regard to pedestrians at crossings do not apply to such a case. *Warner v. Baltimore &c. R. Co.*, 168 U. S. 339; *Alabama &c. R. Co. v. Coggins*, 88 Fed. Rep. 455; *Graven v. McLeod*, 92 id. 846; *Chesapeake &c. R. Co. v. King*, 99 id. 251.

But where one crosses tracks to take a train with a ticket in his pocket, without going to the station or notifying the company's officers of his intention to become a passenger, he is not entitled to extraordinary care at its hands. *Southern R. Co. v. Smith*, 86 Fed. Rep. 292; s. c., 40 L. R. A. 746.

Defendant was not negligent in backing its train, where the night was dark and it did not know that plaintiff, after flagging the train had attempted to follow and board it, after it had run past the station before it could be stopped. *St. Louis &c. R. Co. v. Whittle*, 74 Fed. Rep. 296.

A passenger is not negligent *per se* in attempting to cross an adjoining track immediately behind his own car without stopping to look

or listen. He was struck by a car going in the opposite direction, which was bearing down on the crossing without signaling and at high speed while the first car was discharging passengers. *Smith v. Union Trunk Line*, 18 Wash. 351.

(c). INJURIES FROM ACTS OF THIRD PERSONS.

A carrier should use reasonable and ordinary care, in receiving and discharging passengers, to avoid injuries to them from the acts of third persons, or, in the case of street cars, from the condition of the street within its duty to repair.

A hook and ladder company truck was coming rapidly behind a street car, and a car was on the opposite track. The conductor was warned to go on, but he stopped his car and insisted that the passenger, wishing to stop at that point, should alight. While plaintiff was on the platform for that purpose, she was struck by the hook and ladder. The carrier was liable, as it was bound to carry safely, and know where it was safe to stop. *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378, aff'g judg't for pl'ff.

But see *Black v. Brooklyn City R. Co.*, 108 N. Y. 640, where a person attempting to board a car was thrown by a car going in opposite direction on another track.

Plaintiff was injured as a result of a disturbance on the crowded platform of an elevated railroad car caused in part by defendant's guard. The car and the platform were so crowded that the gates could not be entirely closed while the car was in motion as required by statute. It was held that there was evidence of negligence and plaintiff was not guilty of contributory negligence as matter of law in boarding the crowded platform, and it was error, to dismiss the complaint. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Express agent moving truck over platform has not paramount right, and his warning of danger is not a protection, if he runs upon and injures some one. He must run it carefully and prudently, so as not to needlessly expose one to danger. Action was against express company. *Palmer v. Platt*, 27 Hun. 534, aff'g judg't for pl'ff; s. c. aff'd, 98 N. Y. 628.

While trucks were going from ferry boat, the door of the ferry house was opened to let the crowd of passengers go on the boat. Plaintiff's intestate was jostled by the crowd, of which he was a part, so as to be killed by a truck passing off. Defendant was negligent and liable. *Tonkins v. N. Y. Ferry Co.*, 47 Hun. 562, aff'g judg't for pl'ff; s. c. aff'd, 113 N. Y. 653.

Distinguishing *Loftus v. Union Ferry Co.*, 84 N. Y. 555.

The mere fact that a postal clerk throws off a mail bag at a certain place, without previous knowledge on the part of the railroad company of his intention to do so, does not constitute negligence on the part of the company.

Action to recover damages for a fall upon the platform of a railroad company's station, through alleged failure to sufficiently light its platform; the court in effect charged that the jury might predicate actionable negligence upon the failure of the defendant to light its depot sufficiently to enable the plaintiff to avoid the obstacle which caused her fall, without reference to the circumstance whether or not an obstacle of that kind had ever been there before.

Defendant's counsel asked and the court refused to charge that, if the jury believed that the platform would have been lighted sufficiently, for the purposes of the passengers getting on and off the cars with safety, if the mail bag (which was the obstruction which caused the plaintiff's fall) had not been thrown where it was, and if it was the first time that the mail bag had been thrown off there, the defendant was not liable. Error.

It was a question of fact, under the evidence, whether the mail bag had ever been thrown off before in the way of passengers, and, if so, whether the defendant, through its proper agents, knew it, or in the exercise of reasonable care, ought to have known it. *Ayers v. The Delaware, Lackawanna & Western Railroad Company*, 17 Hun, 414.

Defendant's negligence in permitting its platform to become so overcrowded that a passenger was forced up against a car and his foot caught between the car and the platform, was properly submitted to the jury; but it was reversible error to submit to them the question of its negligence in starting the car, in spite of plaintiff's order not to start, when it was not aware of his perilous position. *Dawson v. New York &c. Bridge Co.*, 31 App. Div. 537.

A conductor, knowing that several passengers with bundles desired to alight at a place where a conductor is needed to prevent passengers pushing or crowding, is negligent in absenting himself from the car before reaching it. *Baldwin v. Fair Haven &c. R. Co.*, 68 Conn. 567.

A railroad company which permits mail bags to be thrown upon its depot platform from swiftly moving trains, is answerable to one rightly upon such platform, who is injured in consequence of such practice. *Ohio &c. R. Co. v. Simms*, 43 Ill. App. 260.

That a crowd pushed a passenger on the platform over to where there was a defective board, was no defense as defendant was bound to anticipate crowding. *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414.

Plaintiff was negligent in running, without looking, across the

vehicle exit of a ferryboat dangerously close to an approaching team. *Hoboken Ferry Co. v. Feist*, 58 N. J. L. 198.

Negligence in getting on from the wrong side was for the jury, where plaintiff was pushed off the platform by the crowd and the attendant, in parting the crowd for the train, pushed him to the wrong side. *Begly v. Pennsylvania R. Co.*, 201 Pa. St. 84.

Defendant's negligence was for the jury, where it appeared that the platform was crowded as usual, but that there were no guards to prevent accident and that the train came in at a dangerous rate of speed causing plaintiff to be knocked down by a person riding on the platform. *Muhlhouse v. Monongahela Street R. Co.*, 201 Pa. St. 237.

#### (d). STREET CARS—INJURY FROM THE CONDITION OF THE STREET.

A child thirteen years old was ordered, by some one in authority, on the rear platform of a street railway car, to get on by the front platform, and while going there it slipped on the edge of accumulated snow in the street. For the jury. *Mowery v. Central City R. Co.*, 51 N. Y. 666.\*

The plaintiff sought to enter the rear platform of the defendant's street car, which was moving slowly; the platform being full, he passed towards the front platform and slipped and was thrown under the wheels by snow that had been thrown up by the defendant's snow plow and sweepers, and had become icy. Although the defendant simply used and did not own the track, it had assisted in making the ridge, and it was not excused, and question of negligence was for the jury. *Dixon v. Brooklyn City &c. R. Co.*, 100 N. Y. 140.

The repairing of tracks compelled defendant to land its passengers some distance short of the usual stopping place near a ferry. Plaintiff, to reach the ferry, passed around the rear end of the car and, in crossing the street, stepped on one of a number of loose rails laid in a continuous line along the street. The rail tilted and threw her. Judgment for the plaintiff was affirmed. *Wells v. Steinway R. Co.*, 18 App. Div. 180.

A street car company employed a contractor to dig a trench alongside its tracks. Car was stopped opposite a street corner for plaintiff to alight

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\* NOTE.—Chap. 565, Laws New York, 1894. "SEC. 93, REPAIR OF STREETS; RATE OF SPEED; REMOVAL OF ICE AND SNOW.—Every such corporation so long as it shall continue to use any of its tracks in any street, avenue, or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue, or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interest or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation, shall be liable to such city or village for a penalty not exceeding five hundred dollars to be specified in such ordinance or regulation."

on a dark night without warning and she fell into the ditch. The company was held liable for her injuries. *Wolf v. Third Avenue R. Co.*, 67 App. Div. 605.

Defendant was sued for injury due to a hole in the asphalt pavement within the line next its tracks, which it was by law obliged to take care of. The defendant, was entitled to have the jury consider, on the question of its negligence, the fact that the city had contracted with the company that laid the pavement to keep it in repair for five years. *Welch v. Syracuse &c. R. Co.*, 70 App. Div. 362.

Failure to warn a passenger of a dangerous condition of the street at a place at which a car stops for her to alight, is evidence of negligence for the jury. *West Chicago Street R. Co. v. Cahill*, 64 Ill. App. 539; s. c. aff'd. 165 Ill. 496.

Ordinary care required of passengers in alighting does not mean a constant lookout for excavations in the street, especially where they have formerly been guarded. *Lake Street El. R. Co. v. Burgess*, 99 Ill. App. 499.

It was not negligent *per se* to board a car in the proximity of iron poles near the track, while the car is in motion but slowing in response to signal. *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284.

Plaintiff was negligent in getting off and on the rear platform on slippery steps, where he knew that the conductor customarily stood at the front platform to give assistance. *Pittsburg &c. R. Co. v. Aldridge*, 27 Ind. App. 498.

Where a dangerous condition of the street at the place of alighting is known to the carrier and not to the passenger, the former must notify the latter. *Sweet v. Louisville &c. R. Co.*, (Ky.) 67 S. W. Rep. 4.

Failure to see a hole in a cross walk between the tracks which a passenger had the right to assume was safe while looking for a car in the opposite direction upon alighting, was not negligence. *Mahuke v. New Orleans &c. R. Co.*, 104 La. 411.

In the absence of control over the street, a company is not an insurer of the safety of the place at which a person alights. But it is bound to use reasonable care to select a suitable place to stop at. *Conway v. Lewistown*, 87 Me. 283.

Plaintiff stepped on a rolling stone in alighting from a street car. Failure to stop exactly at the street crossing was held not negligence. *Conway v. Lewistown &c. R. Co.*, 90 Me. 199.

Defendant, subject under its charter, to the duty of making repairs, made necessary by its occupation of a highway, stopped to take on plaintiff on a dark night where it had removed a fence and left a ditch. Questions of negligence and contributory negligence were properly submitted to the jury. *Call v. Portsmouth &c. R. Co.*, 69 N. H. 562.



So held also where car was stopped beside a hole in the street into which plaintiff stepped in alighting without looking where she was stepping. *Bass v. Concord Street R.*, 70 N. H. 170.

An instruction to find for plaintiff, if place where she alighted from a street car was dangerous, held error as it did not submit defendant's negligence to the jury. *Foley v. Brunswick Traction Co.*, (N. J. L.) 50 Atl. Rep. 340.

That defendant had never paved the street adjacent to its tracks was no defense for not complying with an ordinance subsequently enacted requiring it to keep it in repair. *Fielders v. North Jersey Street R. Co.*, (N. J. L.) 50 Atl. Rep. 533.

It is not negligence *per se* to jump from the side door of a car instead of leaving by the steps. *Missouri &c. R. Co. v. Hay*, (Tex. Civ. App.) 67 S. W. Rep. 171.

Knowledge that a car had been stopped, a trap door on the platform raised and closed and the journey resumed, did not make it negligent to step thereon in alighting. *Washington v. Spokane Street R. Co.*, 13 Wash. 9.

Passing beyond a crossing without backing to it, was negligence, where the condition of the street where the car stopped was in a dangerous condition. *Vasele v. Grant &c. Electric R. Co.*, 16 Wash. 602.

#### (c). INJURIES FROM GATES, GUARDS, DOORS, &c.

The same rule of care, as last stated, would apply to gates, guards, doors, etc.

The guard chains on a ferry boat were let down, before the boat was secured, and the foot of an alighting passenger was caught between the boat and the floating bridge. It was held that she was assured that the way was safe by the lowering of the chain, and the defendant was liable. *Ferris v. Union Ferry Co.*, 36 N. Y. 312, aff'g judg't for pl'ff.

The guard not opening the door at a station, the passenger opened it, not shoving it so as to catch it, and stood in the door. The guard signaled the train to start and the door swung to and injured the plaintiff. For jury. *Baker v. M. R. Co.*, 118 N. Y. 533, aff'g 22 J. & S. 394, and judg't for pl'ff.

As the defendant's train approached the station, the trainman opened the door of the car and held it open, whereupon the plaintiff reached the sill of the door just as the train stopped. The stoppage of the car jarred the passenger, who seized the door frame, and the door, released by the brakeman, slammed upon her fingers. There was evidence justifying a verdict for the plaintiff and it was not negligence for the passenger to

leave her seat, and to go towards the door under the circumstances. *Colwell v. M. R. Co.*, 57 Hun, 452, aff'g judg't for pl'ff.

*Wilde v. Northern R. Co.*, 53 N. Y. 156; *Nicholas v. Sixth Ave. R. Co.*, 38 id. 131.

It is negligence for a railroad company to have, suspended above a passageway, a gate which falls very rapidly and cannot be controlled by the operator. The plaintiff testified that he first saw a gate descending upon him when it was about eighteen inches above his head and a little in front of him. He was going fast and continued to advance, but before he could clear the gate it fell upon and injured him. Verdict for plaintiff affirmed. *Keitt v. Staten Island Rapid Transit R. Co.*, 75 Hun, 519.

Where one follows a crowd off ferryboat at night over a gang plank, which she knows has no guard rail and is not lighted, she is negligent *per se* on failing to pay attention to where she is stepping. *Fogassi v. New York &c. R. Co.*, 17 App. Div. 286; aff'g s. c., 19 Misc. 108.

Where defendant's guard allowed the gate of the car to be opened by a passenger without objection before the train had stopped and plaintiff, the night being dark, thought, upon seeing the gate open, that the train had stopped, and stepped off and was injured; it was held error to nonsuit plaintiff. *McAlan v. Trustees &c.*, 43 App. Div. 374.

A passenger, familiar with the adjustments of side bars and steps on an open car at a terminal station in order to reverse its direction, was not allowed to recover for injuries to his knee by the lowering of the step while he was attempting to board. *Clark v. Metropolitan Street R. Co.*, 68 App. Div. 49.

Plaintiff was warranted in relying on the safe mooring of a ferry boat, when invited to go ashore by the opening of the gates, though no gang-plank was provided, and recovered for injuries to her foot caught between the boat and wharf. *Spero v. Long Island R. Co.*, 21 Misc. 683.

Alighting without taking hold of the guard rail to guard against a sudden movement of the car, was not negligence *per se*. *Schaefer v. Central Crostown R. Co.*, 30 Misc. 114.

Where plaintiff was compelled to stand in defendant's train for want of a seat, and upon the sudden opening of a door, his fingers were caught and crushed, no recovery was allowed. *Murphy v. Atlanta &c. R. Co.*, 89 Ga. 832.

Plaintiff standing near a door of a crowded and dark car, in a tunnel, in the absence of the brakeman, attempted to shut the door to keep out the smoke, and his hand was injured. Plaintiff was not *per se* negligent. *Western &c. R. Co. v. Stanley*, 61 Md. 266.

See, also, *Gee v. Metropolitan R. Co.*, L. R., 8 Q. B. 161.

Nonsuit sustained, where plaintiff fell backward while pulling his foot

loose from the car step where he had caught it in getting off. *Howell v. Union Traction Co.*, (Pa. St.) 51 Atl. Rep. 885.

A man who stands with his hand in the frame of an open door, cannot maintain an action for the brakeman's closing the door, if the brakeman did not see him standing there. *Texas &c. R. Co. v. Overall*, 82 Tex. 247.

Where injuries occurred by reason of a large number of people crowding through the only means of exit to a depot, a recovery was allowed. *Taylor v. Penn. R. Co.*, 50 Fed. Rep. 755.

#### (f.) PREMATURE STARTING AND JERKING CARS—STEAM CARS.

A carrier should allow passengers a reasonable time to enter or alight from its cars, and it is negligent, if it prematurely starts its train, while passenger is entering or alighting, and thereby injure him, or if he has entered it, jerk the train in starting with such unusual, unnecessary and excessive violence as to do him injury; but some disturbance of the equilibrium of persons on cars may be necessary in starting the same, and the passenger, in standing or walking after boarding the car, should use reasonable care to protect himself, and especially is he negligent, if he voluntarily place himself and remain in a position on the train where he is likely to be dangerously affected by such starting or jerking.

It is negligent to suddenly put a train in motion, so as to endanger the safety of passengers, entering or leaving the train. The train was standing still, partly filled with passengers; as plaintiff stepped upon the steps of the car, the train, without any signal or notice, and without any examination by those in charge to ascertain, whether any one was getting on or off, was started with a violent jerk, which threw plaintiff from the car. *Keating v. N. Y. C. R. Co.*, 49 N. Y. 673; affirming 3 Lansing, 469, and judg't for pl'ff.

While a passenger was alighting from a stage, she was thrown and injured by the horse starting up. This fact showed that the horse was not suitable, or the driver incompetent or negligent. *Roberts v. Johnson*, 58 N. Y. 613.

The sudden jerking of a railroad train backward while passengers are rightfully passing out of the cars, is liable to produce accidents, and is negligent. *Sauter v. N. Y. C. R. R. Co.*, 66 N. Y. 50; affirming 6 Hun, 446, and judg't for pl'ff.

The station was called and the train stopped; the plaintiff went on the platform; the car was started backward with a jerk, throwing the plaintiff forward between the cars. The cars then started forward and injured the plaintiff. *Milliman v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 642; affirming 41 Hun, 409, and judg't for pl'ff.

The running of a train beyond the usual stopping place is not *per se*

negligence, nor is delay necessary to reverse the motion, so as to back to the usual place, negligence.

A train ran beyond the station; the brakeman had called the station; the plaintiff was going out when, by a jerk of the train, she was thrown and hurt. Question of negligence was for the jury. *Taber v. D., L. & W. R. R. Co.*, 71 N. Y. 489; affirming 4 Hun, 765, and judg't for pl'ff.

The cars had apparently stopped, and while the plaintiff was on the platform to alight, they were suddenly jerked, and the plaintiff was thereby injured. The train had been either stopped or slowed down so that to her, in the inside of the car, it appeared to have stopped. She was bound to act upon appearances, and after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of passengers, required the train to be so run and managed, as not to endanger their lives, and a sudden jerk, or start, without any warning, when the passengers were upon their feet, moving toward the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to any one in the cars, when the train appeared to have stopped, it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers. *Bartholomew v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 716, aff'g judg't for pl'ff.

The plaintiff was alighting, on a dark night, and placed his foot on the last step, let go the rail, when there was a sudden start of the car, throwing him off. If these facts were true, the defendant was liable, as the passengers must have reasonable time to alight.

The fact that a passenger is proceeding to leave a train at a station where it has stopped, ought, for the purpose of his protection, to be known by the company through its servants, and, therefore, so far as that is essential, it is deemed chargeable with knowledge. *McDonald v. The Long Island R. Co.*, 116 N. Y. 516, aff'g judg't for pl'ff.

Defendant was not negligent in making up a freight train containing a passenger car away from the station so as to cause the cars to come together with force or violence, in the absence of knowledge of plaintiff's presence or of a custom sufficiently established to appraise its servants of the probability of a passenger attempting to enter at that point. Such custom is not established by evidence that, in one instance, the train had been boarded there in sight of the conductor and, in another, upon the invitation of the baggageman and, in few others, without the knowledge or consent of anyone. *Jones v. New York &c. R. Co.*, 156 N. Y. 187; s. c., 41 L. R. A. 490.

Where a train is moving but two miles an hour and there is no peculiar

danger, it is not negligence *per se* to step from the station platform to the train at the invitation of the conductor. Having reached the platform in safety he was thrown off by a sudden jerk of the train; it was for the jury to say whether the accident was not caused by the subsequent mismanagement of the train. *Distler v. Long Island R. Co.*, 151 N. Y. 424; rev'g 78 Hun, 252.

Plaintiff got off the train on the side away from the depot where there was a ditch and near the intersection of the highway; the conductor, not seeing him, signaled the departure of the train, and the plaintiff was thrown. Not unusual for parties to alight from cars on that side of the train, and the negligence was for the jury. *Plopper v. N. Y. C. & H. R. Co.*, 13 Hun, 625; reversing judgment for plaintiff on ground that court charged that it did not constitute contributory negligence to get off side of train opposite from ditch.

An attempt to board or alight from a moving train is negligence *per se*, but the fact that a passenger in a railroad car left his seat and moved towards the door of the car, not, however, attempting to alight therefrom, after the calling out by the conductor of the name of the station which was his destination, is not such negligence as will preclude him from recovering damages from the corporation for injuries sustained by reason of the sudden jerking of the train. *Newton v. Central &c. R. Co.*, 80 Hun, 491.

See *De Soucey v. M. R. Co.*, 41 St. R. 71.

It is for the jury to say whether defendant was negligent in suddenly backing its train from a terminal station after all passengers but plaintiff, who had been asleep, had left and were 80 to 100 feet away. *Daly v. Central R. Co.*, 26 App. Div. 200.

The sudden jerking of a train preparing to stop does not put upon the defendant the burden of explanation. *Denver &c. R. Co. v. Fotheringham*, (Colo. App.) 68 Pac. Rep. 978.

Where sufficient time has been given for alighting, company was not liable to one thrown to the floor by the sudden starting of the train, while getting bundles off the rack above her, when no one knew of her dangerous position. *East Tennessee &c. R. Co. v. Green*, 95 Ga. 136.

See, also, *Suber v. Georgia &c. R. Co.*, 96 Ga. 42.

Encumbrance with baggage must be considered in allotting the time for alighting. *Killian v. Georgia R. &c. Co.*, 97 Ga. 727.

Where the train is composed partly of freight cars, to which some jolting is a natural incident, defendant must give a reasonable opportunity to be seated before starting. *Macon &c. R. Co. v. Moore*, 108 Ga. 84.

It was for the jury to say whether defendant was negligent, where a crowded car was stopped with such violence that several passengers were thrown against plaintiff with great force. *Chicago &c. R. Co. v. Morse*, 197 Ill. 327; aff'g s. c., 98 Ill. App. 662.

Failure to stop long enough to safely discharge all passengers was negligence, though there was an unusual crowd. *Baltimore &c. R. Co. v. Slanker*, 77 Ill. App. 567; s. c. aff'd, 180 Ill. 357.

Where the train was started as plaintiff, an old lady, was in the act of alighting, it could not be said as matter of law that she was negligent in trying to gain the platform to prevent injury instead of remounting the steps. *Chicago &c. R. Co. v. Stormont*, 90 Ill. App. 505; s. c. aff'd, 60 N. E. Rep. 104.

Sudden and violent, but not unusual stopping of street car was not negligence. *Chicago &c. R. Co. v. Morse*, 98 Ill. App. 662.

Conductor directed plaintiff to go to the platform before coming to the switches and be ready to alight the moment the train stopped. He went to the platform and remained on the lower step while the train was 1,600 feet from the switches and going 12 to 14 miles an hour, and was thrown by a sudden increase of speed. His contributory negligence prevented his recovery from defendant. *Cincinnati &c. R. Co. v. McLain*, 148 Ind. 188.

That the plaintiff went on the platform when the train had nearly stopped did not prevent recovery where she was thrown while alighting by its sudden starting. *Cincinnati &c. R. Co. v. Revalce*, 17 Ind. App. 657.

Sufficient time must be allowed to enable passengers to alight by the exercise of reasonable diligence. *Luse v. Union P. R. Co.*, 57 Kan. 361.

Sufficient time to enable one to alight "with ease" is not necessary. *Louisville &c. R. Co. v. Eakin*, 103 Ky. 465.

Or to enable him to leave the premises. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939; *Louisville &c. R. Co. v. Ricketts*, (Ky.) 37 S. W. Rep. 952.

Sufficient time to enable one, though encumbered with baby and basket, to obtain a seat in a car need not be allowed before starting. *Middlesborough R. Co. v. Webster*, (Ky.) 50 S. W. Rep. 843.

That a woman with an escort is fleshy and is burdened with children is not notice of such an infirmity as requires a conductor to wait until she is seated before starting. *Louisville &c. R. Co. v. Hale*, 102 Ky. 600; s. c., 12 L. R. A. 293.

But defendant was negligent in causing a violent jerk before one has had time to be seated. *Sheffer v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 403.

The utmost care and skill which a prudent man would exercise under the circumstances is required as to the control of a car while one is alighting. *Lutz v. Louisville R. Co.*, (Ky.) 48 S. W. Rep. 1080.

Starting, while an old woman burdened with baskets was in the act of alighting, was negligence. *Boikens v. New Orleans &c. R. Co.*, 48 La. Ann. 831.

Sudden movement of the train while plaintiff was on the platform to alight and before she could do so, was negligence. *Kennon v. Vicksburg &c. R. Co.*, 51 La. Ann. 1599.

Sudden movement of a train while one is alighting, caused by letting off air in the brake was negligence, where it could have been avoided. *Pomeroy v. Boston &c. R. Co.*, 172 Mass. 92.

Plaintiff was not negligent *per se* in not taking the first seat on entering, especially where there were other passengers back of him. *Moore v. Saginaw &c. R. Co.*, 119 Mich. 613.

An elevated railroad must wait a reasonable length of time to allow a passenger to get aboard and to have the gate closed. And while it may start before he is seated, it must use the highest degree of care of cautious persons not to injure him by a sudden jolt or jerk. *Barth v. Kansas City El. R. Co.*, 142 Mo. 535; *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152; *Cullar v. Missouri &c. R. Co.*, 84 Mo. App. 340.

Starting train suddenly with a jerk with knowledge that one who had boarded to assist children had not alighted, was negligence. *Whitley v. Southern R. Co.*, 122 S. C. 987.

Failure to alight during a 16-second stop is not negligence *per se*. *Smitson v. Southern P. R. Co.*, (Or.) 60 Pac. Rep. 907.

Failure to see a boy attempting to get on the front platform without having indicated his intention to board, was not negligence. *Pitcher v. People's &c. R. Co.*, 174 Pa. St. 402.

It was negligence to couple engine to train while passengers were in the act of alighting. *Roughley v. West Jersey &c. R. Co.*, 202 Pa. St. 43.

The time allotted for alighting must be such as is necessary under the circumstances, though one is slow by reason of age or youth. *Southern R. Co. v. Mitchell*, 98 Tenn. 27.

Passenger was allowed to recover for negligence of brakeman in putting on the brakes so hard as to produce a jerk of unusual violence. *Southern R. Co. v. Vandergriff*, (Tenn.) 64 S. W. Rep. 481.

Defendant held liable, where, with notice that plaintiff got aboard only to assist a passenger, it started the train without allowing him reasonable opportunity to alight. *International &c. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102; *id.*, 19 *id.* 170; *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

In reliance on conductor's mistaken statement that the train had stopped at a station, on a dark night plaintiff went upon the platform to alight and was thrown off by the sudden starting of the train. Judgment for plaintiff was affirmed. *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643.

Sufficient time must be allowed to alight in safety. *Missouri &c. R. Co. v. McElree*, 16 Tex. Civ. App. 182.

Plaintiff started to board a train upon the conductor's call, but, the steps being crowded with people boarding, the train started before he could get on. Judgment for plaintiff was affirmed. *Texas &c. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415.

Time must be allowed to enable one who has taken part of his luggage out to re-enter and remove the rest: if the train cannot wait, he must be warned not to enter. *Texas &c. R. Co. v. Born*, 20 Tex. Civ. App. 351.

Alighting from a train without waiting for assistance was not negligence *per se*. *Martin v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 56 S. W. Rep. 1011.

Plaintiff with a ticket for a flag station went upon the platform to alight while the train was slowing up to exchange mail and was thrown off by a sudden jerk of the car. Defendant's negligence in failing to stop and plaintiff's negligence in attempting to alight from a moving car were properly submitted to the jury. *San Antonio &c. R. Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Where one is informed that the train will remain standing for some time, and is directed to care for his stock during the stop, he is warranted in inferring that he will be protected in assuming such dangerous positions as are necessarily incident to the duties so directed. *Missouri &c. R. Co. v. Jahn*, 18 Tex. Civ. App. 74.

Where it is necessary to carry a passenger, proper care must be used in doing so; defendant was held liable for negligence in carrying her out. *International &c. R. Co. v. Gilmer*, 18 Tex. Civ. App. 680.

It being defendant's duty to stop long enough to enable all to alight who wish to, it was no defense that plaintiff held a ticket to another station and his intention to alight before he arrived there was unknown to the conductor. *Texas &c. R. Co. v. Goldman*, (Tex. Civ. App.) 51 S. W. 215.

Carrier is bound to announce its stations, but personal notice is not required. *Houston &c. R. Co. v. Cohn*, 22 Tex. Civ. App. 11.

Where a train had been started before plaintiff had had time to alight and stopped again, suddenly throwing her against the doorway, defendant was negligent. *Texas &c. R. Co. v. Nunn*, 98 Fed. Rep. 963.

Reasonableness of the length of time for stopping is no defense to neg-



ligent starting of train while one is actually boarding. *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186.

Plaintiff was not negligent in going to the platform to meet a friend where the train had not stopped the full 10 to 15 minutes which it was announced that it would do. *Southern R. Co. v. Smith*, 95 Va. 187.

Defendant must awaken a passenger holding a berth in a sleeping car a sufficient time to enable her to properly prepare herself for leaving the train. *McKeon v. Chicago &c. R. Co.*, 94 Wis. 477; s. c., 35 L. R. A. 252.

It was no excuse that the conductor, from where he stood, was reasonably justified in thinking all the passengers had alighted, when in fact they had not had reasonable time to do so. *Walters v. Chicago &c. R. Co.*, (Wis.) 89 N. W. Rep. 140.

#### (g). PREMATURE STARTING AND JERKING CARS—STREET CARS.

Evidence that the plaintiff asked the driver of the car to keep on the brake until he had alighted, to which the driver assented, and the driver let off the brake and thereby set the car in motion, while the plaintiff was alighting, was for the jury. It was not negligent to alight from the front platform, there being no notice to the contrary. *Mulhado v. B. O. R. Co.*, 30 N. Y. 370, aff'g judg't for pl'ff.

While a passenger has no right to jump off a car of a horse railroad, while the car is in motion, or attempt it, yet a passenger has authority to prepare to leave a car, when there is any evidence of an intention to stop, or when there is a signal given therefor. When a driver, upon notice, partially stops a car and then starts up without notice, he is negligent. *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131.

A car must not be started until the passengers have had a reasonable time to alight. Defendant was not entitled to a specific charge.

"That a hoop-skirt, such as that worn by the plaintiff on this occasion, is an unnecessary article of female apparel, and that a lady thus attired was bound to exercise more care in entering or alighting from a street car than a man." *Poulin v. Broadway & Seventh Ave. R. Co.*, 61 N. Y. 621.

*Chrissey v. Hestonville &c. R. Co.*, 25 Smith (Pa.) 83; *Wardell v. N. O. City R. Co.*, 35 La. Ann. 202.

A driver of a horse car told a boy of ten years to jump on the front platform; he got on the first step, and, while attempting to gain the second, the driver struck the horses. The car was given a jog and the boy thrown off and hurt. *Maher v. Central Park N. & E. R. Co.*, 67 N. Y. 52, aff'g 7 J. & S. 155, and judg't for pl'ff.

**From opinion.**—"The authorities are numerous, that persons who are traveling on a railroad car, are justified in following the directions or request of the employé in charge, while he is engaged in the direct line of his duty, in assisting passengers in getting off and on a car, or in directing them while so doing. They may very properly assume that such employés are familiar with the operations of the cars, and have knowledge of what is required for safety and protection while giving such directions. *Filler v. N. Y. C. R. R. Co.*, 49 N. Y. 47; s. c., 59 id. 351; *Clark v. Eighth Ave. R. R. Co.*, 36 id. 135; *McIntyre v. N. Y. Cent. R. Co.*, 37 N. Y. 287."

The train started while plaintiff was alighting; the defendant claimed that some persons pulled the rope. There was some evidence impeaching this. For jury. *Ferry v. M. R. Co.*, 118 N. Y. 497; aff'g 22 J. & S. 325. and judg't for pl'ff.\*

A man of seventy years of age, unincumbered, signaled a street car which, upon the application of the brake, slowed up but did not stop, whereupon the plaintiff caught hold of the rail with both hands, but, as he put his foot on the step, the brake was relaxed and the car started with a sudden jerk, whereby his feet were thrown from the step and he was dragged and injured.

The negligence of the plaintiff and defendant was for the jury. The fact that the car was moving slowly when the plaintiff attempted to get on was not *per se* negligence. *Morrison v. Broadway & Seventh Ave. R. Co.*, 130 N. Y. 166, aff'g judg't for pl'ff.

Distinguishing *Hayes v. Forty-second & c. S. & R. Co.*, 97 N. Y. 259.

An infant, in charge of a female of middle years, entered an open car; before they could reach a place of safety and while yet on the top-most step on a level with and part of the floor of the car, upon a signal it started with a jerk and threw the woman on the seat and the boy into the street, injuring him. The question of the defendant's negligence was for the jury as it was the duty of the conductor to see that the passenger was in place of safety before giving the signal to proceed. *Akershool v. Second Ave. R. Co.*, 131 N. Y. 599.

Plaintiff crossed the horse car track to reach the car, which stopped for him on the further track; he got hold of the handle and had his foot on the step, when the car started and dragged him until he struck a car

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\*NOTE. "SEC. 419. MISCONDUCT OF OFFICIALS OR EMPLOYÉS ON ELEVATED RAILROAD. Any conductor, brakeman, or other agent or employé of an elevated railroad, who:

(1) Starts any train or car, of such railroad, or gives any signal or order to any engineer or other person to start any such train or car, before every passenger therein who manifests an intention to depart therefrom by rising, or moving toward the exit thereof, has departed therefrom; or before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train, has actually boarded, or entered the same, unless due notice is given by an authorized employé of such railroad that the train is full and that no more passengers can then be received; or

(2) Obstructs the lawful ingress or egress of a passenger to or from any such car; or

(3) Opens a platform gate of any such car while the train is in motion, or starts such train before such gate is firmly closed, is guilty of a misdemeanor." Penal Code, as amended by chap. 692, Laws of 1892

on the opposite track. For jury. *Dale v. B. C. R. Co.*, 1 Hun. 146, aff'g judg't for plff; s. c. aff'd, 60 N. Y. 638.

A passenger claimed that while alighting from a street car the same was started before she had sufficient time to free herself from it, which was denied by defendant's evidence. For the jury. *Durfee v. Johnstown, Gloversville and Kingsboro Horse R. Co.*, 71 Hun. 279, aff'g judg't for plff.

Plaintiff, thrown from car platform by jerk of car while she was in the act of alighting, was held not negligent in failing to use handles to a car, when it appeared that, to do so, she must get off backwards. *Martin v. Second Ave. R. Co.*, 3 App. Div. 148.

Defendant's negligence in suddenly starting the car before plaintiff had time to enter and throwing her against the door was for the jury. She was not negligent in boarding by the front platform at the invitation of the driver. *De Rozas v. Metropolitan Street R. Co.*, 13 App. Div. 296.

Motorman with knowledge of dangerous position of passenger must use care in running his car on a curve to avoid jolts and jerks. *Lansing v. Coney Island &c. R. Co.*, 16 App. Div. 146.

Where the motorman testified that a violent jerk would be the result of putting on more than one point of power at a time in starting a car, it was proper to leave it to the jury to say whether so doing was the cause of the violent jerk in the present case. It was not negligence for plaintiff to stand in the aisle holding on to a strap on being unable to obtain a seat. *Grötsch v. Steinway R. Co.*, 19 App. Div. 130.

Where a car was started while plaintiff was in act of alighting, she was not negligent in pausing on the step until an approaching truck has changed its position sufficiently to make it safe for her to alight. *Norton v. Third Ave. R. Co.*, 26 App. Div. 60.

Car started before a woman had become seated. It could only be started with a jerk. Negligence was for the jury. *Dochtermann v. Brooklyn &c. R. Co.*, 32 App. Div. 13; s. c. aff'd, 161 N. Y. 586.

Where a car has temporarily stopped on account of a wagon in front of it, the conductor may be held negligent in failing to ascertain whether anyone was attempting to board it, before he signals it to start again. *Dean v. Third Ave. R. Co.*, 34 App. Div. 220.

Motorman was not negligent in failing to see that one might be in the act of boarding, where he was not appraised of anyone's desire to enter and the situation was such that one could not be expected to take the slackening of speed as a preparation for stopping and attempt to get on. *Bachrach v. Nassau Electric R. Co.*, 35 App. Div. 633.

Where plaintiff did not know that his signal to the conductor was

communicated to the gripman, he was not warranted in assuming that a slackening of speed was made to permit him to get off. *Armstrong v. Metropolitan Street R. Co.*, 36 App. Div. 525.

Where two parties have hailed a car it was for the jury to say whether the driver, knowing one had boarded, was negligent in failing to know that the other desired to board also and see that he was safely aboard before starting. *Sexton v. Metropolitan Street R. Co.*, 40 App. Div. 26.

Defendant had not given plaintiff a reasonable time to alight, where she had not time enough to release her skirts from an obstruction on the platform of the car on which they had caught without her fault. It is not negligence *per se* to wear long skirts though they are apt to catch upon such obstructions. *Smith v. Kingston City R. Co.*, 55 App. Div. 143: s. c. aff'd, 169 N. Y. 616.

Of two cars coming toward plaintiff in the same direction on parallel tracks, he signaled the one furthest from him. It slowed down. After the car nearest him had passed he attempted to board the car he had signaled by the rear platform, where the conductor stood looking at him, signal cord in hand, but was thrown to the ground by the sudden starting of the car. It was held error to set aside a verdict for plaintiff. *Kimber v. Metropolitan Street R. Co.*, 69 App. Div. 353.

Street railway company held liable for starting a car while one was in the act of boarding. *Schalscha v. Third Ave. R. Co.*, 19 Misc. 141.

Where it did not appear that plaintiff's dress caught on the car through any defect therein, recovery was denied. *Doyle v. Metropolitan Street R. Co.*, 29 Misc. 331.

Starting while one was alighting was negligence. *Weiss v. Metropolitan Street R. Co.*, 29 Misc. 332.

Especially starting with a jerk. *Brady v. Metropolitan Street R. Co.*, 33 Misc. 793.

Without warning and while the passengers were getting off before her. *Flanagan v. Metropolitan Street R. Co.*, 31 Misc. 820.

Where the evidence was conflicting as to whether the car was started while plaintiff was alighting or she attempted to alight before it had stopped, it was error to refuse to charge that defendant was not liable if she got off while the car was in motion. *Cunningham v. Dry-Dock &c. R. Co.*, 31 Misc. 471: rev'g s. c., 60 N. Y. Supp. 990.

Starting before plaintiff had time to get completely on while hindered by persons ahead of him, with knowledge that a truck stood near the track, with which he was apt to collide, was negligence. *Goldwasser v. Metropolitan Street R. Co.*, 32 Misc. 682: aff'g s. c., 65 N. Y. Supp. 1134.

That a car runs on schedule time and only stops at regular stations is no excuse for not seeing that one is safely off, where it does stop by request. *Birmingham &c. Co. v. Wildman*, 119 Ala. 547.

Ignorance of plaintiff's infirmities which made it difficult for her to board, was no excuse for failure to use reasonable care to see that she was attempting to board before starting. *Post v. Hartford &c. R. Co.*, 72 Conn. 362.

Starting the car while a passenger is on the footboard and before he has an opportunity to enter the car, is negligence. *Anacostia &c. R. Co. v. Klein*, 8 App. D. C. 75.

Where a car has stopped and a conductor has notice of one's intention to alight, he is bound to give a reasonable time to do so, though it is at an unusual place. *Washington &c. R. Co. v. Grant*, 11 App. D. C. 107.

After the car stopped a lady passenger rose without delay and went to the platform, but the car was started while she was in the act of getting off with her back to the front of the car and without taking hold of the guard rail. She was permitted to recover. *Rouser v. Washington*, 13 App. D. C. 320.

Whenever a street car stops for any cause near a crossing, it is the duty of those in charge to use reasonable care not to start it again while anyone is boarding or alighting. An instruction requiring passengers to use the highest degree of care in alighting held erroneous. *Chicago Street R. Co. v. Manning*, 170 Ill. 417; aff'g s. c., 70 Ill. App. 239.

Starting car where defendant's servants knew or by the exercise of reasonable care should have known that plaintiff was in the act of alighting, was negligence. *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634; aff'g s. c., 71 Ill. App. 162.

Where a car has stopped after the conductor has called the name of a street, one is warranted in acting on the assumption that it will not start before he has had time sufficient to alight. *North Chicago Street R. Co. v. Brown*, 178 Ill. 187; aff'g s. c., 76 Ill. App. 654.

Responsibility for injuries to a passenger attaches when the train starts up as he is attempting, with the exercise of due care to get on. *Chicago &c. R. Co. v. Drake*, 33 Ill. App. 114.

Failure to stop long enough to enable a boy of five to follow his mother off a car so as to avoid being struck by a passing car, was negligence. *West Chicago Street R. Co. v. Waniata*, 68 Ill. App. 481; s. c. aff'd, 169 Ill. 17.

Where a car has stopped pursuant to a signal defendant could not say that it did not know plaintiff was in the act of getting on. *West Chicago Street R. Co. v. James*, 69 Ill. App. 609.

Conduct indicating a desire to alight in the immediate presence of the

conductor and gripman is equivalent to an express notice thereof. *West Chicago Street R. Co. v. Stiver*, 69 Ill. App. 625.

The greatest care consistent with the practical operation of the cars, is required so as to prevent injury to one in the act of alighting. And when the car has stopped, though in the middle of a block, one may assume that he may alight in safety. *West Chicago Street R. Co. v. Luka*, 72 Ill. App. 60.

Railroad's liability as common carrier has not ceased until it has stopped long enough to permit passengers to alight. *Jeffersonville &c. R. Co. v. Parmaice*, 51 Ind. 42.

*Keller v. Sioux &c. R. Co.*, 27 Minn. 178; see, also, *Straus v. Kansas City &c. R. Co.*, 72 Mo. 414; *Louisville &c. R. Co. v. Mack*, 64 Miss. 738.

A person boarding a moving car that has slowed to take him on, has the right to assume that due care will be exercised not to start with a sudden jerk. *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284.

Conductor descended and assisted plaintiff off the car and, when he got on again, stepped on the train of her skirts still on the platform, and started the car going. Conductor was negligent. *Citizens' Street R. Co. v. Shepherd*, (Ind. App.) 62 N. E. Rep. 300.

One who voluntarily assumes a dangerous position on a railway car and is injured by the car's jerking cannot recover for such injuries. *Lindsey v. Chicago &c. R. Co.*, 64 Iowa, 407.

*Bon v. R. Co.*, 56 Iowa 664; *Secor v. Toledo &c. R. Co.*, 10 Fed. R. 15; *Illinois Central R. Co. v. Green*, 81 Ill. 19; *Blodgett v. Bartlett*, 50 Ga. 353; *Lewis v. London &c. R. Co.*, L. R. 9 Q. B. 66.

That the signal to start was given by an unauthorized person, did not relieve defendant of seeing that a person was safely alighted before allowing the car to continue thereunder. *Leavenworth Electric R. Co. v. Cusick*, 60 Kan. 590.

Where the circumstances are sufficient to warrant one assuming the street car stopped to enable him to alight, he may do so and defendant is negligent in not allowing sufficient time therefor, though it had not stopped for that purpose. *Bell Electric Line Co. v. Tomlin*, (Ky.) 40 S. W. Rep. 925.

That it was customary for passengers to leave cars while in motion was no excuse for starting while one was in the act of alighting. *Louisville R. Co. v. Rammacker*, (Ky.) 51 S. W. Rep. 175.

A reasonable chance must be given for passengers to alight from a street car, and greater time for a person of known disability. *Wardell v. New Orleans &c. R. Co.*, 35 La. Ann. 202.

*Howell v. St. Charles St. R. Co.*, 22 La. Ann. 603; *Chrissey v. Hestonville &c. R. Co.*, 75 Pa. St. 83; *Toledo &c. R. Co. v. Baddley*, 54 Ill. 19; *Jeffersonville &c. R.*

Co. v. Hendricks, 26 Ind. 228; Illinois Central R. Co. v. Slatton, 54 Ill. 133; Southern &c. R. Co. v. Kendrick, 40 Miss. 374; Fairmount &c. R. Co. v. Stutler, 54 Pa. St. 375; Dawson v. Louisville &c. R. Co., 11 Am. & E. R. Cas. (Ky.) 134; St. Louis &c. R. Co. v. Person, 49 Ark. 182.

Starting a car while a passenger is on the step about to alight is gross negligence. *Caruth v. Texas &c. R. Co.*, 45 La. Ann. 1228.

A passenger was injured by remounting the front platform of a car which he had assisted in replacing on the track, and it was held, that driver's negligence in starting the car should go to the jury. *Peoples' &c. R. Co. v. Green*, 58 Md. 84.

Failure to see that all persons seeking to embark had entered the car before starting, was negligence. *Davey v. Greenfield &c. R. Co.*, 177 Mass. 106.

Passenger on the rear platform, the conductor being inside collecting fares, rang the signal to start while plaintiff was in the act of alighting. Defendant's negligence was for the jury. *Nichols v. Lynn &c. R. Co.*, 168 Mass. 528.

See, also, *O'Neil v. Lynn &c. R. Co.*, (Mass.) 62 N. E. Rep. 983.

Until it becomes necessary to receive passengers into a train, it is not negligence to move it back and forth for the convenience of the company. *Flint &c. R. Co. v. Stark*, 38 Mich. 714.

So where the injuries are received by reason of jerking of street car. *Brown v. Congress &c. R. Co.*, 49 Mich. 153.

Where a train starts before a passenger has had time to get on or off, the carrier will be liable. *Wood v. Lake Shore &c. R. Co.*, 49 Mich. 370.

*Chicago, West. Div. R. Co. v. Mills*, 105 Ill. 63; *Rathbone v. Union R. Co.*, 13 R. I. 709; *Louisville &c. R. Co. v. Mask*, 64 Miss. 738; *Jeffersonville &c. R. Co. v. Parmelee*, 51 Ind. 42; *Saare v. Union R. Co.*, 20 Mo. App. 211.

Defendant was liable for the consequences of a sudden jerk due to the inexperience of a motorman. *Elson v. Ft. Wayne &c. R. Co.*, 114 Mich. 605.

An instruction apt to convey the idea that a conductor must assist women with children to alight, is erroneous. *Selby v. Detroit R. Co.*, 122 Mich. 311.

Where a street car suddenly started as plaintiff was in the act of getting on with the knowledge of conductor, liability attached. *Sahlgard v. St. Paul &c. R. Co.*, 48 Minn. 232.

No recovery allowed on ground that train was not stopped long enough, when plaintiff knew that premature starting was due to an unauthorized act of passenger in pulling bell rope. *Mississippi &c. R. Co. v. Harrison*, 66 Miss. 419.

A person who signals a train to stop at a point not a stopping place, and is injured while attempting to get on by the sudden starting of the train, cannot recover as a passenger, his purpose to get on being unknown to the trainmen. *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643.

Carrier was not chargeable with punitive damages, where plaintiff's signal at a flag station was seen by the engineer but not by the conductor, who, however, signalled the engineer to stop to allow a passenger to alight and gave him the signal to start, leaving plaintiff behind. *The Yazoo &c. R. Co. v. Faust*, (Miss.) 32 South. Rep. 9.

If a reasonable time be given, the company is not necessarily liable for starting the train thereafter, while passenger is alighting. *Clotworthy v. Hannibal &c. R. Co.*, 80 Mo. 220.

*Straus v. K. C. &c. R. Co.*, 75 Mo. 185; *Swigert v. Hannibal &c. R. Co.*, 75 id. 475; *Davis v. Chicago &c. R. Co.*, 18 Wis. 175; *Pa. R. Co. v. Lyons*, 129 Pa. St. 113; *Covington v. Western &c. R. Co.*, 81 Ga. 273; *Madden v. Mo. Pac. R. Co.*, 50 Mo. App. 666. See *Chicago &c. R. Co. v. Arnol*, 144 Ill. 261; *Washington &c. R. Co. v. Harmon*, 147 U. S. 571.

When the plaintiff was in the act of alighting, the train suddenly started and he was thrown from the platform of the car; question of plaintiff's negligence is for the jury. *Leslie v. Wabash &c. R. Co.*, 88 Mo. 50.

See, also, *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336; *Nichols v. Dubuque &c. R. Co.*, 68 Iowa 732; *Central R. Co. v. Van Horn*, 9 Vroom (N. J.) 133; *Clotworthy v. Hannibal &c. R. Co.*, 80 Mo. 220.

A street car is required to exercise a very high degree of care as to starting while one is alighting; a passenger is bound to use ordinary care. *Cobb v. Lindell R. Co.*, 149 Mo. 135; *Grace v. St. Louis R. Co.*, 156 Mo. 295.

That car stops at a street corner after an intending passenger has signaled it does not make a street car company liable for injuries while attempting to get on, where the stop was made to discharge passengers only and the conductor warned plaintiff in a voice sufficiently loud to be heard, not to board. *Macey v. Metropolitan Street R. Co.*, (Mo. App.) 68 S. W. Rep. 1063.

Plaintiff was not negligent, where, as she was about to alight, she requested the conductor to wait until a team approaching had passed and the car started as she was alighting after it had passed. *Hutchins v. Macomber*, 68 N. H. 473.

It was for the jury to say whether it was negligent in a boy to get on the wrong side of a car barred by a rail and whether the conductor was negligent in starting the car before the boy was fairly on. *Kelly v. Consolidated T. Co.*, 62 N. J. L. 514.



It was not negligence *per se* to start a car before one has secured a seat. *Herbich v. North Jersey &c. R. Co.*, 65 N. J. L. 381.

That the car has stopped a reasonable time and plaintiff did not move as quickly as she might, was no excuse for starting the car while she was in the act of alighting. *Morrison v. Charlotte Electric R. &c. Co.*, 123 N. C. 414.

Where defendant was not guilty of any want of due care in starting a car, until plaintiff had gotten off, it was not negligent. *Asbury v. Charlotte Electric R. &c. Co.*, 125 N. C. 568.

A charge that plaintiff was negligent, if, in the exercise of reasonable care, she could have prevented the accident, was misleading, as there might have been many ways of preventing the accident which plaintiff was under no duty to adopt. *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638.

Failure to gather up one's dress was not negligence as matter of law, there being no reason to apprehend danger from not doing so. *Patterson v. Inclined Plane R. Co.*, 12 Oh. C. C. 274.

Where car has stopped at unusual place for the purpose of seeing if the track is clear, it is not negligence to start on without seeing whether anyone is taking advantage of the stop to get on. *Packard v. Toledo Traction Co.*, 22 Oh. C. C. 578.

Where plaintiff attempted to get upon the front platform of a car which had stopped to let another person off, and is injured by the sudden starting of the same no recovery was allowed providing neither driver nor conductor saw him. *Pitcher v. Peoples' St. R. Co.*, 154 Pa. St. 560.

The jury decided street car company's negligence where passenger boarding car by front platform was injured by the sudden starting of the same before she could reach a seat. *Holmes v. Allegheny Traction Co.*, 153 Pa. St. 152.

It was negligence to start a car on information of a passenger. *McCurdy v. United Traction Co.*, 15 Pa. Super. Ct. 29.

What is a reasonable time is for the jury. *McSloop v. Richmond &c. R. Co.*, 59 Fed. Rep. 431.

Although reasonable time was given plaintiff to board defendant's street car, if the same was violently started when the employes knew that he was in the act of boarding, recovery may be had. *Cohen v. West Chicago St. R. Co.*, 60 Fed. R. 698.

Railroad company may be liable for negligence to persons, although its character of common carrier is lost: as where passenger having arrived at her destination was injured by train starting before she had alighted, and recovered for injuries inflicted, although the court said the

liability of company as carrier had ceased. *Imhoff v. Chicago &c. R. Co.*, 22 Wis. 681.

Defendant was not liable for negligence in prematurely starting car, where plaintiff was negligent in attempting to alight. *Kohler v. West Side R. Co.*, 99 Wis. 33.

Failure to see an intending passenger, was no excuse where conductor was inside the car and failed to ascertain that all desiring passage were safely aboard. *Dudley v. Front Street &c. R. Co.*, 43 Fed. Rep. 128.

## VII.—Moving Cars.

A passenger who attempts to board or alight from a moving train, generally is guilty of presumptive negligence, although invited thereto by the servant of the carrier, unless the act or words of the servant are such as would be calculated to, and do disturb and coerce the passenger's judgment, so that he, in good faith, believes and from the standpoint of ordinary prudence and judgment is entitled to believe, that the act is safe, although in fact it is dangerous. This rule does not apply to ordinary street cars moving with moderate speed, unless there be present conditions that would deter a person of ordinary prudence from attempting to alight or enter.

### (a). ENTERING CARS—LIABILITY—STEAM CARS.

It is not negligent *per se* to attempt to board a moving train. *Birmingham R. &c. Co. v. Clay*, 108 Ala. 233.

A person may be exercising due care in mounting the platform of an electric car in motion. *Corlin v. West End &c. R. Co.*, 154 Mass. 197.

It is not negligence *per se* for a passenger to get upon a train after the signal to start has been given, if the train be at rest when he begins his attempt. *Darson v. Boston &c. R. Co.*, 156 Mass. 127.

Mounting a moving train is not *per se* negligence; speed and circumstances are elements for jury to consider. *Swigert v. Hannibal &c. R. Co.*, 75 Mo. 415.

*Johnson v. West Chester &c. R. Co.*, 70 Pa. St. 357; *Lambeth v. North Carolina &c. R. Co.*, 66 N. C. 494; *Conner v. Citizen R. Co.*, 105 Ind. 62; *Chicago &c. R. Co. v. Mumford*, 97 Ill. 560; *Wyatt v. Citizen R. Co.*, 55 Mo. 485; *Vadderventer v. Chicago City R. Co.*, 26 Fed. Rep. 32.

Not negligence *per se* to attempt to board a train suddenly starting from a station where stop had been made, for refreshments, before the allotted time. *Missouri &c. R. Co. v. Tietken*, 49 Neb. 130.

Passenger was not negligent in failing to take the first seat he reaches, though he knows a coupling is about to be made. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 103.

Jury was justified in finding plaintiff not negligent, where he testifies

that he started to alight as quickly as he could when the car stopped, but that it stopped an unusually short time and that, when he got on the step, the train was moving slow enough, as he thought, to jump in safety. *Johnson v. Atlantic &c. R. Co.*, (N. C.) 41 S. E. Rep. 794.

But one's negligence in boarding a moving car does not excuse pushing him off the step. *Sharrer v. Parson*, 171 Pa. St. 26.

Not negligence *per se* to attempt to board a moving train. *Houston &c. R. Co. v. Stewert*, 14 Tex. Civ. App. 703.

Or to assist another to do so. *Houston &c. R. Co. v. Stewert*, 14 Tex. Civ. App. 703; *Mills v. Missouri &c. R. Co.*, (Tex.) 59 S. W. Rep. 874; rev'g s. c., 57 S. W. Rep. 291.

And when the attempt was made at the invitation of the conductor, it did not prevent recovery, where, but for the sudden jerk of the car it would have been boarded in safety. *Missouri P. R. Co. v. Foreman*, (Tex. Civ. App.) 46 S. W. Rep. 834.

Rules in regard to boarding passenger trains do not apply to live freight traffic. *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 945.

#### (b). ENTERING CAR—LIABILITY—STREET CARS.

It is not always *per se* negligent to get on a street car in motion. *Phillips v. R. & Sar. R. R. Co.*, 49 N. Y. 117; *Morrison v. Erie R. Co.*, 56 id. 302; *Mettlestadt v. Ninth Ave. R. R. Co.*, 4 Robt. 377; *Burrows v. Erie R. R. Co.*, 63 id. 556.

Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or is clumsy, or is encumbered with children, packages or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as matter of law, that there was negligence in doing so. But in most cases it must be a question for a jury.

The plaintiff signalled an open car, the brake was applied and the car was going slowly. The plaintiff put one foot on the step and one hand on the seat; the driver loosed the brake and the car was jerked, and the plaintiff hurt. For the jury. *Eppendorf v. B. C. & N. R. R. Co.*, 69 N. Y. 195, aff'g judg't for plff.

The plaintiff claimed, that the platform of the car was crowded and that one foot was on the lower step; that he could not get hold of the hand rail and that the car started and that he was thrown off and injured by an uptown car going in the opposite direction. For the jury. It was error to charge, that a verdict could be based on negligence in the con-

duct of uptown car. *Black v. B. C. R. Co.*, 108 N. Y. 640, rev'g judg't for plff.

The fact that a person attempted to enter a stage drawn by horses on the streets of a city, while it was in motion, where the driver thereof had nearly stopped the stage, and its motion hardly perceptible, does not *per se* constitute contributory negligence. *Frobisher v. Fifth Ave. Transportation Co.*, 81 Hun. 544; s. c. rev'd on another point, 151 N. Y. 431.

Negligence and contributory negligence were for the jury, where plaintiff started to board a car while it was stopping but nearly at a standstill, and defendant started it with a jerk without notice and while he had but partly entered the car, throwing him to the ground. *Wallace v. Third Ave. R. Co.*, 36 App. Div. 57.

To board a slowly moving street car is not negligence *per se*. *Sexton v. Metropolitan &c. R. Co.*, 40 App. Div. 26.

Plaintiff held not negligent as a matter of law in boarding a slowly moving street car with bundles in one hand and with the other catching the handrail furthest from it. *Birmingham R. &c. Co. v. Brannon*, (Ala.) 31 South. Rep. 523.

It is not negligence *per se* to board the platform of a moving street car which has slackened its speed pursuant to signal. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

Evidence of customary stoppage of a car at a given point was inadmissible to show that it was moving slowly at that point when plaintiff boarded it. *West Chicago &c. R. Co. v. Thorpe*, 187 Ill. 610; *North Chicago Street R. Co. v. Wiswell*, 168 id. 613; aff'g s. c., 68 Ill. App. 443.

Boarding a moving electric or cable car is not negligent *per se*. *West Chicago &c. R. Co. v. Lups*, 74 Ill. App. 420; *Cicero &c. Street R. Co. v. Meixner*, 160 Ill. 320.

Mounting front platform of moving street car is not *per se* negligent. *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

*Baltimore &c. R. Co. v. Wilkinson*, 30 Md. 224.

It was for the jury to say whether it was, under the circumstances, negligent to board a moving train. *Chicago &c. R. Co. v. Flaherty*, 96 Ill. App. 563.

Plaintiff was not *per se* negligent in getting on a street car in motion. *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601; *Omaha Street R. Co. v. Martin*, 48 Neb. 65.

Where a car slows up or otherwise gives the appearance of complying with a signal, it is negligence to start on until passenger is safely aboard. *Austrian v. United Traction Co.*, 19 Pa. Super. Ct. 329.

But negligence in attempting to board did not excuse increasing speed

with a jerk, while passenger was in the act of doing so with knowledge of those in charge. *Christie v. Galveston City R. Co.*, (Tex. Civ. App.) 39 S. W. Rep. 638.

(c). ENTERING CARS—NO LIABILITY—STEAM CARS.

The plaintiff tried to get on a train which was slowly moving, but the platform was so crowded that he could not get on the steps, and he was carried along and hit by an obstruction. The plaintiff was negligent.

Plaintiff testified that the cars came and slowed down, and he started to get on, they had about stopped; others began to jump on; ahead of him a good many were jumping on. That the brakeman called out West Troy (name of the station). That they were getting on all along the cars. That he got on the step, two men got ahead of him, and he could not get any further up. That the cars were then jerked ahead and *jerked him off the step, but he did not let loose of the handle. That he recovered back, and when they were on pretty good speed, they jerked very powerful.* The handle was the iron rod. That he got on because he saw others getting on, so he recovered back upon the step, but had no more than recovered back, before he was knocked off by the platform, and rolled in between the car and the platform. That the cars were going very slow when he got on, *but the second time were going pretty good speed.* That he did not see or know anything about the platform until he struck it. It was proved that this platform was a structure of the height of the floor of the cars, the front of which was seven inches from the outside of a car upon the track, erected and used only for the purpose of loading and unloading freight. *Phillips v. Rensselaer & Sar. R. R. Co.*, 49 N. Y. 177; reversing 51 Barb. 642, and affirming nonsuit.

When the passenger purchased her ticket the train was at the station. She came on the platform of the station after the departure signal had been given and the engineer was about to apply steam, and the conductor and brakeman had gone in the train, being unaware of her presence. The plaintiff grasped the rail of the car, was thrown down and injured. Defendant was not liable. Where those on station platforms have entered and those in the cars have left, the train may be started. *Paulitsch v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 280.

Boarding or alighting from a moving car is presumably and generally a negligent act *per se*; to rebut this it must appear, that the passenger was put to his election between alternate dangers, or that his free agency or attention was disturbed by those in charge. Acquiescence by those in charge is not enough.

A train on defendant's elevated road, after stopping at a station, had

started again when "S." and two others preceding him, attempted to get on to the rear platform of the first car. The conductor had given the signal to start, and had closed, or attempted to close, the gate to the platform before the first of the three men reached the car. The train was slowly moving, but with a constantly accelerated speed. The two men in advance succeeded in getting on the train safely; the conductor having opened, or they having pushed open, the gate. "S." who was a short distance behind, attempting to get on board, took hold of the stanchions of the car with both hands, and placed one foot upon the car platform, when the conductor closed the gate. "S." was carried along a few feet until he came in contact with a water pipe, receiving fatal injuries. The accident occurred in the evening; the station platform was lighted. "S." had been in the habit of taking the train at this station for more than a year. The train was accustomed to stop "very sharp," and to start "very quick." Trains ran every five minutes. Held, that the plaintiff was properly nonsuited. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, aff'g 31 Hun. 5, and nonsuit.

Distinguishing *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47.

After the gate was closed, and the train in motion, an excluded passenger had hold of the stanchions of the platform, clinging to them as the train moved, while the gateman was pushing him away. Three witnesses for the plaintiff saw the accident. The wife and sister observed only the gateman pushing the deceased at a moment, when they were unable to say whether the train had started or not; but the third witness, a passenger in an adjoining car, and apparently wholly disinterested, testifies distinctly, that after the gate was slammed and the train in motion, the deceased was holding on to the iron standard, supporting the roof of the platform, while the gateman was trying to push him away, and that this continued until the deceased disappeared from sight. It was not material whether the act of the deceased should or should not be deemed *a physical effort* to get upon the car. It was an interference with the moving train, obviously dangerous and imprudent, from which the injury resulted, and for which there was no necessity or excuse. Nonsuit was proper. *Card v. Manhattan R. Co.*, 103 N. Y. 670, rev'g judg't for plff.

A person who, in a safe place and under no stress of circumstances, attempts to board a train in motion, while in such proximity to a known and prominent obstruction, as would render the consequences of a mis-step serious, no matter what motive or influence induced the act, is negligent.

An adult, acquainted with the station, stood upon the freight platform until the train came in sight, when he descended some steps to the pas-

senger platform and stood three or four feet from the steps waiting for the train, which slowed up to one or two miles per hour but did not stop. The conductor called out, "if you are going, jump on." In attempting to do so the passenger was caught between the moving train and the freight platform. He was negligent.

One *sui juris* in full possession of his faculties, with nothing to disturb his judgment, attempting to board a train moving at the rate of from four to six miles per hour, past a station, is negligent *per se* although the conductor called out "jump on, if you are going." *Hunter v. C. & S. V. R. Co.*, 112 N. Y. 371, rev'g judg't for pl'ff.

Where, in the same case but after a new trial, the train was moving from one to three miles per hour, the court, by a majority of one, arrived at the same result. *Hunter v. C. & S. V. R. Co.*, 126 N. Y. 18, rev'g judg't for pl'ff.

Distinguishing *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47.

A person who is injured while attempting to board a moving train propelled by steam, is presumptively guilty of contributory negligence. *Myers v. The New York Central and Hudson River Railroad Company*, 82 Hun. 36. (New York Common Pleas.)

The boarding by a person of an elevated railway train while the gate is closing and the train moving, and persisting, against an effort to remove him, in the precarious position thus obtained, is contributory negligence. *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g nonsuit. (N. Y. Com. Pleas.)

Not negligent *per se* to board a slowly moving horse car. *Brown v. Washington &c. R. Co.*, 11 App. D. C. 37.

Not negligence as matter of law to board a moving car. *Chicago &c. R. Co. v. Gore*, 96 Ill. App. 553; *North Chicago Street R. Co. v. Kaspers*, 85 id. 316.

Plaintiff waited until train had started, and, in attempting to board it, was injured. His negligence contributed to the injury and he could not recover. *Chicago &c. R. Co. v. Scates*, 90 Ill. 586.

*Phillips v. Rens. &c. R. Co.*, 49 N. Y. 177; *Michigan Central R. Co. v. Coleman*, 28 Mich. 440.

Negligence *per se* to board a moving train after it left station. *Walthers v. Chicago &c. R. Co.*, 72 Ill. App. 354.

Or before it arrived. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Plaintiff, entitled to ride in a caboose, attempted to climb one of the forward cars, holding in one hand a lantern and a pole, and was injured. He was guilty of contributory negligence. *McCorle v. Chicago &c. R. Co.*, 61 Iowa, 555.

Bon v. R. Co., 56 Iowa 664; Doggett v. Illinois Central R., 34 id. 284; Player v. Burlington &c. R. Co., 62 id. 723.

Violation of a statute in boarding a moving train without permission, was the proximate cause of injury. *Young v. Chicago &c. R. Co.*, 100 Iowa, 357.

One who waits until a train has started before boarding it, cannot recover for injuries received in falling from it. *Bailey v. C. N. &c. R. Co.*, 14 Ky. L. R. 226.

Where deceased ran and in attempting to get on a moving train was killed, no recovery was allowed. *Knight v. Ponchartrain R. Co.*, 23 La. Ann. 462.

Hubener v. New Orleans &c. R. Co., 23 La. Ann. 492; Denver &c. R. Co. v. Pickard, 9 Colo. 163; where employes invited person to jump on train.

One mounting a moving train does not become a passenger until after he has reached a place of reasonable safety; and cannot recover if he falls off, before so doing. *Merrill v. Eastern R. Co.*, 139 Mass. 238.

*Knight v. Ponchartrain R. Co.*, 23 La. Ann. 462; *Hubener v. New Orleans &c. R. Co.*, id. 492; *Galveston &c. R. Co. v. LeGierse*, 51 Tex. 189. See, however, *Central R. Co. v. Perry*, 58 Ga. 461.

Plaintiff, who was requested by one of defendant's employes to stop a train, was injured in attempting to board it, and, his act being voluntary, no recovery was allowed. *Blair v. Grand Rapids &c. R. Co.*, 60 Mich. 124.

No liability to an old man who jumped on a moving train, lost his footing so that he held only by his hand, and although told not to hold on, continued to do so until the train attained a rapid speed and he was injured. *McMurtry v. Louisville &c. R. Co.*, 67 Miss. 601.

One who attempts to get on a moving train after being warned by trainmen not to do so, has no right of action. *Fulks v. St. Louis &c. R. Co.*, 111 Mo. 335.

Boy of 14 is not *per se* negligent in attempting to board an electric car with a trailer moving from three to seven miles an hour. *Sly v. Union Depot R. Co.*, 134 Mo. 681.

It was negligent *per se* to board a moving train under an increasing speed of 6 or 7 miles an hour, though by invitation of the conductor. *Heaton v. Kansas City &c. R. Co.*, 65 Mo. App. 179.

A person who attempted to get on a train in motion and falling was killed, was contributorily negligent, notwithstanding his fall was due to a defective platform. *Bacon v. R. Co.*, 143 Pa. St. 11.

A railroad company's invitation to passengers to board its train is withdrawn the moment the train begins to move. *Chaffee v. Old Colony R. Co.*, 11 R. I. 658.



One who attempted to board a freight train, and under circumstances which would have kept back a reasonable man, under no apprehension of danger, cannot recover. *Richmond &c. R. Co. v. Picklesimer*, 17 Va. L. J. 12.

(d). ENTERING CARS—NO LIABILITY—STREET CARS.

Charge that an attempt to get on a moving horse car was negligent, but the jury found the car was not moving when the plaintiff attempted to get on. *Wolfkiel v. Sixth Ave. R. Co.*, 38 N. Y. 49, aff'g judg't for pl'ff.

An able bodied man, unincumbered, waited upon the crosswalk for an open street car and motioned for it to stop, when it had nearly stopped he put his foot on the side of, and near the middle of it, took hold of the stanchion, and, after the car had moved six or seven feet, he was hit by the wheel of a track standing in the street. A refusal to nonsuit was error, as it was the plaintiff's duty to see, before getting on the car, that there was no obstruction outside of the car, which would make it dangerous for him to attempt to board it. *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583, rev'g judg't for pl'ff.

It was error to charge that it is as matter of law negligent to board a moving street car. *Lobsenz v. Metropolitan Street R. Co.*, 72 App. Div. 181.

Where it does not appear that a car slowed in response to a signal, it was negligent to attempt to board it with a box over the shoulder. *Hansen v. Third Ave. R. Co.*, 27 Misc. 524.

Having hailed a street car the plaintiff attempted to mount it in motion; the company was not liable as the driver had the right to suppose plaintiff would wait until car had stopped, and rules forbade it stopping where the injury occurred. *Holohan v. Wash. &c. R. Co.*, 8 Macky (D. C.) 316.

Attempting to board an electric car in motion bars recovery. *Noo Dan v. Seattle Electric &c. R. Co.*, 5 Wash. 466.

Error to charge that it was negligence to suddenly increase speed of street car approaching a stopping place with such slow motion that one might reasonably undertake to board it, where it did not appear that an attempt to board was known to those in charge. *Metropolitan Street R. Co. v. Hudson*, 113 Fed. Rep. 449.

(e). ALIGHTING FROM CARS—LIABILITY—STEAM CARS.

If a passenger on a slowly moving car is put to the choice of leaving the train or being carried to the next station, the defendant is liable for

the result of the choice, provided the choice be not wantonly or unreasonably exercised. The jury must say whether the passenger used reasonable care. *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47, rev'g judg't for pl'ff for error in charge as to damages.

The plaintiff was hurt while alighting from a car under somebody's direction to do so. If the direction came from somebody connected with the train, the defendant was liable; otherwise, not. *Filer v. N. Y. C. R. R. Co.*, 59 N. Y. 351, reversing judgment for plaintiff on the ground that court charged that it did not make any difference on question of contributory negligence, whether direction to alight was given by defendant's servant or any other person.

On the next trial all necessary evidence was forthcoming, and it was shown that the train was moving slowly, and the brakeman told her she had better get off, and while doing so the train gave a jerk. *Filer v. N. Y. C. R. R. Co.*, 68 N. Y. 124, aff'g judg't for pl'ff.

The plaintiff knew of the notice forbidding passengers to alight while the car was in motion. The car stopped and started up again and the plaintiff, on the platform of the car, asked a person to help her, which he did, and she was hurt in so alighting. Nonsuit should have been granted. *Burrows v. Erie R. Co.*, 63 N. Y. 556, rev'g judg't for pl'ff.

Distinguishing *Penn. R. Co. v. Kilgore*, 32 Penn. 292; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 47. Citing *Morrison v. Erie R. Co.*, 56 id. 302; *Garett v. M. & L. R. Co.*, 16 Gray, 501; *Lucas v. N. B. & T. R. Co.*, 6 id. 64.

It is negligent not to fully stop a train for a passenger to alight, or to induce one to alight when the train is in motion, and the passenger is not negligent *per se* in alighting, if induced so to do by the train agent.

As the train approached the station, where the plaintiff intended to and had the right to leave the cars, the speed was reduced until the train came nearly to a stop. The plaintiff prepared to leave and, with a little child in his arms, proceeded to the car platform for that purpose. According to his testimony the conductor, who was standing on the platform of the station, called to him and said, "you want to clear off here," and he answered he wanted to get off, and the conductor told him to step off, or get off, or jump off, he didn't know which. The train was then in motion and he got off on the right side of the car, taking hold of the rail on the right side of the car platform with his left hand; he then stepped off with his right foot first and was twisted around; he thought the train had stopped the same minute he stepped off, but was mistaken as he felt it was going and he was jerked around; the conductor took hold of him and they tumbled off the platform of the station together. He testified he did not know the train was going when he got off, or he thought it had stopped, and then he swore that when he

was in the act of getting off he saw it had not stopped, thus contradicting his former evidence. Question of contributory negligence was for the jury. *Bucher v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 128, rev'g nonsuit.

Plaintiff's jumping from a car upon apprehending a collision, though an error of judgment, was not contributory negligence, as, in face of the peril produced by defendant's negligence, she was not called upon to exercise the best judgment. *Heath v. Glens Falls &c. R. Co.*, 90 Hun. 560.

It was for the jury to say whether defendant was negligent in running rapidly over a crossing having an abrupt curve, two open switches and other railroad tracks, knowing a passenger was preparing to alight, and whether the latter was negligent in arising from her seat in preparing to alight with her child, on the assumption that the car would stop as usual at the side of the crossing first reached. *Whitaker v. Staten Island &c. R. Co.*, 72 App. Div. 468.

Guard opened gate of car while it was still in motion and plaintiff stepped off and was injured. Held error to nonsuit plaintiff. *McAlan v. Trustee's &c.*, 43 App. Div. 324.

Under a conflict of evidence as to whether plaintiff got off while the car was moving or the car moved before he could get off, it was held that defendant was entitled to a charge that, if he got off while it was moving, he could not recover. *Kuhlman v. Metropolitan Street R. Co.*, 30 Misc. 417; rev'g s. c., 29 Misc. 773.

Charge, that unnecessarily stepping from moving car barred recovery, held proper. *McDonald v. Montgomery Street R. Co.*, 110 Ala. 161.

Where announcement was made "all out for Huntsville," it was not negligent *per se* to go upon the platform preparatory to alighting while the car was in motion. *Southern R. Co. v. Roebuck*, (Ala.) 31 South. Rep. 611.

Not negligent *per se* to alight from electric car in motion though with a bundle under one arm about a foot long and eight inches wide. *Birmingham Railway &c. Co. v. James*, 121 Ala. 120.

The plaintiff, a woman, was told by the conductor to jump from a slowly moving train and in so doing was injured; recovery was not barred. *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519.

Not negligent *per se* to alight from train going 3 miles an hour. *Watkins v. Birmingham &c. R. Co.*, 120 Ala. 117.

It was not negligence for a woman of fifty-six encumbered with a valise, to alight from a slowly moving train. *Little Rock &c. R. Co. v. Atkins*, 46 Ark. 423.

The plaintiff's negligence in jumping from a train which did not stop

long enough, may be so slight as not to defeat recovery. *Illinois Cent. R. Co. v. Able*, 59 Ill. 131.

Woman was told by conductor to jump from slowly moving train. Recovery. *Georgia &c. R. Co. v. McCurdy*, 45 Ga. 288.

Whether stepping from a moving car is negligence depends upon the condition of the passenger and surrounding circumstances. *Chicago City R. Co. v. Meehan*, 11 Ill. App. 215; *Chicago &c. R. Co. v. Clausen*, 70 Ill. App. 550; s. c. aff'd, 113 Ill. 100.

Negligence in alighting while the train was in motion did not prevent recovery where plaintiff was injured by a locomotive on an adjoining track. *Pennsylvania Co. v. McCaffrey*, 68 Ill. App. 635.

Passenger may rely on conductor's advice, unless the circumstances warn him otherwise. *Penn. R. Co. v. Hoagland*, 78 Ind. 203.

*Penn. R. Co. v. McCloskey*, 23 Pa. St. 526; *Chicago &c. R. Co. v. Randolph*, 53 Ill. 510; *Lambeth v. N. C. R. Co.*, 66 N. C. 494; *Southwestern R. Co. v. Singleton*, 67 Ga. 306; Same Case, 66 id. 252.

Plaintiff attempted to leave a train which had not stopped long enough to allow him to alight. His negligence was for the jury. *Illinois C. R. Co. v. Whittaker*, (Ky.) 51 S. W. Ry. 465.

The plaintiff, a woman, was told by the conductor to jump from a slowly moving train and in doing so was injured; recovery was not barred. *Baltimore &c. R. Co. v. Leapley*, 65 Md. 571.

Where train stopped at station one minute, which was not time enough for plaintiff to alight, and she jumped after it had started up again, her recovery was not barred. *Lloyd v. Hannibal &c. R. Co.*, 53 Mo. 509.

It was not negligent to jump from a moving train upon a brakeman's giving warnings of danger of a wreck. *Ephland v. Missouri P. R. Co.*, 137 Mo. 181; s. c., 35 L. R. A. 107; rehearing denied, 137 Mo. 196; s. c., 35 L. R. A. 109.

In determining the character of such act, regard must be had as to what a reasonably prudent person would have done under such circumstances. *Chitty v. St. Louis &c. R. Co.*, 148 Mo. 64.

Not negligence *per se*, where plaintiff had one foot off and one on, when the train started. *Sanderson v. Missouri P. R. Co.*, 64 Mo. App. 655.

It is within the scope of authority of a brakeman to direct a passenger being carried by his station to jump while the train is in motion. *Owens v. Wabash R. Co.*, 84 Mo. App. 143.

It was for the jury to say whether sufficient time had been allowed for alighting, where plaintiff went to platform immediately upon announcement of the station, but the train was in motion before she reached the ground, and the train stopped again to let off other passengers who had

not alighted. *Toler v. Yazoo &c. R. Co.*, (Miss.) 31 South. Rep. 788.

Jumping from a moving train under circumstances of obvious peril bars recovery. *Chicago &c. R. Co. v. Hyatt*, 48 Neb. 161.

It is not negligent *per se* to alight from a moving train at night at the direction of the porter unless done in a negligent manner. *Hodges v. Southern R. Co.*, 122 N. C. 992.

Where plaintiff rode in a box car instead of the caboose, and, while the train was in motion, stood before its open door and was thrown out by a lurch of the car, this negligence barred a recovery. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41.

It was not negligence *per se* for a passenger to alight from a moving train at the conductor's direction, where it had slowed up to let him off but without stopping, and then increased its speed again. *Cooper v. Georgia &c. R. Co.*, 56 S. C. 91.

An employé on a pay car to receive his wages has the company's implied invitation to alight, if the train starts before he is given sufficient opportunity to get off. *Railroad Co. v. Slacker*, 86 Tenn. 344.

A woman, though weighing 200 pounds, and seventy-six years of age, was not negligent in alighting from a slowly moving train to avoid being carried by, where reasonable time was not given to alight. *Southern R. Co. v. Mitchell*, 98 Tenn. 27.

It is not *per se* negligence for a passenger to step from a train before it has quite stopped at a station. *Galveston &c. R. Co. v. Smith*, 59 Tex. 406.

*Treat v. Boston &c. R. Co.*, 131 Mass. 371; *Brooks v. Boston &c. R. Co.*, 135 id. 21; *Shannon v. Boston &c. R. Co.*, 78 Maine 52; *Johnson v. R. Co.*, 70 Pa. St. 365; *Delamatyr v. R. Co.*, 24 Wis. 586; *Fortune v. Missouri R. Co.*, 10 Mo. App. 252; *Doss v. R. Co.*, 59 Mo. 37; *Wyatt v. Citizens' R. Co.*, 55 id. 485; *Karle v. K. C. &c. R. Co.*, id. 476; *Lloyd v. H. & St. J. R. Co.*, 53 id. 509; *Leslie v. Wabash &c. R. Co.*, 88 id. 50; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *A. T. &c. R. Co. v. McCandless*, 33 Kas. 373.

It is not *per se* negligent to jump off a moving car though the conductor had stated that the train would stop. *Missouri &c. R. Co. v. Meyers*, (Tex. Civ. App.) 35 S. W. Rep. 421.

Not negligent *per se* to leave a moving train. *International &c. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102.

Jumping for fear of a wreck was not negligent where the circumstances reasonably justified the apprehension. *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 708.

See, also, *Railway Co. v. Neff*, 87 Tex. 303; *Railway Co. v. Watkins*, 88 id. 20.

Where train had slowed so that it was safe to alight, it was negligent to suddenly start it ahead while a passenger was waiting on the car plat-

form to alight. *San Antonio &c. R. Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Plaintiff was not negligent in jumping from a moving train, where, owing to the darkness, he could not see how fast it was going, and two men had already jumped without injury. *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114.

Where boarding a moving train was done at the conductor's invitation, ignorance of plaintiff's position upon starting the train with a jolt was immaterial. *Missouri P. R. Co. v. Foreman*, (Tex. Civ. App.) 46 S. W. Rep. 831.

Plaintiff accustomed to ride on freight trains, having boarded a freight train and tendered his fare was allowed to recover where conductor declined the fare, refused to stop the train and either pushed him off or ordered him to jump. *Texas &c. R. Co. v. Kelley*, (Tex. Civ. App.) 47 S. W. Rep. 809.

Where the danger is not apparent to one of ordinary judgment, he has a right to rely on the conductor's advice to jump. *International &c. R. Co. v. Rhoades*, 21 Tex. Civ. App. 459.

It was held error to instruct that, to relieve defendant from negligence for injury to passenger jumping from moving train, the plaintiff must have been negligent in jumping. *Texas &c. R. Co. v. Atchison*, (Tex. Civ. App.) 54 S. W. Rep. 1075.

Jumping from a moving train is not *per se* negligence. *Jones v. Baltimore &c. R. Co.*, 21 Wash. L. R. 99.

The fact that others remained without injury in a car which collided with a crash did not prevent recovery by plaintiff who was nervous and jumped. *Wanzer v. Chippewa Valley &c. R. Co.*, 108 Wis. 319.

#### (f). ALIGHTING FROM CARS—NO LIABILITY—STEAM CARS.

It is not always a question for a jury whether a passenger was negligent in alighting from a car in motion. If the fact be undisputed, it may be a question of law.

The station was called and the train was stopped. A man and daughter of twelve years, and his wife, went on the platform of the car when the train started. The night was dark; the man took the daughter in his arms and stepped off and the daughter was hurt. The action was by the daughter of the age of twelve years. Plaintiff was chargeable with negligence. *Morrison v. Erie R. Co.*, 56 N. Y. 302, rev'g judgt for pl'ff.

The defendant's train stopped on a bridge at a proper distance from the intersection of its tracks. The train then began to move slowly on, when a passenger, although no announcement of a station had been

made, stepped off in the darkness and fell through the bridge and was drowned. It was not the duty of the company to warn passengers that they must not leave the car when not at a station, and the deceased was guilty of contributory negligence. *Davis v. Lehigh Valley R. Co.*, 64 Hun, 492; affirming nonsuit.

The plaintiff's intestate boarded a train at Cobleskill, which was a through train from that point to Albany. After the train had left Cobleskill the conductor, in passing through the train collecting fares, was handed by the plaintiff's intestate a mileage book, and at the same time was informed by him that he desired to stop at Quaker street, where the train was not permitted to stop. The conductor informed him that he did not think the train would stop at such station. Returning in a short time, he said, "We will not stop at Quaker street, but will see."

The train slowed up to allow a freight train going in the opposite direction to pass. At this point the conductor said to the plaintiff's intestate: "It is going pretty slow now, and it will be going faster, and you better get off now; that is all I have to say about it." The deceased thereupon stepped between the freight and passenger trains, was hit by the freight train and was killed.

It was not shown whether the deceased was aware of the proximity of the freight train to the passenger car, but there was ample space on the opposite side of the passenger car from the freight train for the deceased to have alighted.

Held, the deceased took the hazard of the consequences of his negligence; that to alight from or to board a moving train is negligence *per se*. *Lewis v. The President, Managers and Company of the Delaware and Hudson Canal Co.*, 80 Hun, 192; rev'd, 145 N. Y. 508.

Citing *Halpin v. Third Ave. R. Co.*, 40 N. Y. Supr. Ct. 8 J. & S. 175; *Morrison v. Erie R. Co.*, 56 N. Y. 302.

Where plaintiff prepares to leave the train after the guard has announced the station, but while the train is in motion, and, after the door of the vestibule is opened, steps upon the platform and down the steps, where it is dark, under the assumption that the train has stopped, but without in fact knowing whether it has or not, he cannot complain on the ground that the guard did not warn him that it was still in motion, as a railroad company is under no duty to expressly warn a passenger of the stopping of its trains. *Mearns v. Central R. Co.*, 163 N. Y. 108; rev'g s. c., 23 App. Div. 298.

A passenger on the defendant's cars, while the same were moving at the rate of speed of from six to ten miles an hour, got down upon the

steps of the caboose on which he was riding and jumped to the ground, and falling, sustained injuries.

At the time of the accident the train had passed the station to which the railroad company had sold the plaintiff a ticket; the conductor of the train stood on the steps at the opposite end of the car, and signalled the engineer to stop and called to the plaintiff not to alight. The plaintiff saw the signal given, but did not hear the conductor's warning to him. He was negligent and could not recover. *Scully v. N. Y., L. E. & W. R. Co.*, 80 Hun, 191.

The fact that the rear door of a combination car could not be opened when the train arrived at plaintiff's station and he was compelled to go forward through the baggage compartment to alight and the conductor directed him to jump out of the side door of the baggage compartment, did not justify his doing so, where the car was moving slightly, the ground covered with snow and ice and, by reason of the darkness, he could not see where he might be jumping; especially where the front car platform was just beyond such compartment and permitted him to alight on a regular station platform. *Geogagan v. New York &c. R. Co.*, 10 App. Div. 454.

As to boarding and alighting from moving cars other than street cars, see 21 L. R. A. 354.

Going out on the platform of a railroad car for the purpose of alighting at the next station while the train is going at high speed, was negligence. Complaint dismissed. *Jonas v. Long Island R. Co.*, 20 Misc. 176; s. c. aff'd, 21 id. 306.

When, to avoid being carried off, a person who waited until train had started jumped and injured his arm, the company was not liable. *Central R. Co. v. Letcher*, 68 Ala. 106.

See, also, *Il. & L. &c. R. Co. v. Leslie*, 57 Tex. 83.

Passenger's negligence in alighting from a train under dangerous circumstances, is not excused by conductor having advised him to do so. *South. &c. R. Co. v. Schaeffer*, 15 Ala. 136.

*Jeffersonville &c. R. Co. v. Swift*, 26 Ind. 459; *Cincinnati &c. R. Co. v. Peters*, 80 id. 168; *Chicago &c. R. Co. v. Hazzard*, 26 Ill. 373; *East Tenn. &c. R. Co. v. Massengill*, 15 Lea. (Tenn.) 328.

After reasonable opportunity for passengers to alight no liability attaches for injuries to one attempting to get off from moving train. *R. Co. v. Tankersley*, 54 Ark. 25.

No recovery was allowed a passenger of sound mind who, in the night time, jumped off a train moving twelve miles an hour. *R. Co. v. Mayes*, 58 Ark. 399.

So, if passenger relies on promise of a conductor to stop at a place



other than a regular station, and jumps from the train, there is no liability; *quære*, whether she might recover for breach of the promise. *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476.

Where passenger was notified that his train would stop at C, but jumped before it came to a stop, no action lies. *Savannah &c. R. Co. v. Watts*, 82 Ga. 229.

See *Blitch v. Central R.*, 76 Ga. 333; *Hemmington v. Chicago &c. R. Co.*, 72 Wis. 42; where failure of conductor to inform passenger that train would come back to station was material on question of company's negligence.

Plaintiff was negligent in jumping from a train in spite of warnings to avoid being carried by. *Western &c. R. Co. v. Goodwin*, 105 Ga. 237.

Plaintiff's knowledge of the dangerous character of the ground at the place where he attempts to alight from a moving train was an element of consideration in determining his negligence. *Sanders v. Southern R. Co.*, 107 Ga. 132.

Passenger is negligent if he leaps from a train to avoid being carried beyond his stopping place. *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Passenger went on platform and down the step after car had started, when he was confronted with a telegraph pole, which would strike him if he retraced his step, and jumping was the only alternative. Recovery was denied. *Lindsay v. Southern R. Co.*, (Ga.) 41 S. E. Rep. 46.

Negligence in alighting while car is in motion is for the jury. *Canfield v. North Chicago Street R. Co.*, 98 Ill. App. 1.

Fear of being carried by is no excuse for a woman with bundles in attempting to alight while the train is increasing speed and the step is two feet from the platform. *Toledo &c. R. Co. v. Wingate*, 143 Ind. 125, 134.

See 21 L. R. A. 354.

Passenger jumped when train slowed up at a crossing where brakeman told him to. His negligence was for the jury. *Lennon v. Chicago &c. R. Co.* (Iowa) 75 N. W. Rep. 671.

That the name of the station has been called does not excuse getting off in the dark while the train is moving at 18 to 20 miles an hour. *Louisville &c. R. Co. v. Depp*, (Ky.) 33 S. W. Rep. 417.

Company was not liable to one accompanying passengers in the car and leaving after it started, where no notice had been given those in charge that he did not intend to take passage. *Berry v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 699.

Conductor told plaintiff that, while the train did not stop at his station, it would slow up to enable him to alight. As they were nearing it the conductor beckoned to him and disappeared. Plaintiff went out on the

steps and swung off in the dark and while the train was going 20 miles an hour over a high trestle. Recovery was denied. *Illinois C. R. Co. v. Hanberry*, (Ky.) 66 S. W. Rep. 417.

Plaintiff was taken aboard a freight train with the understanding that it would stop at his station, and, as it approached was told to get ready. It did not stop and plaintiff was thrown from the car by the motion of the train running by at high speed as he was preparing to alight. He was not allowed to recover. *Peak v. Louisville &c. R. Co.*, (Ky.) 66 S. W. Rep. 995.

See, also, *Louisville &c. R. Co. v. Head*, (Ky.) 59 S. W. Rep. 23.

Failure to stop train does not justify passenger in jumping off it. *Walker v. R. Co.*, 41 La. Ann. 795.

Where the next station was but a short distance, fear of being carried by, was no excuse for jumping from a moving train, and direction of conductor to "jump with the train" was not an advice to jump, but an assistance, seeing a determination to do so. *McDonald v. Boston &c. R. Co.*, 87 Me. 466.

No recovery was allowed a woman who tried to get off a train in the night time before it had come to a standstill. *England v. Boston &c. R. Co.*, 153 Mass. 490.

See *Cincinnati &c. R. Co. v. Duffrain*, 36 Ill. App. 352; *Leggett v. Western &c. R. Co.*, 143 Pa. St. 39.

Where no effort is made by passenger to leave the car at his crossing he cannot justify his jump by fear of being carried by. *White v. West End Street R. Co.*, 165 Mass. 522.

Plaintiff, being delayed in getting out of her seat, though she met the brakeman who had come in, shut the door and sat down, nevertheless proceeded to the platform and alighted while car was in motion, in broad daylight. It was held error not to direct for defendant. *La Pointe v. Boston &c. R. Co.*, 179 Mass. 535.

Plaintiff, accustomed to alighting at the place where he was injured, was negligent in alighting after the train had started and where he could have seen that the train was in motion had he looked. *Brown v. New York &c. R. Co.*, (Mass.) 63 N. E. Rep. 941.

Alighting before a car stops, was held negligence. *Defoe v. St. Paul City R. Co.*, 65 Minn. 319.

Plaintiff, a mature man, jumped from defendant's train at a place other than a regular stopping place at night, conductor having slowed up for that purpose; recovery was barred. *Bardwell v. Mobile &c. R. Co.*, 63 Miss. 574.

See *Lindsey v. Chicago &c. R. Co.*, 64 Iowa, 407; *South &c. R. Co. v. Schauler* 75 Ala. 136; *Straus v. Kansas City &c. R. Co.*, 86 Mo. 421.

Jumping off while a train is moving eight miles an hour past passenger's station is negligence. Judgment for plaintiff was reversed. *Illinois C. R. Co. v. Trail*, (Miss.) 25 South. Rep. 863.

Passenger alighting from cars under circumstances in which prudence would forbid, as when he jumps to prevent carriage beyond his destination, cannot recover. *Kelly v. Hannibal &c. R. Co.*, 70 Mo. 604.

*Leslie v. Wabash &c. R. Co.*, 88 Mo. 50; *Lake Shore &c. R. Co. v. Bangs*, 47 Mich. 470; *Jewell v. Chicago &c. R. Co.*, 54 Wis. 610; *Davis v. R. Co.*, 18 id. 175; *R. Co. v. Aspell*, 23 Pa. St. 147; *Gavett v. R. Co.*, 16 Gray 501; *Secor v. R. Co.*, 10 Fed. R. 15; *Bon v. R. Co.*, 10 N. W. (Iowa) 225; *Nichols v. R. Co.*, 106 Mass. 463; *I. C. R. Co. v. Able*, 59 Ill. 131; *O. & M. R. Co. v. Schiebe*, 44 id. 460; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441; *Jeffersonville R. Co. v. Swift*, 26 id. 459; *Jeffersonville R. Co. v. Hendricks*, id. 228; see also same case, 41 id. 48; *C. & A. R. Co. v. Randolph*, 53 Ill. 510; *I. C. R. Co. v. Slatton*, 54 id. 133; *O. & M. R. Co. v. Stratton*, 78 id. 88; *Craven v. Central Pac. R. C. Co.*, 72 Cal. 345; *Central R. Co. v. Letcher*, 69 Ala. 106; *Gr. Sr. R. Co. v. Hawk*, 72 id. 112; *Gothard v. Ala. Gr. Sr. R. Co.*, 67 id. 114; *Damont v. New Orleans &c. R. Co.*, 9 La. Ann. 441; *Frost v. Grand Trunk R. Co.*, 10 Allen 387; *Gonzoles v. New York &c. R. Co.*, 50 How. (N. Y.) 126; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 520.

Alighting from a train in motion when two persons had been thrown in attempting to alight before him, defeats plaintiff's action for injuries. *Brown v. Barnes*, 151 Pa. St. 562.

That one finds himself on the wrong train does not justify leaving it while going 10 to 15 miles an hour, though he is told by a trainman that he may do so. *Rothstein v. Pennsylvania R. Co.*, 171 Pa. St. 620.

Platform gate was opened while train was in motion and plaintiff voluntarily jumped off. He was not allowed to recover. *Agulino v. New York &c. R. Co.*, 21 R. I. 263.

It was error to charge that failure to stop would be negligence, to which contributory negligence in getting off while the train was moving would be no bar. *Louisville &c. R. Co. v. Collier*, 104 Tenn. 189.

The announcement of the station as required by statute did not render defendant liable for plaintiff's going to the platform before the train stopped. *Payne v. Nashville &c. R. Co.*, 106 Tenn. 167.

Negligence in alighting from a slowly moving train is for the jury. *San Antonio &c. R. Co. v. Dukes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Getting up and standing in the aisle upon approaching the station was not negligence. *Gulf &c. R. Co. v. Bell*, 93 Tex. 632.

Where plaintiff alighted, though she thought the train was moving too fast to do so in safety, verdict was properly directed for defendant. *Williams v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 36 S. W. Rep. 329.

Plaintiff was negligent in alighting between stations while train was moving at its ordinary speed. *High v. International &c. R. Co.*, (Tex. Civ. App.) 55 S. W. Rep. 526.

Carrying a passenger by his station is no excuse for his taking a child of four off the train while in motion. *Texas &c. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153.

See, also, *Texas &c. R. Co. v. Born*, 20 Tex. Civ. App. 351.

It is negligence *per se* in a passenger to attempt to board a moving train contrary to a city ordinance. *Mills v. Missouri &c. R. Co.*, (Tex. Civ. App.) 51 S. W. Rep. 291; s. c. rev'd, 59 S. W. Rep. 874 (on the ground, that, so far as it related to passengers, the ordinance was invalid).

Boy was negligent in jumping off moving train in the dark after it had begun to move from the station at which he had been assisting passengers to board. *Oxsher v. Houston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 55.

That a non-vestibule car was put in a train advertised as "solid vestibule" held not a ground of recovery for death of one in daytime thrown from the platform thereof while train was in motion, having gone there to be ready to alight as soon as train stopped. *Sansom v. Southern R. Co.*, 111 Fed. Rep. 887.

That conductor had promised to stop where the train was not scheduled did not justify a boy of 17 in jumping when he saw that it failed to do so. *Schiffler v. Chicago &c. R. Co.*, 96 Wis. 141.

It was held negligent *per se* for one of mature age to step, knowingly and unnecessarily, from a moving train. *Walters v. Chicago &c. R. Co.*, (Wis.) 89 N. W. Rep. 140.

Citing *Brown v. Railway Co.*, 80 Wis. 162.

#### (g). ALIGHTING FROM CARS—NO LIABILITY—STREET CARS.

The defendant's conductor stopped a street car to allow a passenger to alight, which she did, and the conductor rang the bell and the car started. At this time another passenger, the plaintiff, had arisen from her seat and taken three steps toward the rear end of the car, when, by the starting of the car, she was thrown down. She had not signalled the conductor to stop nor attracted his attention in any way. A charge to the effect that, if the plaintiff arose to get off or for some other purpose, it was negligence, as matter of law, for the conductor to start the car without warning her, was error. The question was whether, if the plaintiff was standing, when the conductor started the car, he was negligent in doing so without warning her, and whether the conductor should have seen her in the absence of any signal from her. *Losee v. Waterliet &c. R. Co.*, 63 Hun. 401, rev'g judg't for plff.

Plaintiff was negligent, where, after the car had started on after discharging some passengers, he stepped upon the front platform and alighted with his back to the horses without notifying either the con-

ductor or the driver of his desire to get off. *Steuer v. Metropolitan Street R. Co.*, 46 App. Div. 500.

Plaintiff, supposing a street car would stop at the first cross walk of a cross street, got down on the running board and signaled the conductor, who rang the bell. The motorman, however, did not stop until he reached the further cross walk, and plaintiff was thrown from the car by its motion in crossing intersecting car tracks. Direction of verdict for defendant was sustained. *Nies v. Brooklyn &c. R. Co.*, 68 App. Div. 259.

Plaintiff got down upon the steps preparatory to alighting as the car slowed up at a street crossing as it usually did. He whistled to the conductor to stop, but the car at that instant jerked forward throwing him off. That conductor was at the time collecting fare with his back to the rear of the car so that he could not see signals to him, did not show negligence, on the part of defendant. *Simis v. Metropolitan Street R. Co.*, 65 App. Div. 270.

See, also, *Harris v. Union R. Co.*, 69 App. Div. 385.

Charge that getting off a moving car was negligence *per se* held proper in view of the circumstances. *Kuhlman v. Metropolitan Street R. Co.*, 30 Misc. 417.

Not negligent *per se* to leave an electric car while in motion, where a passenger had told the conductor he wished to alight and the car after passing the station slowed up apparently for the purpose of permitting him to do so. *Birmingham R. &c. Co. v. James*, 121 Ala. 120.

It was not negligence *per se* to get upon the steps to alight while the car is slackening and moving slowly. *Birmingham &c. R. Co. v. James* 121 Ala. 120.

Where plaintiff was warranted in assuming that a car would stop before rounding a curve, it was not negligent to go on the platform to alight with bundles in one hand and attempting to grasp the hand rail with the other. *Babcock v. Los Angeles T. Co.*, 128 Cal. 173.

The motorman had failed to comply with plaintiff's first request to stop at the street crossing, but at a second signal stopped a little beyond: held, latter was negligent in getting off before the car stopped. *Campbell v. Los Angeles R. Co.*, 135 Cal. 137.

It is not negligent *per se* to alight from a slowly moving electric car. But, if passenger's negligence brings him into danger with knowledge of the carrier, the latter is liable for failure to exercise reasonable care to avoid injury to him; plaintiff was in act of alighting from moving car when conductor seized him by the arm which caused him to fall under the car. Nonsuit was held error. *Posten v. Denver &c. T. Co.*, 11 Colo. App. 187.

It was negligence in a boy of 16 to alight from a rapidly moving train,

because its speed was such as to make it appear that it would not stop at his destination. *Jones v. Georgia &c. R. Co.*, 103 Ga. 570.

Standing on the platform with his back against the dashboard while waiting for the car to stop was not negligence *per se*. *North Chicago Street R. Co. v. Baur*, 119 Ill. 126; s. c., 45 L. R. A. 108; aff'g s. c., 79 Ill. App. 121.

Not negligent *per se* to jump from a carriage where the horses start to run away. *Benner Livery &c. Co. v. Busson*, 58 Ill. App. 17.

Not negligent *per se* to get off slowly moving street car. *West Chicago &c. R. Co. v. Dudzik*, 67 Ill. App. 681.

Plaintiff was negligent in going to the footboard of a car after signalling for it to stop and attempting to get off before it stopped without defendant's knowledge. *Chicago City R. Co. v. Gregg*, 69 Ill. App. 77.

Whether it is negligent to alight from a moving street car depends upon the condition of the passenger and the surrounding circumstances. *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215.

Not negligent *per se* after signalling for a stop and then getting down on steps without holding on. *North Chicago Street R. Co. v. Southwick*, 66 Ill. App. 241; s. c. aff'd, 165 Ill. 494.

See, also, *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634.

While riding after dark upon a trolley car that had been switched without his knowledge on to the adjoining track so as to bring the footboard next the poles between the tracks, plaintiff, learning that he was being carried away from his destination, stepped upon the foot board while the car was in motion, to get a transfer ticket and was struck by a pole. He was not negligent *per se*. *Citizens' Street R. Co. v. Hoffbauer*, 23 Ind. App. 614.

Where plaintiff was thrown while stepping from platform to steps for the purpose of alighting between cross walks without notice to those in charge of the car, judgment for defendant was affirmed. *Dressler v. Citizens' Street R. Co.*, 19 Ind. App. 383.

Passenger remained talking on the car till it started. Jury found him negligent in attempting to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

Negligence in alighting from a street car in motion is for the jury. *Root v. Des Moines &c. R. Co.*, (Iowa) 83 N. W. Rep. 904.

That a street car conductor called a boy of ten to the platform when drawing near to his destination before giving the signal, did not make defendant liable, where, owing to his own imprudence, he fell from the platform. *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65.

It was negligent *per se* for one familiar with the road and the position of the trolley poles to attempt to alight while the car was in rapid motion

with his body beyond the car line and back to the poles, and in spite of a posted warning. *Sharkey v. Lake Roland El. R. Co.*, 84 Md. 163.

If, after a reasonable time for getting off a street car, plaintiff attempts to get off without the knowledge of company's employes, no recovery can be had. *Gilbert v. West End Street R. Co.*, 160 Mass. 403.

An instruction that a street car company is bound by its conductor's promise to stop the car and let a passenger off at a certain place, was rightly refused, although it was a circumstance to be considered in an action for negligence. Plaintiff was jerked or alighted from a moving car. *Robinson v. Northampton St. R. Co.*, 157 Mass. 324.

Where plaintiff went upon the platform and to the steps to alight after signaling conductor and while the car was moving 7 to 12 miles an hour, judgment was ordered for defendant, notwithstanding the verdict. *Saiko v. St. Paul City R. Co.*, 67 Minn. 8.

See, also, *Currie v. Mendenhall*, 77 Minn. 179.

Nonsuit was sustained where, after plaintiff had gotten on the running board, to alight, the conductor gave the signal to start, and plaintiff leaned outward to signal the conductor again, and was struck by an approaching wagon. *Flynn v. Consolidated Traction Co.*, (N. J. L.) 52 Atl. Rep. 369.

Evidence that a street car made very short stops was held competent on the ground that it tended to prove that plaintiff may not have been negligent under the circumstances in leaving his seat and walking to the rear platform of the car, while it was in motion, to be ready to alight when it stopped. *Mt. Adams &c. R. Co. v. Isaacs*, 18 Oh. C. C. 177.

Fact that conductor of street car is inside the car when it slowed up for plaintiff to get on does not charge the company with liability. *Picard v. Ridge Ave. &c. R. Co.*, 147 Pa. St. 195.

Plaintiff was nonsuited, where he fell from a street car, crossing in ordinary motion over railroad track, while standing with one foot on the step and one on the platform crowded between two others, with both hands full of bundles. *Barry v. Union Traction Co.*, 194 Pa. St. 576.

If a passenger on a street car, after having requested the driver to stop, jumps from the same before it comes to a stand, he is guilty of contributory negligence. *Hagan v. Philadelphia &c. R. Co.*, 15 Phila. 278.

One stepping from the front platform of a street car in motion is negligent. *Beattie v. Citizens' &c. R. Co.*, 1 Cent. (Pa.) 633.

*Hagan v. Philadelphia &c. R. Co.*, 15 Phila. 278; see, also, *Chrissey v. Hestonville &c. R. Co.*, 25 P. F. Smith (Pa.) 83; *Cram v. Metropolitan R. Co.*, 112 Mass. 38; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600.

Plaintiff was negligent in going to the platform to alight, notwith-

standing the conductor had not signaled to stop in response to his signal. *Slade v. Union Traction Co.*, 7 Pa. Dist. R. 34.

Plaintiff was negligent in attempting to alight while the car was in motion and without signifying his intention to those in charge. *Blakney v. Seattle Electric Co.*, (Wash.) 68 Pac. Rep. 1037.

See, also, *Brown v. Seattle & C. R. Co.*, 16 Wash. 465.

### VIII. Platforms of Cars.

A carrier's duty requires him to carry passengers inside and not outside of the passenger cars, hence, if the passenger, without the carrier's permission, express or implied, be unnecessarily upon the platform of the car, in the baggage or express car, especially if this be prohibited, and be injured on account of some exposure incident to the position, he cannot recover therefor. But it has not been uniformly held that it is negligent to stand on the platform of a street car, and in some states the question of negligence is for the jury. Permission to occupy such a position may be implied from the crowded condition of the interior of the car, the acceptance of fare without protest while the passenger is in such position, and, not infrequently, from a custom of the carrier to allow passengers to ride there; but mere acquiescence on the part of the carrier does not usually constitute permission to remain in a dangerous position. And, so, if a passenger do any act or take up any position on a car, that he knows or should know to be dangerous, and maintain the same unnecessarily, and injury result to him, in whole or part from such danger, he cannot recover therefor.

(See "Injuries to Passenger from External Causes," *post*, p. 536.)

#### (a). STEAM CARS.

A passenger is not negligent for standing on the platform of a car in motion, if there be no vacant seats inside. It is not part of a passenger's duty to enforce the company's rules, but rather the duty of the company's servants; nor is it the duty of a passenger, while the train is in motion, to go from car to car, seeking a seat, nor to find a safe seat, as all should be safe.

The plaintiff was on platform of car and was injured in a collision. *Willis v. Long Island R. Co.*, 34 N. Y. 670, aff'd 32 Barb. 398.

From opinion.—"Their position, whether judiciously or injudiciously selected, so far as they were concerned, was lawful under these circumstances as between them and the company; and, in legal contemplation, it neither caused nor contributed to the injury. The law on this subject was settled in the leading case of *Carroll v. The New Haven R. R. Company*, in which the question was directly involved; and the judgment of the Superior Court in that case was subsequently affirmed in this court. (2 Duer 571; 6 id. 415, 416.) It was very properly held in the case of *Colegrove v. The New Haven & Harlem Company*, that it did not necessarily follow that *no* fault of the plaintiff could excuse the defendants from liability, unless it had the effect to produce the *collision* that caused the injury;



but in that case, as in the other, the court affirmed the judgment and sustained the plaintiff's recovery, the jury having been instructed that if the company undertake to carry in any one car more than they can accommodate with seats, so that some are of necessity forced to stand upon the platform, and have no opportunity before the train is under way to find seats in other cars, such persons are there by permission of the company, and are lawfully there; and the company can claim no exemption under the statute, no matter how conspicuously their notices may be posted in the interior of the cars. (20 N. Y. 492; 6 Duer 382.) The rule, as settled in the case of *Carroll v. The New Haven R. R. Company*, has recently been affirmed by a unanimous decision of this court. *Halsey v. Earle*, 30 N. Y. 208.

The Supreme Court was also right in holding, that under the statute the defendant was not absolved from liability, if the jury found from the evidence as matter of fact, that the plaintiff had neither time nor opportunity to proceed to the rear cars in search of a seat, without exposure to hazard in passing from platform to platform while the train was in rapid motion; that there was no seat unoccupied in the coach on which he was riding; and that he was guilty of no actual want of care in the selection of a position in which to stand, until he could obtain the accommodation to which he was entitled.

The statute is, 'in case any passenger shall be injured while on the platform of any car in violation of the printed regulations of the company posted up at the time in a conspicuous place, inside of its passenger cars then in the train, such company shall not be liable for the injury, *provided the said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers.*' " Laws of 1850, 234, sec. 46.\*

It is not *per se* negligence for a passenger, by direction of a servant of the company, to go from one car to another, while in motion, to find a seat. *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287.

The stoppage of a train at a station is an invitation to take passage, and if tickets are sold for that train, a safe place to ride must be furnished, otherwise a passenger on a platform, thrown off by a lurch at a curve, may recover. *Werle v. L. I. R. Co.*, 98 N. Y. 650.

The plaintiff, at the suggestion of the conductor, waited just inside of the car to cross into another, when attached. When the car was attached the coupling did not catch and the plaintiff, in trying to cross, fell between the cars. The conductor called, "all aboard," just as the cars touched; this might be considered an invitation to enter cars. *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467; affirming 22 J. & S. 317, and judgment for plaintiff.

Plaintiff boarded an elevated train of defendant's at the invitation of

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\* NOTE.—"SEC. 13. RIDING ON PLATFORM; WALKING ALONG TRACK. No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passenger inside such passenger cars; and no person, other than those connected with or employed upon the railroad, shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." (Chap. 565, L. 1890.)

its employé and stood upon the platform for lack of room inside the car. The latter soon after, as the result of a quarrel with an intoxicated passenger, struck at him, causing an unusual movement of the crowd, which forced plaintiff outward. The gates were not entirely closed, and to steady himself, he grasped the iron railing back of him and by reason of the train's rounding a curve at the time became pinned between it and the railing of the next car. It was held not to be negligence *per se* in such case to ride upon the platform and plaintiff did not assume the risk of dangers that were not usual and incidental to such mode of travel and had a right to assume that he would be notified, if there were any. Defendant's negligence in overcrowding the car was for the jury and failure to close the gates was evidence of negligence. *Graham v. Manhattan R. Co.*, 149 N. Y. 336; rev'g s. c., 8 Misc. 305.

Plaintiff started for the closet of a vestibule sleeping car, with the surroundings of which he was familiar. Suddenly the lights went out and, being confident of his location, he opened a door which he supposed to be that of the closet, but which in fact was that of the vestibule, and stepped off the train. It was held that a rule of defendant requiring the vestibule door to be bolted did not warrant the plaintiff's utter heedlessness of where he was going under circumstances obviously calling for the exercise of caution, and that he was negligent as matter of law. *Piper v. New York & C. R. Co.*, 156 N. Y. 224; s. c., 41 L. R. A. 724; rev'g s. c., 89 Hun. 75.

Train broke in two by the draw-head of coupling pulling out. Passenger on platform hurt by parts of train coming together; he said he did not see sign, nor hear the brakeman forbid his standing on the platform. Negligence, and contributory negligence were for the jury. *Goodrich v. P. & N. Y. C. & C. R. Co.*, 29 Hun. 50, aff'g judg't for pl'ff.

Citing Hadencamp v. Second Ave. R. Co., 1 Sweeney, 490; Ward v. The Central Park, & C. R. Co., 11 Abb. (N. S.) 411; Solomon v. Central Park & C. R. Co., 1 Sweeney, 298; Robertson v. New York & C. R. Co., 22 Barb. 91.

A passenger was going from one car to another, while the train was in motion, and while so doing the train parted and the deceased was thrown down and killed. Unless notified not to do so, the passenger in so going from one car to another assumed only the ordinary risks incident to such an action, and had a right to assume that the couplings, etc., were safe. *Costikyan v. R. W. & C. R. Co.*, 58 Hun. 590, aff'g judg't for pl'ff; aff'd, 128 N. Y. 633.

Following *Goodrich v. Penn & C. R. Co.*, 29 Hun. 50.

Plaintiff's intestate was riding on the platform of a car; the train approached the station and the crowd began to come out of the car on the car platform: the intestate stepped back and fell between the cars and

was killed. The defendant might have foreseen this. *Merwin v. M. R. Co.*, 48 Hun, 608, aff'g judg't for pl'ff; s. c. aff'd, 659.

Citing *Werle v. Long Island R. Co.*, 98 N. Y. 650

Negligence and contributory negligence were for the jury, where defendant allowed a tree to stand within five or six inches of the side of passing cars and allowed plaintiff to remain on the front platform without objection, where he was struck by the tree while leaning out beyond the edge of the car in the dark, without necessity. *Sias v. Rochester R. Co.*, 92 Hun, 140.

A boy of ten and a half is only held to the degree of care reasonably to be expected of one of his age and so is not negligent *per se* in following other passengers onto the platform before the train stops, though it might have been negligent in them to do so. *Schreiner v. New York &c. R. Co.*, 12 App. Div. 551.

Plaintiff was negligent in arising before the car stopped, opening the door and placing her hand against the jamb to steady herself. A nonsuit was sustained. *Guthman v. Manhattan R. Co.*, 53 N. Y. Supp. 139.

It is the duty of a passenger on an elevated railroad who finds the platform where he is obliged to stand dangerous from overcrowding, and has reached a place of safety by getting off at a station, to wait for the next train, and where he does not do so, but voluntarily gets upon the car platform, he takes the risk. *Graham v. The Manhattan R. Co.*, 8 Misc. 305.

Plaintiff was not negligent *per se* in leaving his seat as the train was slowing up to stop at a street crossing and going to the steps of the platform to alight, whence he was thrown by a sudden increase of speed. *Watkins v. Birmingham R. &c. Co.*, 120 Ala. 141; s. c., 43 L. R. A. 297.

Plaintiff's negligence in riding on the front platform of the caboose was for the jury, where it appeared to him dangerous to ride inside on account of the heavily loaded freight cars in the rear. *Prescott &c. R. Co. v. Smith*, (Ark.) 67 S. W. Rep. 865.

Plaintiff was not negligent *per se* in going to the platform after the train had stopped, at a regular station platform to speak with a party. He put his hand on the door casement to steady himself from the sudden jerking of the car, which slammed the door and caught his hand. *McCurrie v. Southern P. Co.*, 122 Cal. 558.

The care required of a boy of fifteen in riding on the step of a crowded car is such as should be expected of one of his age. *Georgia &c. R. Co. v. Watkins*, 97 Ga. 381.

That a conductor has promised to stop at a place where the train was not scheduled to stop at and had directed plaintiff to be ready on the platform, did not justify latter in going upon the steps where the train

was going at high speed and gave no indication of stopping. *Hicks v. Georgia &c. R. Co.*, 108 Ga. 304.

Plaintiff's negligence in holding on to the first step of a workingman's train, the platform of which was crowded, with his body projecting so as to strike a car negligently left near the track, was for the jury and a verdict for plaintiff was sustained. *Lake Shore &c. R. Co. v. Kelsey*, 180 Ill. 530; aff'g s. c., 76 Ill. App. 613.

Plaintiff, to allow a lady passenger to pass, without first looking, stepped backward and fell between the platforms of vestibule cars opened by the motion of the train on a reverse curve. It was held error not to instruct for defendant. *Louisville &c. R. Co. v. Stout*, 66 Ill. App. 298.

Where there was standing room within, plaintiff, a boy of 15, was not warranted in standing on the steps of the platform while the car was moving 25 miles an hour, to vomit. *Cleveland &c. R. Co. v. Moneyhun*, 146 Ind. 147; s. c., 34 L. R. A. 141.

Negligence, in going upon the platform of a car to alight before it has stopped, though it is slackening up and moving slowly. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

See, also, "Moving cars," *ante*, p. 476.

Plaintiff was not negligent *per se* in riding on the platform of a crowded excursion train, though there was standing room inside. *Chesapeake &c. R. Co. v. Lang*, 100 Ky. 221.

The proper accommodations required by Mo. R. S. 1889, sec. 2587, to relieve railroad from injuries caused by riding on the platform, is a seat, and not merely standing room. Not negligence *per se* at common law to ride on the platform. *Choute v. Missouri P. R. Co.*, 67 Mo. App. 105.

Plaintiff was not negligent *per se* in getting up and standing in the doorway waiting for the car to stop. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 414.

It was negligence as matter of law, though one had a ticket to ride on a particular train, to ride on the steps outside the vestibule door upon being unable to get into the coach. *Sanders v. Chicago &c. R. Co.*, 10 Okl. 325.

Standing on platform while car is moving is not negligence *per se*. *Poolittle v. Southern R. Co.*, 62 S. C. 130.

While one assumes the ordinary risks in passing over platforms of moving trains he does not subject himself to more than ordinary dangers. *Sickles v. Missouri &c. R. Co.*, 13 Tex. Civ. App. 434.

Plaintiff was not negligent *per se* in being on the rear platform by which he was directed to enter, the door of which was in fact kept locked

by a rule of the company known to him. *Missouri &c. R. Co. v. Brown*, (Tex. Civ. App.) 39 S. W. Rep. 326.

Failure of defendant to warn plaintiff of danger which was apparent to him in riding on platform while car is going at high rate of speed was not negligence. *Ebert v. Gulf &c. R. Co.*, (Tex. Civ. App.) 49 S. W. Rep. 1105.

It cannot be said that standing on platform of moving train is or is not negligence *per se* it is solely a question for the jury. *St. Louis &c. R. Co. v. Ball*, (Tex. Civ. App.) 66 S. W. Rep. 879.

Negligence in standing on platform, where the interior of the car was crowded, was for the jury. *Williams v. International &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 1085.

Negro was allowed to recover, where he could not enter the negro car by reason of its occupancy by whites and was forced to the platform, whence he was thrown by motion of the car. *Williams v. International R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 1085.

While going through an unlit vestibule on a rapidly moving train on a dark night, plaintiff mistaking the image of a light reflected from a car window for the light itself walked out on the ground through the door of the vestibule which had been left open. Negligence and contributory negligence were for the jury. *Bronson v. Oakes*, 76 Fed. Rep. 734.

It was negligent to go upon the platform of a moving train with both arms full of bundles, to ask the conductor to stop a train which was carrying plaintiff by her station. *Jamison v. Chesapeake &c. R. Co.*, 92 Va. 327.

It was not negligent *per se* to stand on the platform of a crowded car while it was in motion. *Trumbull v. Erickson*, 97 Fed. Rep. 891.

Rule prohibiting standing on platform is waived by admitting more than car can accommodate. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Refusal to go inside upon the conductor's request prevented recovery, and failure to compel passenger to enter was not negligence, where he was not so intoxicated as to lead one to suppose that he could not care for himself. *Fisher v. West Virginia &c. R. Co.*, 42 W. Va. 183; s. c., 33 L. R. A. 69.

Not negligent *per se* to ride on platform when no room inside. *Ward v. Chicago &c. R. Co.*, 102 Wis. 215.

#### (b). STREET CARS.

The deceased, having paid his fare, was seated with a companion of his own age, in the interior of a car. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for

adult passengers. They went forward in the car and took other seats, and were again ordered up, and, objecting to giving up their seats, were "put out" of their places by the conductor.

The car had by this time become very full, "very crowded." The deceased was crowded and pushed by the passengers in the car out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died.

Ordinary attention is all that is required of a passenger, on a car. *Sheridan v. Brooklyn City & Newtown R. Co.*, 36 N. Y. 39, aff'g judg't for pl'ff.

If the passenger be riding on the platform of the car in a place of danger, negligence is thereby *prima facie* established.

*Memphis & C. R. Co. v. Salinger*, 46 Ark. 528; *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112.

But the presumption is rebutted if the car be full and the conductor took the ticket on the platform, as that carries an invitation to ride there and of assurance of safety. *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135.

*Gustle v. Union Pac. R. Co.*, 23 Mo. App. 361; *Dickinson v. Port Huron & C. R. Co.*, 53 Mich. 43; *Atchison & C. R. Co. v. McCandless*, 33 Kans. 366.

The car was so crowded that a passenger could not enter without discomfort, and the conductor received fare and allowed passengers to ride on the platform, from which the plaintiff was thrown. The defendant's negligence and contributory negligence were for the jury. *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596; affirming 8 Hun. 494, and judg't for pl'ff.

*Passenger R. Co. v. Young*, 21 Oh. St. 518.

Without regard to sec. 46, ch. 140, L. 1850, relieving a carrier from liability from injuries received by one riding on a platform, the warning in the car against riding on the platform and the furnishing of a seat inside does not relieve a company from negligence, where a passenger rides on the platform of a street car and is hurt by the sudden start of the car and the plunge of the horses, when the conductor took full fare, and persons smoking are accustomed to riding on the platforms. *Nolan v. Brooklyn & Newtown R. Co.*, 87 N. Y. 63, aff'g judg't for pl'ff.

See *Baltimore R. Co. v. Wilkinson*, 30 Md. 224; *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

From opinion.—"In *Phillips v. Rensselaer & S. R. R. Co.* (49 N. Y. 177), the passenger undertook to get upon the cars while in motion, and was plainly guilty of contributory negligence. In *Clark v. Eighth Ave. R. Co.* (36 N. Y. 135) the

passenger was riding on the steps of the car, a position palpably more dangerous than riding on the platform. In *Ward v. Central Park &c. R. Co.* (11 Abb. N. S. 411) it appeared that the track was in bad condition from accumulations of snow and ice, of which the passenger was fully cognizant, and which the court say was suggestive of the "extreme probability" of a jar or jolt. In *Solomon v. Central Park &c. R. Co.* (1 Sweeney, 298), the boy was sitting on the step of the platform, and was thrown off by a jolt. In all these cases there was some element warranting an inference of negligence beyond and outside of riding on the front platform. These authorities do not establish the doctrine asserted. It is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car. *Willis v. Long Island R. R. Co.*, 34 N. Y. 676; *Hadencamp v. Second Ave. R. R. Co.*, 1 Sweeney, 490; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596. The question is one of fact for the jury, taking into view all the circumstances of the case. *Morrison v. Erie R. Co.*, 56 N. Y. 307; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Westchester & Phila. R. R. Co. v. McElwee*, 17 P. F. Smith, 311; *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234; *Wharton on Negligence*, sec. 366.

"It is further claimed that no negligence of the defendant was shown. It must be freely confessed that the evidence, taken altogether, is very unsatisfactory; but that is not the question here. It comes up in the form of a motion for a nonsuit which was denied, and that ruling must be sustained, where the evidence is conflicting and the inferences to be drawn are doubtful. *Belton v. Baxter*, 58 N. Y. 415; *Cook v. N. Y. Cent. R. R. Co.*, 3 Keyes, 467; *Ochsenbien v. Shapley*, 85 N. Y. 214.

Although there was plenty of room in the street car, the plaintiff went on the platform, then went on the lower step to allow a passenger to enter, and, as he was stepping up, the car started with a jerk and he was injured. The defendant was not liable.

Does sec. 46 of General Railroad Act apply to street railroads (*Quaere*)? *Hayes v. Forty-Second Street &c. R. Co.*, 97 N. Y. 259.

The plaintiff gave his seat in the car to his wife, and went to the platform of a street railway car, which, being crowded, he stood on the car steps, and from thence the movement of the passengers threw him under the car. Contributory negligence of the defendant was for the jury. *Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556, aff'g judg't for pl'ff.

A regulation of a company prohibiting smoking except on front platforms was deemed to have modified notice on the car not to ride on platform and did not prevent recovery by one injured while engaged in smoking in that position. The exemption of railroad from liability for injuries received while riding on the platform of cars, where notices have been posted and there are accommodations inside, contained in section 46 of the General Railroad Laws of 1850 (ch. 110), held not to apply to street railroads. *Vail v. Broadway R. Co.*, 147 N. Y. 377; s. c., 30 L. R. A. 626.

A street railroad company, operating by electricity, need not warn passengers of the approach of a motor to a curve in its tracks, in the

absence of proof that the curve in the track is a dangerous and improper one for such railroad, or that there is any defect in the car or track which renders it dangerous.

In order to authorize a jury to find a street railroad company, operated by electricity, guilty of negligence by reason of the running of a motor car at too high a rate of speed, there must be some evidence that the rate of speed is unusual, improper or dangerous, and the jury is not permitted to speculate as to the duty of the railroad company in regard to the rate of speed at which it may run its cars, nor to capriciously fix such rate without evidence.

A person is guilty of contributory negligence who, being an habitual passenger of a street railroad, at the time of an accident is riding on the steps of the front platform of an electric car on such street railroad, when there is ample accommodation for him within the car, and he is riding on such platform by the permission of the conductor of such car, in order that he may smoke. *Francisco v. The Troy & Lausingsburgh Railroad Company*, 18 Hun, 13.

Contributory negligence was for the jury, where plaintiff was riding on the running board of a crowded street car while passing a truck, standing between the curb and the car, and was injured by the backing of the truck. *Wood v. Brooklyn City R. Co.*, 5 App. Div. 492.

Plaintiff, riding on front platform, at the conductor's direction, to smoke, and while in the act of paying his fare, was thrown by a sudden jerk of the car, caused by the plunge of the horse under the driver's whip, when it had stopped to walk over a dangerous place. Dismissal of the complaint was error. *Hastings v. Central Crosstown R. Co.*, 7 App. Div. 312.

Plaintiff was not negligent *per se* in riding on the platform of a crowded car when he was injured by the giving way of a gate, which the conductor knew was not fastened, and against which plaintiff was pushed or thrown. *Pendergast v. Union R. Co.*, 10 App. Div. 207.

It is for the jury to say, whether defendant was negligent in driving so rapidly past a turnout on the track as to throw plaintiff, riding on the front platform, from the car, and whether plaintiff was negligent in so riding there to smoke. *Dillon v. Forty-Second Street &c. R. Co.*, 28 App. Div. 401.

It was not error to charge that plaintiff was not negligent in remaining on the front platform after giving up his seat to a lady, where the danger of the position was not obvious. Injury caused by negligent collision with truck. *Still v. Nassau Electric R. Co.*, 32 App. Div. 276.

It was for the jury to say whether plaintiff was negligent in riding on the running board of a car in which there were no unoccupied seats



though there was space within to stand, where the conductor collected his fare without objection to his staying there and he was thrown off by a sudden jerk of the car. *Hassen v. Nassau Electric R. Co.*, 34 App. Div. 71.

See, also, *Elberhardt v. Metropolitan Street R. Co.*, 69 App. Div. 560.

Plaintiff was not negligent *per se* in going on the front platform to smoke, which it was defendant's custom to allow, though it had been snowing and things were slippery and slushy. Plaintiff was thrown over the dashboard by a sudden jerk and killed. *Bradley v. Second Ave. R. Co.*, 34 App. Div. 284.

By permitting one to ride on the front platform of a crowded car, a carrier undertakes the duty of exercising extraordinary care for his safety. Defendant was held negligent in rounding a curve, without notice, with such a violent jerk as to wrench plaintiff's hand off the railing of the car and throw him into the street. *Lucas v. Metropolitan Street R. Co.*, 56 App. Div. 405.

Where plaintiff has no notice that he cannot enter the car through the front platform, he is not necessarily negligent in remaining thereon after finding himself unable to enter, although he could have boarded at the rear platform. *Toussend v. Binghamton R. Co.*, 57 App. Div. 234.

Question was for the jury, where car was stopped for passenger who was on front platform to alight, and started while he was getting off. *Lar v. Forty-second Street &c. R. Co.*, 46 Supr. Ct. (J. & S.) 418.

Defendant was found negligent for allowing so many passengers on platform of car as to break it down. *Norris v. Brooklyn City R. Co.*, 4 Misc. 294, aff'g judg't for pl'ff. (City Court of Brooklyn); s. c. aff'd, 143 N. Y. 666.

In an action for injuries, there was evidence tending to show that, while plaintiff was riding on the front platform of defendant's car, the driver thereof drove the car against a wagon standing across the track and about to enter a stable, whereby plaintiff was thrown off and injured. This justified a finding of negligence on the part of the defendant. *For v. The Brooklyn City Railroad Co.*, 7 Misc. 285. (City Court of Brooklyn.)

As a street car was slowing down in pursuance of plaintiff's signal that she wished to alight, she placed herself near the side of the car in readiness to leave it, but the car passed the crossing for some distance, and the conductor then signaled the driver to proceed, and the sudden starting of the car loosened plaintiff's hold and threw her off. Held, that plaintiff was not chargeable with contributory negligence. *Demann v. Eighth Ave. R. Co.*, 10 Misc. 191.

It was not negligence *per se* to ride on the front platform. Plaintiff was thrown by the car jumping a switch while going at high speed. *Taft v. Brooklyn &c. R. Co.*, 14 Misc. 410; *Seelig v. Metropolitan Street R. Co.*, 18 Misc. 383.

It was not negligent *per se* to ride upon the platform of a crowded car. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

One who stands unnecessarily upon the platform of a car must take the risk of the situation. *Chicago &c. R. Co. v. Carroll*, 5 Ill. App. 201.

*Macon &c. R. Co. v. Johnson*, 38 Ga. 409; *Hickey v. Boston &c. R. Co.*, 14 Allen, 429; *Higgins v. N. Y. &c. R. Co.*, 2 Bosw. (N. Y.) 132; *Quinn v. Illinois Central R. Co.*, 51 Ill. 495; *Andrews v. Capitol &c. R. Co.*, 2 Mackey (D. C.) 137; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112.

It is not necessary that a railroad company should construct a platform so that a person standing on any part of it could not be injured by a passing train. *Chicago &c. R. Co. v. Mahara*, 47 Ill. App. 208.

A railroad company is liable for the injuries sustained by a drunken passenger in falling off the rear platform, if they knew his condition and permitted him to remain there. *St. Louis &c. R. Co. v. Carr*, 47 Ill. App. 353.

The jury are to decide the question of company's negligence in permitting a street car to be crowded, by reason of which plaintiff was pushed off and injured. *Chicago &c. R. Co. v. Considine*, 50 Ill. App. 471.

It is not negligent *per se* in one riding on a platform to fail to hold on to the platform bar. *Kean v. West Chicago Street R. Co.*, 75 Ill. App. 38.

A request by one in authority for gentlemen to vacate seats on a crowded car in favor of ladies is not so unreasonable as to warrant one in not complying therewith; nor is it negligent *per se* to ride on the rear platform of a car with or without the direction of the conductor. *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466.

One who voluntarily chooses a car platform must take the risks of the situation. *Olivier v. Louisville &c. R. Co.*, 43 La. Ann. 804.

*McCauley v. Tenn. &c. R. Co.*, 93 Ala. 356; *Aikin v. Frankford &c. R. Co.*, 142 Pa. St. 47.

Jolting of cars when they were being coupled was not actionable, where the injury resulted from the falling of a child of two years from the car platform after passengers had been warned by conductor to keep their seats. *Demahy v. R. Co.*, 45 La. Ann. 1329.

It is not negligence *per se* to ride on the platform where there is room inside, though one thereby assumes the risk naturally incident to the situation. *Watson v. Portland &c. R. Co.*, 91 Me. 584.

A boy of fifteen years is guilty of contributory negligence and cannot recover for injuries caused by attempting to mount the front platform of a car notwithstanding the driver prevailed upon him to do so. *Detrich v. Balt. &c. R. Co.*, 58 Md. 347.

*R. Co. v. Jones*, 95 U. S. 439.

If a passenger, knowing the train is in motion, stands on the platform of a car and is injured by the jerking of the train, she cannot recover. *Garrett v. Manchester &c. R. Co.*, 16 Gray, 501.

Question was for the jury, where a passenger in a train, relying on company's agreement to stop at a certain place, made his way to the platform of the car, and either fell or was pushed therefrom. *Treat v. Boston &c. R. Co.*, 131 Mass. 371.

*Barden v. Boston &c. R. Co.*, 121 Mass. 426; *Maguire v. Middlesex R.*, 115 id. 239; *Meesel v. Lynn &c. R. Co.*, 8 Allen, 234; *Cram v. Metropolitan R.*, 112 Mass. 38; *Murphy v. Union R.*, 118 id. 228.

Question of passenger's negligence in standing on a street car platform covered with ice, after having signaled conductor to stop, is for the jury. *Fleck v. Union R. Co.*, 134 Mass. 480.

It was for the jury, when passenger in street car, having signaled conductor to stop, went to rear platform, which was coated with ice, and was thrown off by the jolting of the car. *Fleck v. Union R. Co.*, 134 Mass. 480.

Plaintiff, in an open street car, in which no seats were to be had, stood between two cross seats and was thrown out while turning a curve in the street. Recovery was allowed. *Lapointe v. Middlesex R. Co.*, 144 Mass. 18.

One who stands on car platform, knowing that the train is about to start, and is injured by the mere starting of it, cannot recover. *Torrey v. Boston &c. R. Co.*, 147 Mass. 412.

One who passes from one car to another in search of a seat, and is injured while so doing, can recover. *Dewire v. Boston &c. R. Co.*, 118 Mass. 443.

The question of plaintiff's due care in standing upon the platform of a trolley car was a proper one for the jury. *Beal v. Lowell &c. R. Co.*, 157 Mass. 444.

Negligence in riding on a platform, against rule of the company not strictly enforced, for the jury. *Sweetland v. Lynn &c. R. Co.*, 177 Mass. 574; s. c., 51 L. R. A. 783.

In absence of regulation prohibiting it, riding on car platform may not bar recovery. *Upham v. Detroit &c. R. Co.*, 85 Mich. 12.

It was not negligent to ride on the running board where there was no room inside. *Pomaski v. Grant*, 119 Mich. 675.

It was contributory negligence for a passenger at invitation of driver to sit on driving bar when there was plenty of room inside. *Downey v. Hendrie*, 46 Mich. 498.

It is not negligent *per se* to remain on the platform as the car approaches a curve as one has the right to assume that it will be slackened before reaching it. *Blondel v. St. Paul City R. Co.*, 66 Minn. 284.

Failure to compel a boy of eight, sitting on the rear platform with feet upon the steps, to go inside was evidence of negligence for the jury. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

Boy of 16, riding on platform of crowded car leaned out beyond its side somewhat, through curiosity. He was negligent. *Benedict v. Minneapolis &c. R. Co.*, (Minn.) 90 N. W. Rep. 360.

Passenger riding on platform of street car assumes the risk of the position, but not the risk of the danger created by driving the car at a dangerous rate of speed. *Wilmot v. Corrigan &c. R. Co.*, 106 Mo. 535.

Plaintiff was not negligent in remaining on the running board of a car instead of re-entering the car while it is passing to the next street after having passed the street at which he asked to be left off at. *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385.

Under statute providing that, if passengers get off the front platform, and are injured, no action will lie, it is competent to show that plaintiff could not get off the rear platform because of the crowd, and was injured by the handle of the brake before she attempted to leave the front platform. *Wissen v. Missouri R. Co.*, 19 Mo. App. 662.

Not negligent *per se* to ride on the platform. *East Omaha Street R. Co. v. Godola*, 50 Neb. 906.

Passenger has the right to assume that the position assigned to him by carrier's agent is a safe one. *City R. Co. v. Lee*, 50 N. J. L. 435.

Going upon the platform of a car to await its stopping is not *per se* negligent. *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407.

No liability of company, if plaintiff was injured while voluntarily upon the rear platform, and not supporting himself by holding on to anything. *Douglas v. Railroad*, 106 N. C. 65.

*Louisville &c. R. Co. v. Bisch*, 120 Ind. 549.

Passenger was not allowed to recover for being thrown from a car by its sudden stopping to avoid a collision not brought about by defendant's negligence. *Cleveland City R. Co. v. Osborn*, (Oh. St.) 63 N. E. Rep. 601.

Standing on the rear platform of a moving car was not negligence. *Lake v. Cincinnati &c. R. Co.*, 13 Oh. C. C. 494.

The question of negligence in standing on the front platform of a

crowded car for the jury. *Germantown &c. R. Co. v. Walling*, 97 Pa. St. 55.

*Chicago &c. R. Co. v. Hughes*, 69 Ill. 170; *Zemp v. Wilmington &c. R. Co.*, 9 Rich. L. (S. C.) 84; *Chicago City R. Co. v. Young*, 62 Ill. 238; *Baltimore &c. R. Co. v. Leonhardt*, 66 Md. 70.

Where a child of eight made its way through a crowded car to the platform, and directly upon being discovered by the conductor was injured, no negligence can be fastened on the company. *Sandford v. Railroad Co.*, 136 Pa. St. 84.

Plaintiff took driver's seat on front platform without his invitation, and, while the car was passing over a switch at high speed was thrown and killed. There was room inside. Dismissal of complaint held proper. *Mann v. Philadelphia Traction Co.*, 115 Pa. St. 122.

Plaintiff's intestate who was killed by a rear end collision while riding on the bumper of an electric car without the knowledge of the conductor, was properly nonsuited. *Bard v. Pennsylvania Traction Co.*, 116 Pa. St. 91.

It was not negligent *per se* to ride on the platform of a crowded car at a place designated by the conductor while going around a curve at high speed. *Reber v. Pittsburg &c. Traction Co.*, 119 Pa. St. 339.

But, where there was room inside and there was no reason why a passenger should not go there, he was held negligent *per se* in remaining on the platform. *Thane v. Scranton Traction Co.*, 191 Pa. St. 249.

It is not negligence to ride on front platform of street car, unless forbidden. *Walling v. R. Co.*, 12 Phila. 309.

*Chicago &c. R. Co. v. Klauber*, 9 Ill. App. 613; *Meesel v. Lynn &c. R. Co.*, 8 Allen, 234; *Hardencamp v. Second Ave. R. Co.*, 1 Sweeney, 190; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364. See, also, *Nolan v. Brooklyn R. Co.*, 87 N. Y. 63; *McGuire v. Middlesex R. Co.*, 113 Mass. 239; *Downey v. Hendrick*, 46 Mich. 498; *Augusta R. Co. v. Renz*, 55 Ga. 126.

Plaintiff was one of a crowd of persons who gathered on the back platform of a car to hear a speech, and was injured by the breaking of the same. No liability attached to the company. *Gillis v. Penn. R. Co.*, 9 P. F. Smith (Pa.) 129.

A train, which had been side tracked all night, suddenly parted as a passenger was crossing from one car to another, and passenger was injured. It was negligence not to warn him of his danger. *Andrust v. Union Pac. R. Co.*, 30 Fed. Rep. 354.

Fact that all the seats in a car were occupied and the aisle so crowded that standing there would have been discomfort to plaintiff, does not excuse him for standing on the platform. *Worthington v. Cent. Vt. R. Co.*, 64 Vt. 107.

Riding on the front platform with the implied consent of the con-

ductor, which was customary, was not *per se* negligent, though the morning was foggy and the position occupied was the driver's stool. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48.

Where there was nothing but standing room inside, it was not negligent to stand on the platform outside. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Riding on foot board of a street car is not *per se* negligence. *Geitz v. Milwaukee &c. R. Co.*, 72 Wis. 307.

## IX. Passenger in Baggage, Mail or Express Car.

Whether the presence of a passenger in a baggage car at the time of an accident by collision, was contributory negligence, is for the jury. The question was whether his presence in car was in any part the cause of his injury. *Webster v. R., W. & O. R. Co.*, 115 N. Y. 112, aff'g 40 Hun. 112, and judg't for plff.

A rule of carrier prohibiting passengers from riding in express cars precludes recovery for passenger's injuries received while riding in such a car; but, a continued and general abandonment of the rule, by the carrier, will lay it open to an action for injuries to a passenger violating the same. *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

A one-legged passenger was not negligent *per se* in going into the baggage car, while it was standing at a station, to see the conductor about his safety in alighting at his destination. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482.

It was not negligence *per se* to leave one's seat to go to and return from the baggage car. Death was caused by failure to have a platform to the baggage car. *Louisville &c. R. Co. v. Berg*, (Ky.) 32 S. W. Rep. 616.

No negligence attaches to a company which has a saloon car at the rear of a train, not intended for use of passengers, but, at the time carrying some passengers, in passing to which in the night time, decedent met his death. *State v. Maine &c. R. Co.*, 81 Me. 84.

Riding in baggage car in the absence of regulations prohibiting it, was not *per se* negligent. *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125.

Passenger in baggage car not defeated in an action for injuries, by that fact alone, it appearing that the rule prohibiting it was habitually disregarded. *Jones v. Chicago &c. R. Co.*, 43 Minn. 279.

No recovery for one riding on caboose cupola. *Tuley v. Chicago &c. R. Co.*, 41 Mo. App. 432.

One assumes the risk of injury resulting from going into an express car. *Fremont &c. R. Co. v. Root*, 49 Neb. 900.

That one is intoxicated did not relieve carrier of the duty of protect-

ing him, where it permitted him to ride, dancing about, in the baggage car between unguarded open doors on either side. *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 601; s. c., 54 L. R. A. 955.

Passenger in baggage car for want of a better seat, takes the risks incident to the presence of baggage, but is not therefore defeated in an action for injuries caused by a collision. *N. Y. & R. Co. v. Bull*, 53 N. J. L. 283.

Passenger in baggage car, violating rules of the company in relation to passenger's safety, although by license of the conductor, was *per se* negligent. *Pa. R. Co. v. Langdon*, 92 Pa. St. 21.

See *Sullivan v. Philadelphia R. Co.*, 6 Cas. (Pa.) 234; *Powell v. Penn. R. Co.*, 3 id. 414; *West Chester & C. R. Co. v. Miles*, 5 P. F. Smith (Pa.) 209; *O'Donnell v. Alleghany & C. R. Co.*, 9 id. 239.

See, also, *Robertson v. Erie R. Co.*, 22 Barb. 91; *H. & T. C. R. Co. v. Clemmons*, 55 Tex. 88; *R. Co. v. Jones*, 5 Otto, 439; *R. Co. v. Lane*, 83 Ill. 448; *Hickey v. R. Co.*, 14 Allen, 429.

A baggage car is not, as a matter of law, an improper place for a passenger to ride, and the right of a person to recover for an injury arising from an unsafe track is the same when in the baggage car as in the passenger car. *O'Donnell v. Alleghany & C. R. Co.*, 9 P. F. Smith, (Pa.) 239.

No recovery is allowed if it be shown that no injury would have been received if plaintiff had been in the passenger car. *H. & T. & C. R. Co. v. Clemmons*, 55 Tex. 88.

## X. Passenger Riding in Dangerous Place.

Nonsuit was properly granted, where plaintiff unnecessarily remained on the running board of a car, knowing that the hub of a wagon in the street ahead projects within dangerous proximity. *Caspers v. Dry Dock & C. R. Co.*, 22 App. Div. 156.

It was for the jury to say whether plaintiff was negligent in getting on a car so crowded that he had to ride on the step and hold on to the hand rail. *Schaefer v. Union R. Co.*, 29 App. Div. 261.

Conductor's negligence in forcing himself onto a crowded platform was for the jury. *Gray v. Metropolitan Street R. Co.*, 39 App. Div. 536.

It was not *per se* negligent to decline a seat in a crowded car, in favor of a lady and remain standing on the running board. *Brainard v. Nassau Electric R. Co.*, 44 App. Div. 613.

Defendant's negligence was for the jury, where its conductor testified that he saw the dangerous proximity of a truck while plaintiff was on the running board but thought he had plenty of time to enter the car. That plaintiff saw the danger while getting in is not sufficient to establish

his negligence as matter of law. *Paris v. Brooklyn City &c. R. Co.*, 46 App. Div. 231.

Defendant was negligent where its motorman must have known that a truck, which he attempted to pass, was so close as to strike parties on the running board of the car, which was crowded, unless they leaned inward. That plaintiff was moving along such running board looking for a seat was not sufficient to establish his negligence as matter of law. *Henderson v. Nassau Electric R. Co.*, 46 App. Div. 280.

Plaintiff, standing at the edge of a car while rounding a curve with no more than the usual jerking, without holding on to anything, was thrown off and injured. He was not allowed to recover. *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. 242.

Riding on top of freight car when one could have ridden in the caboose was negligence *per se*. *Beyer v. Louisville &c. R. Co.*, 114 Ala. 424.

Going down a hatchway to the main deck of a steamer to look for baggage, was not *per se* negligent. *Bowman v. California &c. Nav. Co.*, 63 Cal. 181.

Where defendant had not furnished plaintiff with a seat in the inside, he was not negligent in standing on the outside. *Babcock v. Los Angeles Traction Co.*, 128 Cal. 153.

No recovery was allowed a passenger who sat on end board of an open car, when a safe seat could have been had. *Jackson v. Crilly*, 16 Colo. 103.

It was not negligent *per se* to remain for a time on the footboard instead of immediately entering the car. *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60.

Where defendant did not allow plaintiff sufficient time to return to the caboose after feeding and watering his stock, it could not complain that he remained in the freight car instead of in the caboose. *Illinois C. R. Co. v. Beebe*, 174 Ill. 13; aff'g s. c., 69 Ill. App. 363.

Jury was justified in finding that defendant failed to observe the high degree of care required, where it allowed plaintiff to stand in the place usually occupied only by the gripman, without informing him of his peril from the brake lever, and that plaintiff was not negligent in standing there when the car was crowded. *West Chicago Street R. Co. v. Johnson*, 180 Ill. 285; aff'g s. c., 77 Ill. App. 112.

No recovery was allowed one who rode on the footboard of the tender of an engine. *Chicago &c. R. Co. v. Riley*, 10 Ill. App. 416.

It was not negligence *per se* to ride on the running board of a car where there was no room inside, nor in failing to jump, on the instant, out of the way of a passing wagon, though that would have been the safer course. *West Chicago Street R. Co. v. McNulty*, 64 Ill. App. 549.



The court refused to draw a distinction between seats and footboards as relative places of danger in view of the general custom of carriers. *West Chicago Street R. Co. v. Stiver*, 69 Ill. App. 625.

Where plaintiff, after being told that he could secure a transfer from the conductor of the rear car, was injured while passing from one car to the other along the footboard while the train was in motion, a direction for the defendant was sustained. *Eickhof v. Chicago &c. Street R. Co.*, 77 Ill. App. 196.

Remaining on a car to prevent animals from escaping, where one sees another car about to strike, was not negligent, where danger therefrom was not reasonably apparent. *Illinois C. R. Co. v. Anderson*, 81 Ill. App. 137.

It was not negligent *per se* to ride on the footboard of a crowded car across a viaduct, where one is unacquainted with the danger; but defendant was negligent in failing to warn him of the danger of being struck unless he used extra care and inclined his body to the car in passing the posts thereof. *West Chicago Street R. Co. v. Marks*, 82 Ill. App. 185.

It may not be *per se* negligence to occupy a dangerous position on the train. *Lafayette &c. R. Co. v. Sims*, 27 Ind. 59.

Unnecessarily riding in a car with horse and goods, though with permission of trainmen, where a caboose was provided, was negligence. Held error to refuse to sustain demurrer to evidence. *Walker v. Green*, 60 Kan. 289.

Contributory negligence in leaning out of window while approaching a bridge was no excuse for failing to warn plaintiff, where the conductor saw his danger in time. *South Covington &c. Street R. Co. v. McCleave*, (Ky.) 38 S. W. Rep. 1055.

That there was no room inside the car did not relieve a passenger, familiar with the locality, of consequences of his own negligence in leaning back, while riding on the running board of a car, so as to strike a pole 15 inches therefrom. *Sibley v. New Orleans City &c. R. Co.*, 49 La. Ann. 588.

It is not *per se* negligence for a passenger on a street car, who had signaled car to stop, to stand upon the steps so as to be in a position to alight. *Bowie v. Greenville St. R. Co.*, 69 Miss. 196.

Plaintiff was not permitted to recover, where the jerk which threw him off, while he stood on the car step as it was about to stop, was not more than usual. *Philips v. St. Charles Street R. Co.*, 106 La. 592.

Sitting on platform of street car, with feet on step, against the rules of the company and the remonstrance of driver, was negligent. *Mills v. Lynn &c. R. Co.*, 129 Mass. 351.

To sit on a driving bar of a street car even at driver's invitation, was negligent. *Downey v. Hendric*, 46 Mich. 498.

Plaintiff was negligent *per se* in riding on the bumper of the car. Was warned by conductor. *Nieboer v. Detroit Elec. R. Co.*, (Mich.) 87 N. W. Rep. 626.

Contributory negligence in riding on the top of a freight car was no defense to an action for injuries from a collision occasioned by the gross negligence and reckless conduct of defendant in switching a car down grade without brakes in the direction another was bound to take. *Illinois R. Co. v. Brown*, 77 Miss. 338.

Where plaintiff tried to board a train by climbing upon sheet iron covering of the steps of the last platform, no action will lie. *Carroll v. Interstate &c. Co.*, 107 Mo. 653.

A conductor is not bound to go beyond a request that one riding on the top of a car get down; plaintiff is negligent in remaining after being informed of the risk. *Aufdenberg v. St. Louis &c. R. Co.*, 132 Mo. 565.

That plaintiff may have assumed an unsafe position by remaining on the running board of a street car on seeing an approaching wagon, does not relieve defendant of all duty toward him; he may assume that defendant saw the obstruction and will stop in time to prevent collision. *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385.

The question of whether one was negligent or not in riding on the running board of a car does not depend on whether one is a passenger or not. *Raming v. Metropolitan Street R. Co.*, 157 Mo. 477.

It was not negligent to follow the custom of riding on the driver's seat with defendant's knowledge. *Sparks v. Citizens' Coach Co.*, 6 N. J. Law J. 365.

It was negligence to allow one to ride on the bumper of an electric car. *Griener v. North Jersey Street R. Co.*, 65 N. J. L. 409.

An instruction that plaintiff was negligent in assuming a position the danger of which would have been apparent to one exercising reasonable care, was not complete without adding, if she could have by such care avoided assuming it. *Asbury v. Charlotte Electric R. &c. Co.*, 125 N. C. 568.

It was negligent to go into a box car where a caboose was provided. *Hobison &c. R. Co. v. Johnson*, 3 Okla. 41.

Plaintiff was negligent in leaving her seat in spite of warnings, where the car was under control and going at usual speed; though previously it had been proceeding rapidly and had collided with a cart. *Jackson v. Philadelphia Traction Co.*, 182 Pa. St. 104.

It was negligent to mount the running board of a car in front of an

advancing car on an adjoining track before the side bar which permitted entrance had been raised. Nonsuit sustained. *Malpass v. Hestonville &c. R. Co.*, 189 Pa. St. 599.

One, riding on the step of a trolley car with consent of conductor for lack of room inside, is entitled to same degree of care to protect him from danger as other passengers. *Bumbar v. United Traction Co.*, 198 Pa. St. 198.

Passenger was negligent in riding on the side steps of an open street car. *Woodroffe v. Roxborough &c. R. Co.*, 201 Pa. St. 521.

It was negligent *per se* to ride in a car with one's horses and goods in spite of his contract to ride in the caboose and the protest of the conductor. *Humphreys v. Fremont &c. R. Co.*, 8 S. D. 103.

Though shipper believed that he would be unable to reach the caboose in time to board, where his contract provided that he should ride, he was negligent in going into the engine contrary to the company's rules. *Mobile &c. R. Co. v. Bogle*, 101 Tenn. 40.

The high degree of care imposed, requires seats to be furnished so as not to expose passengers to positions of greater danger. Passenger not guilty of contributory negligence in riding on platform though there were seats in other coaches inaccessible to him. *International &c. R. Co. v. Williams*, 20 Tex. Civ. App. 587.

Drover, injured by a sudden jolt while in a stock car when the train was standing still, was not barred of recovery because he had been riding in the stock car while the train was in motion in violation of a provision of his pass. *Texas &c. R. Co. v. Reeder*, 76 Fed. Rep. 550; s. c. aff'd, 170 U. S. 530.

Not negligence *per se* for passenger to ride in a place where he has no right to be. *The Burgundia*, 29 Fed. Rep. 364.

Where a shipper could have reached his poultry car safely by the ground, he was negligent in attempting to walk upon the tops of the cars. *Kimball v. Palmer*, 80 Fed. Rep. 210.

One assumes the risk in leaving a place of safety provided and, unnecessarily, out of curiosity, approaching a burning oil tank. *Chicago &c. R. Co. v. Myers*, 80 Fed. Rep. 361.

Where one was required to take full charge of a fine horse during transportation, he was not negligent in remaining, with defendant's knowledge, in the car with it, as it was customary to do in such cases. Defendant was negligent in rounding a curve at high speed knowing of his position. *Chicago &c. R. Co. v. Lee*, 92 Fed. Rep. 318.

Surrendering a seat to one less able to stand is not negligence which precludes recovery. *Trumbull v. Erickson*, 97 Feb. Rep. 891.

It was negligence to attempt to pass over the tops of cars of unequal

height, while passing through a snow shed, in an unusually severe storm. *Nelson v. Southern P. Co.*, 15 Utah, 325.

One seated unnecessarily near the open door of a caboose, was *per se* negligent. *N. & W. R. Co. v. Ferguson*, 79 Va. 241.

It was negligent to return to a dangerous seat on the chain box on the rear of a tender in spite of a notice and after having left it at the order of a brakeman. *White v. Peninsular R. Co.*, 20 Wash. 132.

Not negligent *per se* to stand in the aisle of a car. *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119.

## XI. Willful and Malicious Acts of Servants.

The carrier should, even on drawing and sleeping cars, protect its passengers from annoyance, insult, willful, or wanton injury, theft or robbery by its servants, and use due care to protect them from similar injuries from other passengers, or third persons, but this does not extend to large sums of money, securities and valuables, not within the knowledge of the carrier and the contract of carriage.\*

There is an apparent holding that if, in the lawful removal of a passenger from a car for failure to exhibit ticket, the conductor used unnecessary force and wantonly injured the passenger, he, but not the corporation, was liable for such malicious excess of force. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 456. This is not the present doctrine.

Where the delay in transportation of the passenger was caused by the willful act of the conductor, the carrier was held liable. *Weed v. Panama R. Co.*, 11 N. Y. 361.

Story on Bailments, secs. 400-406; *Stokes v. Saltonstall*, 13 Peters, (U. S.) 181.

The defendant was liable for injury to passenger, caused, while ejecting him, when the car was in motion, and so the defendant was liable for any circumstances aggravating the wrongful ejection, although wantonly done. *Sandford v. Eighth Ave. R. Co.*, 23 N. Y. 343.

Where the conductor, under mistake of fact or judgment as to the passenger's right to ride, ejected him from the car, the company was liable. The same was said to be the rule where there was justifiable cause for ejection, but excessive force was used not wantonly or recklessly. *Higgins v. Watervliet Turnpike R. Co.*, 46 N. Y. 23, aff'g judg't for plff.

Explaining *Hibbard v. N. Y. &c. R. Co.*, 15 N. Y. 467; citing *Seymour v. Greenwood*, 7 H. & N. 356; *Limpus v. London &c. Co.*, 1 H. & C. 526; *Goff v. Great Northern R. Co.*, 30 L. J. Q. B. 148; *Poulton v. London &c. R. Co.*, 2 L. R., 2 Q. B. 534.

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\* NOTE.—As to such acts towards trespassers, see "Degree of Care Required," etc., *ante* p. 388.

A passenger upon the defendant's car, desiring to alight, passed out upon the platform, and requested the conductor to stop the car, and refused to get off until the car came to a full stop; whereupon, and while the car was in motion, conductor threw her from the car with great violence. Held, that the act was wanton and willful trespass, not in performance of any duty to, or of any act authorized by the defendant, and that the defendant was not liable. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, rev'g judg't for pl'ff.

**From opinion.**—"The rule well established and recognized in all the cases, and to which there are no exceptions, is, that to charge the master for the wrongful acts of the servant, they must have been committed by the express authority of the master, or in his service, and within the scope of the employment and authority of the servant." \* \* \* "For the willful, wanton, or reckless acts of the servant not committed in the service of the master, and not within the limit of his duty or the scope of his employment, the master is not liable." \* \* \* "The question of liability does not depend entirely on the quality of the act, but rather upon the other question, whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. *Seymour v. Greenwood*, 7 H. & N. 355; *Limpus v. London Gen. O. Co.*, 1 H. & C. 526; *Goff v. Great Northern R. Co.*, 3 E. & E. 672. When the act of a servant, whether a trespass or otherwise, is without the authority, either expressly conferred upon the servant, or implied from the nature of the employment and character of the duties, causes injuries to others, the master is not answerable. It is said that the implied authority in the servant is limited to those acts, which the master could himself do, if personally present, and if, in the performance of such acts, the servant misconducts himself, the master will be liable for his acts. *Poulton v. L. & S. W. Ry. Co.*, L. R., 2 Q. B. 534."

The opinion here quotes the remark of Lord Kenyon in *McManus v. Crickett*, 1 East, 106, adopted in *Wright v. Wilcox*, 19 Wend. 343, that "when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him;" and the opinion continues—"The principle is the same whether the wrongful act of the servant is malicious or merely wanton or reckless." The opinion approves *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455, except as to excess of force.

Where the conductor has been instructed by the company to demand of every passenger a certain fare, and to remove from the car any passenger refusing to pay the same, if the company has not the right to demand the required fare, it is liable for any force used upon the person of a passenger in an attempt to execute such order; if it has the right to the fare, and the conductor, acting in the performance of his duty, exceeds, through zeal or impetuosity of temper, the degree of force necessary and proper to accomplish the removal, the company is liable for resulting injury.

The question whether the act occasioning the injury was willful and malicious, or was mistakenly conceived to be a necessary use of force to

effect the removal, is a question for the jury. *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274.

Citing *Ramsden v. B. & R. Co.*, 104 Mass. 117.

An agent placed at the entrance to its cars, instructed to refuse admission to any one, not having a ticket, refused to allow the plaintiff to pass without a ticket, and the agent struck him and pulled him from the car, doing injury. Held (Dwight, Earl. C. C., dissenting), that the cause of action was for assault and battery substantially alleged as having been committed by the defendant, and as no evidence was given tending to prove that the defendant in any way directed or sanctioned the acts of assault and battery, the defendant was not liable. *Priest v. Hudson River R. R. Co.*, 65 N. Y. 589.

Citing *Phila. & R. Co. v. Wilt*, 4 Whart. 143, 147; *Percival v. Hickey*, 18 Fed. Rep. 284.

Where conductor, in enforcing a rule setting apart a car for females traveling alone, used unnecessary and excessive force, without malice, to remove a passenger violating the rule, the defendant was liable. *Peck v. N. Y. C. & C. R. Co.*, 70 N. Y. 587, aff'g 8 Hun, 286.

It is immaterial that agent acted in good faith. *Hamilton v. T. A. R. Co.*, 53 N. Y. 25.

The jury found that plaintiff was pushed or thrown from the car, and it was claimed by the defendants that such act was so willful, reckless and malicious, that defendant was not responsible. The court held that the defendant was responsible and affirmed judgment for plaintiff. *Schultz v. Third Ave. R. Co.*, 89 N. Y. 247, aff'g 14 J. & S. 211.

Plaintiff, while a passenger on one of defendant's street cars, was unjustifiably attacked and beaten by the driver, who was also conductor. The defendant was liable.

The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, *does not apply as between a common carrier of passengers and a passenger.*

Such a carrier undertakes to protect the passenger against any injury arising from negligence or willful misconduct of its servants, while engaged in performing a duty which the carrier owes to the passenger. *Stewart v. Brooklyn & Crosstown R. Co.*, 90 N. Y. 588, rev'g nonsuit.

Distinguishing and limiting *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

From opinion.—“In *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202; 2 Am. Rep. 39, it is said that ‘The carrier’s obligation is to carry his passengers safely and properly, and to treat them respectfully, and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust.’ In *Day v. Owen*, 5 Mich. 520, the duties of common carriers

are said to include everything calculated to render the transportation most comfortable and least annoying to the passengers. In *Nieto v. Clark*, 1 Cliff. 145, the court says: 'In respect to female passengers, the contract proceeds yet further and includes an implied stipulation that it shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach.' A common carrier is bound, so far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers, and co-passengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract. *Commonwealth v. Power*, 7 Mete. 596; *P., F. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Grand Trunk Ry.*, 57 Me. 213; 2 Am. Rep. 39. In *Flint v. N. & N. Y. Transp. Co.*, 34 Conn. 554, the plaintiff was injured by the discharge of a gun dropped by soldiers engaged in a scuffle. The court held that passenger carriers are bound to exercise the utmost vigilance and care, regarding those they transport, from violence from whatever source arising. \* \* \* Judge Story states the rule as follows: "In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." *Story on Bailments*, secs. 400, 406; *Stokes v. Saltonstall*, 13 Peters (U. S.) 181. "A railway company selects its own agents at its own pleasure, and is bound to employ none except capable, prudent and humane men." *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 365.

If the carrier places lady passengers under the protection of libertines, who insult or assault them, or male passengers under the protection of drunken ruffians, who fall upon and beat them without cause, he should be responsible for the injury. This rule rests upon sound reason, and is abundantly supported by authority.

In *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202; 2 Am. Rep. 39, it was held that a common carrier of passengers was responsible for the wilful misconduct of his servant toward a passenger, and that a passenger who was assaulted and grossly insulted in a railway car by a brakeman employed on the train had a remedy therefor against the company.

In *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657; 17 Am. 504, it was held that a master is liable for wrong done by his servant, whether through the negligence or the malice of the latter, in the course of an employment in which the servant is engaged, to perform a duty, which the master owes to the person injured; and it was held that a railway company is bound to protect the female passenger on its trains from indecent approach or assault, and where a conductor on the company's train makes such an assault on a female passenger the company is liable for compensatory damages. In *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant as a common carrier was held liable for injury. In *Sherley v. Billings*, 98 Bush. 147; 8 Am. Rep. 451, where a passenger in defendant's boat was assaulted and injured by an officer of the boat, the defendant was held liable. In *The Chicago & Eastern Illinois R. R. Co. v. Flexman*, where a brakeman assaulted a passenger, the company was held liable. 103 Ill. 546; *Albany Law Journal*, Nov. 25, 1882, p. 434. For violation of their rights passengers have their remedy by action on the contract of carriage. To sustain the judgment in this case the counsel for the appellant cites and relies on the case of *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418. That case was discussed by counsel and determined by this court upon the assumption, that the rule of the master's liability for the assault

of a servant committed upon a person to whom the master owed no duty was applicable to that case."

A railroad corporation, by the sale of a ticket, undertakes absolutely to protect the passenger against any injury from negligence or willful misconduct of its servants while performing its contract, and *it seems*, so far as practicable, of his fellow passengers (*Thorpe v. N. Y. C. & H. R. R. R. Co.*, 16 N. Y. 402; *Stewart v. B. & C. T. R. R. Co.*, 90 id. 588; *Parsons v. N. Y. C. & H. R. R. R. Co.*, 113 id. 355; *Thompson on Carriers of Passengers*, 50; *P. C. & S. L. R. Co. v. Krouse*, 30 Ohio St. 224), also to provide him with the usual accommodations and any information or facilities necessary for the full performance of the contract, and it may be the passenger's duty to make inquiry for the same. *Siner v. G. W. R. Co.*, L. R. 3 Exch. 150, cited in note to the opinion; *Hulbert v. N. Y. C. R. Co.*, 40 N. Y. 153.

Whatever may be the motive which incites the servant to commit an unlawful act toward the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural consequences. *Nieto v. Clark*, 1 Cliff. 145; *Commonwealth v. Power*, 7 Mete. 596; *Goddard v. G. T. R.*, 51 Me. 202; 2 Am. Rep. 39; *Craker v. C. & N. W. R. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *C. & E. R. R. Co. v. Flexman*, 103 Ill. 546.

Where a passenger purchases a ticket for a passage on an ordinary car, and a ticket for a berth in a sleeping-car on the same train, the porter of the sleeping-car is, in the performance of the duties and obligations of the railroad company under its contract, the servant of the company, although it does not own the sleeping-car or hire or pay the porter. This question has been definitely settled by the highest court in this state and of the United States. *Thorpe v. N. Y. C. & H. R. R. R. Co.*, 16 N. Y. 406; *Penn. Co. v. Roy*, 102 U. S. 451.

Plaintiff purchased tickets for himself and wife for a continuous passage from G. to N. Y. in one of the defendant's ordinary cars, and purchased from the porter, there being no other person acting as conductor, tickets for a section in a sleeping-car on the same train, which upon plaintiff and his wife retiring, were taken up by said porter. The train was detained by a washout, and after waiting until nearly noon the next day, said porter informed plaintiff that he must take another train. The porter conducted plaintiff and his wife to a sleeping-car in the other train, and, upon finding it filled, he conducted them into an ordinary car, where there were no vacant seats. On being requested to return the sleeping-car tickets, or procure for plaintiff something to show that he was entitled to a section in a sleeping-car to N. Y., the porter refused to do so, and turned to go away, when plaintiff touched him lightly on



the arm, saying to him that he must not leave without some satisfaction; whereupon the porter struck the plaintiff a violent blow in the face, knocking him down and injuring him. The complaint was dismissed on trial. Held, error; that the question whether the porter was engaged in the performance of his duties as defendant's servant at the time of inflicting the blow, should have been submitted to the jury. *Buffet v. T. & B. R. R. Co.*, 40 N. Y. 168; *Tousey v. Roberts*, 21 J. & S. 446, 447; *Althorf v. Wolfe*, 22 N. Y. 355; *Isaacson v. N. Y. C. R. R. Co.*, 94 id. 278; *Dwinelle v. N. Y. C. & H. R. R. R. Co.*, 120 id. 117, rev'g 45 Hun. 139, and nonsuit.

See *Williams v. Pullman & Co.*, 40 La. Ann. 87; id. 417.

To enable a passenger to recover for injuries arising from the negligent or willful misconduct of its servants it must appear that the servant was acting, at the time, in the course of his employment.

The plaintiff purchased tickets of the defendant's ticket agent and gave a five dollar bill therefor. Shortly before, a detective had left with said agent a circular, describing men engaged in passing counterfeit five dollar bills, and told said agent to look out for these men, and, if they appeared, to have them arrested. The agent, supposing the plaintiff to be the guilty party, procured his arrest by a police officer. He was discharged at the police court, as the bill was found to be good. The agent was not acting in the line of his duty, so as to make his master responsible, and it was not in the course of his business as agent to entrap the plaintiff, but to aid the police. The defendant was not liable on any ground. *Mulligan v. N. Y. & Rockaway Beach R. Co.*, 129 N. Y. 507.

Plaintiff purchased a ticket of defendant's agent at one of its stations, and, after some altercation about the amount of change, passed through the gate to take a train. The agent followed her out upon the platform, charged her with having passed upon him a counterfeit twenty-five cent piece, and demanded another in its place. She refused, insisting that her money was genuine, and refused to give back the change received. The agent called her a counterfeiter and a common prostitute, placed his hand upon her and told her not to stir until he had procured a policeman to arrest and search her. He detained her on the platform for awhile, but, not getting an officer, let her go. Held, that an action for damages was maintainable; that, in the acts complained of, the agent was engaged about the defendant's affairs, in endeavoring to protect and recover its property, and so it was responsible for his acts.

Upon plaintiff's cross-examination, an offer by defendant to prove that she was an habitual litigant was excluded. Held, no error. *Palmeri v. The Manhattan Railway Co.*, 133 N. Y. 261, distinguishing *Mulligan v. N. Y. & R. B. R. Co.*, 129 id. 506.

Defendant's guard negligently exposed plaintiff to danger by coming to blows with an intoxicated passenger on an elevated car, causing an unusual jostling among the passengers to his injury, and which in the exercise of reasonable foresight he should have anticipated and taken due care to avoid. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Passenger going from defendant's train told the ticket receiver that he had lost his ticket; the gateman refused to let him pass out and had a policeman arrest him for disorderly conduct, and detained him. Defendant had ordered servants to compel passengers to produce tickets. Defendant had no right to detain the passenger, and was liable. *Lynch v. Manhattan E. R. Co.*, 24 Hun. 506, aff'g judg't for pl'ff.

A passenger on platform car, being unable to enter car on account of a locked door, broke the window and, as he was leaving the train, was arrested by person in general employ of company, but not then on duty. This case seems to hold that the company should have secured this window breaker both from the car platform and policeman. *Fisher v. Metropolitan &c. R. Co.*, 34 N. Y. 433.

A dispute arose between driver and passenger, as to whether the latter had paid his fare, and upon latter resisting an attempt of the driver to put him off, a policeman was called who arrested him and took him to the station house, where he was kept until the next morning, and then discharged. The driver testified, that he was disorderly in language and conduct. Held, that the driver in procuring an arrest acted within the scope of his employment, and the defendant was liable for false arrest. Damages for injured feelings and insult was allowable. *Brown v. Christopher & Tenth Sts. R. Co.*, 34 Hun. 471, aff'g judg't for pl'ff.

Where a passenger on a car of a common carrier uses language abusive and insulting, and calculated to bring about a personal encounter, whereby an assault upon such passenger is induced, a carrier is not responsible, as in such case the carrier's servant will not be deemed to have committed the assault within the course of his employment. *Scott v. C. P. &c. R. Co.*, 53 Hun. 414.

The test of a carrier's liability for maliciousness or willfulness in expulsion is, not the quality of the act, but whether or not it is done outside the servant's employment, and to accomplish a purpose of his own foreign to such employment. *Burns v. Glens Falls &c. Street R. Co.*, 4 App. Div. 426.

Defendant is liable for assault by its conductor. *Luhrs v. Brooklyn &c. R. Co.*, 11 App. Div. 173.

Insult and abuse by a passenger while remonstrating with a conductor for his manner of ejecting a drunken man does not justify the passenger's ejection or relieve the company of the consequences of an assault by the conductor. *Weber v. Brooklyn &c. R. Co.*, 47 App. Div. 306.

In an action to recover damages for an alleged assault upon the plaintiff while a passenger on one of defendant's cars by the conductor, the conductor testified that plaintiff used abusive language to him, and struck at him with an iron wrench, and that he then struck plaintiff with his club. This was the only evidence as to provocation for the assault. The court charged that if the plaintiff assaulted or threatened to assault the conductor, the latter was justified in assaulting the plaintiff, and properly refused to charge on request that, "If the plaintiff commenced the altercation, and in the course of it addressed indecent and insulting language to the conductor, and language such as was calculated or likely to produce an assault, the verdict must be for defendant." *Kosters v. The Brooklyn, Bath & West End R. Co.*, 10 Misc. 18. (City Court of Brooklyn): s. c. aff'd, 151 N. Y. 630.

Plaintiff cannot recover as for an assault, where, with slight force he was led by a policeman from the ferry entrance, which he obstructed during an altercation as to his rights under a commutation ticket, and his recovery is confined to the price of the ticket he was compelled to buy. *Henly v. Delaware &c. R. Co.*, 28 Misc. 499; aff'g s. c., 27 Misc. 811.

Plaintiff could not recover for injury as the result of a playful encounter by employes outside of their duties. *Goodloe v. Memphis &c. R. Co.*, 107 Ala. 233.

Carrier is liable for an assault of its conductor otherwise than in the performance of his duty, though it be willful and malicious and not within the scope of his authority: *e. g.*, as a retaliation for personal abuse. *Birmingham &c. R. Co. v. Baird*, 130 Ala. 334; s. c., 54 L. R. A. 752.

Where a conductor's authority only extended to the ejection of delinquent passengers, defendant was not liable for the false imprisonment by the conductor of such a person. *Little Rock Traction &c. Co. v. Walker*, 65 Ark. 144; s. c., 40 L. R. A. 473.

Where a conductor used greater force than is reasonably necessary to repel an assault upon him defendant was liable. *St. Louis &c. R. Co. v. Berger*, 64 Ark. 613; s. c., 39 L. R. A. 784.

Defendant was liable where the efficient cause of the injury was the brakeman's act of pushing a boy down the steps of a moving train, though the immediate cause was the latter's grasping the hand rail to save himself which gave way and threw him under the wheels. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

Where plaintiff's arrest, ill treatment and ejection was for failure to pay his fare, he may recover, though the acts were willfully committed. *Trabing v. California Nar. &c. Co.*, 121 Cal. 137.

Though one is stealing a ride by fraudulent means, he may recover

for the conductor's act in unnecessarily shooting him to secure his expulsion. *Higgins v. Southern R. Co.*, 98 Ga. 751.

Though plaintiff was not a passenger in returning to a station before train time to see about checking or storing his baggage, he may recover for an unwarranted assault by the station agent, though it would be otherwise if he returned to upbraid the agent for causing him to lose the last train. *Georgia R. &c. Co. v. Richmond*, 98 Ga. 495.

Where an agent's act of killing a patron during the discussion of railroad business was unprovoked, defendant was liable, though it was the result of a private feud entirely disconnected with such business; otherwise if the agent was justified by the patron's provocation. *Columbus &c. R. Co. v. Christian*, 97 Ga. 56.

Defendant was liable for the wanton act of the conductor in shooting a passenger, where the latter has not yet left the premises. *Brunswick &c. R. Co. v. Moore*, 101 Ga. 684.

The use of abusive language such as calling a passenger "dead beat" without provocation, permits recovery. *Cole v. Atlanta &c. R. Co.*, 102 Ga. 474.

Defendant was liable for baggage master's assault with intent to commit rape, while upon train. *Savannah &c. R. Co. v. Quo*, 103 Ga. 125; s. c., 40 L. R. A. 483.

Where one properly ejected from a car persists in the use of insulting language he cannot recover for the assault of the agent under such provocation, though the assault may be excessive. *Georgia R. &c. Co. v. Hopkins*, 108 Ga. 324.

Negligence of a trespasser in riding in a dangerous position does not excuse acts of willfulness in ejecting him. *Illinois C. R. Co. v. King*, 119 Ill. 91; aff'g s. c., 77 Ill. App. 581.

A carrier guarantees its passengers against personal injuries by its servants and so it is immaterial that the assault grew out of a private quarrel. Otherwise where the relationship of passenger had ceased. *Hanson v. Urbana &c. Street R. Co.*, 75 Ill. App. 474.

Passenger may recover where defendant's servant unjustifiably assaults him instead of protecting him as his duty required him to do. *Atchison &c. R. Co. v. Henry*, 55 Kan. 715; s. c., 29 L. R. A. 465.

Where the plaintiff, a passenger on defendant's steamboat, was assaulted by the third clerk of the boat he may recover from the company. *Sherlby v. Billings*, 8 Bush. (Ky.) 117.

Plaintiff cannot complain of a retaliatory assault by an employé where he is himself the aggressor. *Wise v. South Covington &c. R. Co.*, (Ky.) 34 S. W. Rep. 894.

Railroad responsible to one in sleeping car, not a trespasser, for the

assault of the porter. *Williams v. Pullman &c. R. Co.*, 40 La. Ann. 417.

Damages may be awarded for the unjustified conduct of defendant's car driver in subjecting plaintiff to abuse and annoyance. *Lafitte v. R. Co.*, 43 La. Ann. 34.

Where passenger delivered up his ticket to brakeman authorized to receive it, and afterwards the brakeman denied having received the same, and threatened the passenger, with violent words and gestures, the company was liable. *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

*Brand v. Railroad Co.*, 8 Barb. 368; *Moore v. R. Co.*, 4 Gray, 465; *Seymour v. Greenwood*, 7 Hurl. & Nor. 354; *Railroad v. Finney*, 10 Wis. 388; *Railroad v. Vandiver*, 42 Pa. St. 365; *Landreaux v. Bell*, 5 La. (O. S.) 275.

Defendant was liable for the assault of its agent upon a customer connected with overcharges which the latter had returned to the station to collect and gave a receipt for. *Richberger v. American Exp. Co.*, 73 Miss. 161; s. c., 31 L. R. A. 390.

Carrier is liable for the assault of its conductor upon a passenger though not done within the scope of his authority. *Johnson v. Detroit &c. R. Co.*, (Mich.) 90 N. W. Rep. 274.

Defendant was liable for the malicious assault of its employés upon a passenger. *Haver v. Central R. Co.*, 62 N. J. L. 282; s. c., 43 L. R. A. 84.

Though it is without provocation and without the scope of his authority. *Williams v. Gill*, 122 N. C. 967.

Defendant's conductor took no material part in plaintiff's unauthorized arrest simply by pointing him out as a passenger. *Owens v. Wilmington &c. R. Co.*, 126 N. C. 139.

Burden is on defendant to show that one on a passenger train is not a passenger. *Iseman v. South Carolina &c. R. Co.*, 52 S. C. 566.

Abusive language of conductor in ejecting one who refuses to pay fare does not give a right of action. *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

As the duty of protecting a passenger from injury is within the scope of the authority of every employé, he may recover where he is treated with acts of rudeness and oppression. *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1.

Or remarks of indecency, though the defendant was not negligent in its selection of the servant. *Knorrville Traction Co. v. Lane*, 103 Tenn. 376.

Carrier not liable in exemplary damages for ejecting passenger from its train, unless it ratifies the act. *G. H. & C. R. Co. v. Donahue*, 56 Tex. 162.

Railroad company must protect passengers from the necessity of hearing obscene language or seeing acts of violence. *St. Louis &c. R. Co. v. Mackie*, 71 Tex. 491.

Willful or malicious acts of conductor render company liable. *Dillingham v. Anthony*, 73 Tex. 47.

A depot policeman acted within the scope of his authority in striking an intoxicated person with a billy to keep him from re-entering the waiting room after starting for the train, and the company was held liable for the loss of his eye. *Texas &c. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

Defendant was liable for an indecent assault of its agent on passenger in its waiting room. *St. Louis &c. R. Co. v. Griffith*, 12 Tex. Civ. App. 631.

Defendant was not liable for the acts of a police officer in repelling with no unnecessary force the assault of one trying to prevent his assisting in the lawful ejection of a passenger. *Houston &c. R. Co. v. Ritter*, 16 Tex. Civ. App. 482.

Defendant was liable for the arrest of a passenger, caused by its agent on the ground of passing forged money. Carrier is liable to passenger for injury by servant in whatever capacity he may be employed. The rule as to acting within authority does not apply. *St. Louis &c. R. Co. v. Franklin*, (Tex. Civ. App.) 44 S. W. Rep. 701.

Defendant was liable for passenger's arrest by its conductor for a previous assault by the passenger upon the conductor, though the latter acted contrary to orders in so doing. *Gulf &c. R. Co. v. Conder*, 23 Tex. Civ. App. 488.

Assault by passenger, which had terminated, did not justify retaliation by conductor. *Galveston &c. R. Co. v. La Prelle*, (Tex. Civ. App.) 65 S. W. Rep. 488.

Conductor's statement in the presence of plaintiff's children and other passengers "the idea of a woman trying to board with a child without a ticket!" was insulting and calculated to mortify and humiliate, and ground for recovery. *Texas &c. R. Co. v. Tarkington*, (Tex. Civ. App.) 66 S. W. Rep. 137.

That a passenger's conduct justifies his expulsion does not justify an assault by the conductor. *St. Louis &c. R. Co. v. Johnson*, (Tex. Civ. App.) 68 S. W. Rep. 58.

In an action by a female passenger for assault by servant, the court ruled: "In respect to female passengers the contract proceeds still further and includes an implied stipulation that she shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. *Nieto v. Clark*, 1 Cliff. (U. S.) 145.

No liability attaches to a railroad company for the shooting of a passenger by its conductor, if conductor had reasonable apprehension that the passenger intended to assault him with a deadly weapon. *New Orleans &c. R. Co. v. Jones*, 142 U. S. 18.

No negligence is imputable to the railroad company for injuries inflicted upon a passenger by the accidental falling of its brakeman upon her as she was mounting the car platform. *Skinner v. Atchison &c. R. Co.*, 39 Fed. Rep. 188.

Defendant was liable for an assault by the employ  s of an independent contractor, engaged to take passenger to its ship. *Barrow S. S. Co. v. Kane*, 88 Fed. Rep. 197. \*

Defendant held liable for act of conductor in locking plaintiff out on platform of caboose, where he had gone at his direction to get off and whence he was thrown by the lurch of the car. *Great Northern R. Co. v. Brugere*, 114 Fed. Rep. 540.

Where the assault by an employ   without provocation occurred in defendant's station house and in front of its agent, who failed to make any effort to prevent it, plaintiff may recover though he is not even a prospective passenger. *Krantz v. Rio Grande &c. R. Co.*, 12 Utah, 104; s. c., 30 L. R. A. 297.

Where an arrest of a passenger is for carrying dangerous instruments in violation of law, and is within the jurisdiction of the policeman, defendant is not liable though the latter acted at the instance of its servants. *Clairborne v. Chesapeake &c. R. Co.*, 46 W. Va. 363.

Defendant is liable though the assault and battery by its conductor is willful as it is a breach of its obligation to protect him from injury. *Smith v. Norfolk &c. R. Co.*, 48 W. Va. 69.

Carrier not liable for act of employ   in imprisoning passenger for non-payment of fare, as carrier itself had no such right. *Emerson v. Niagara &c. R. R. Co.*, 2 Ont. 528.

*Roe v. Birkenhead &c. R. Co.*, 7 Ex. 36.

## XII. Injuries from Negligence of Other Passengers.

A clothes wringer fell from the rack over the seat and injured the plaintiff. In such a case the defendant would only be liable for lack of ordinary care and *was not here liable*. *Morris v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 678, rev'g judg't for pl'ff.

It was proved while the plaintiff was riding in one of defendant's cars

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\* NOTE.—Where the relation of carrier and passenger exists, the obligation of safe carriage and protection cannot be delegated. As to liability, where such relation does not exist, of principal for acts of agent, see "Agency," *ante*, p. 1, and for acts of independent contractor, see "Contractors," *post*, p. 631.

a man standing in front of her, also a passenger, and slightly intoxicated, stepped upon her foot. He was able to keep his feet and was not disorderly, although the attention of the defendant's guard had been called to him. Some three years later the plaintiff, while leaving one of defendant's cars, and while on the platform was again injured by a passenger about to enter the car stepping on the same foot. There was no evidence to show that either injury was caused intentionally, nor that in either instance the person causing the injury was so disorderly as to be dangerous, or to interfere with the comfort or safety of, or to annoy the defendant's other passengers. *Thomson v. The Manhattan Ry. Co.*, 75 Hun, 548, affirming nonsuit.

Where plaintiff was in the act of passing from one car to another where there was plenty of seats, he could not recover for being thrown from the train by the unauthorized operation of the air brakes by a fellow passenger. *McDonnell v. New York &c. R. Co.*, 35 App. Div. 147; appeal dismissed, 159 N. Y. 524.

Statute imposing liability for injuries by employes or from running cars unless company shows due care, construed to apply to injuries by a railroad's servants and not to their failure to prevent injuries by fellow passengers. *Davis v. Georgia R. &c. Co.*, 110 Ga. 305.

It was negligent to permit a valise to project in the aisle of a car for two hours in a position liable to trip passengers. *Chicago &c. R. Co. v. Buckmaster*, 74 Ill. App. 575.

Defendant was not liable to passenger on street car in normal condition, for the acts of a crowd in jostling her, especially where the conductor was at the time engaged in assisting her child to alight. *Ferguson v. Citizen's Street R. Co.*, 16 Ind. App. 171.

In the absence of knowledge of the dangerous character of a can carried by a passenger, defendant was not liable for injuries to a fellow passenger caused by its explosion. *Clark v. Louisville &c. R. Co.*, (Ky.) 49 S. W. 1120.

The misconduct of a fellow passenger in giving the signal for the car to start did not exonerate defendant's failure to anticipate and guard against such an act, which could easily have been done. *Nichols v. Lynn &c. R. Co.*, 168 Mass. 528.

Where the injury arises through the act of an intoxicated person being jostled against plaintiff, while the conductor was engaged in properly ejecting another, there can be no recovery. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488.

For negligent failure to protect a passenger against the careless discharge of a pistol by a fellow passenger, a carrier is liable. *Illinois C. R. Co. v. Minor*, 69 Miss. 710.



Defendant, was not liable, where it could not have anticipated that one passenger would carelessly throw a match so as to ignite the clothes of another, or have prevented the consequent injury. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1; s. c., 32 L. R. A. 167.

No recovery lies against a railroad company for the jostling of one passenger against another as he is in the act of getting off the car. *Eltinger v. Philadelphia &c. R. Co.*, 153 Pa. St. 213.

Unless catch of window was defective no liability attaches to company for the falling of a window which passenger raised. *Voorhees v. Kings Co. El. R. Co.*, 3 Misc. (N. Y.) 18.

No liability attaches to a carrier for injuries to a passenger caused by the slamming of a door in his face by a fellow passenger. *Graeff v. Philadelphia &c. R. Co.*, 161 Pa. St. 231.

That a passenger's act in having a gun was lawful, did not excuse defendant for failure to protect passengers from its reckless use, where his acts were such as to cause reasonable anticipation of danger. *Ferries Co. v. White*, 99 Tenn. 256; s. c., 38 L. R. A. 427.

Though a deputy sheriff was intoxicated, defendant was not liable for a discharge of his pistol by dropping it or stumbling against baggage, when he had not before displayed it or evinced any other cause for alarm. *Galveston &c. R. Co. v. Long*, 13 Tex. Civ. App. 664.

A railroad cannot recover of a Pullman Palace Car Company for permitting disorderly person to enter its car, as the railway company's own conductor has control over it. *Houston &c. R. Co. v. Perkins*, 21 Tex. Civ. App. 508.

Passenger who stumbles over valise in the aisle of a car sufficiently lighted to have disclosed the obstacle has no right of action against the company. *Stimson v. Milwaukee &c. R. Co.*, 75 Wis. 381.

### XIII. Injuries from Assault of Other Passengers.

A carrier is not liable for the wrongful acts of a passenger, but is bound to use the utmost vigilance in maintaining order and guarding passengers against violence. It may refuse to receive, or may expel, one who endangers the safety or interferes with the reasonable comfort and convenience of the other passengers, and the police power the conductor is bound to exercise with all means at his command. The fact that an individual has drunk to excess will not always warrant his expulsion, but he must be dangerous and annoying to others; but the conductor must be apprised of the circumstances requiring his action, or the facts must be such that he cannot fail to recognize them.

The conductor silenced Foster, who was annoying Putnam, and then

Foster kept abusing Putnam in a low tone. Then Foster struck Putnam with a car-hook and killed him. The defendant was not liable. *Putnam v. B'way & Seventh Ave. R. Co.*, 55 N. Y. 108, rev'g judg't for pl'ff.

Citing *Pittsburg &c. R. Co. v. Hinds*, 53 Penn. St. 512; *Flint v. Norwich &c. Co.*, 34 Conn. 554; 6 Blatch. C. C. R. 158.

The introduction of a manifestly intoxicated and quarrelsome, indecently attired passenger into a street car by the employés of the company is an act of negligence for the consequences of which the company is liable, and the company is liable for personal injuries sustained by the passenger from such person. *Hendricks v. Sixth Ave. R. Co.*, 44 N. Y. Supr. Ct. 8.

Carrier must use ordinary care to protect those waiting for a train in its waiting rooms from annoyance and insults by others. *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136.

So where passenger is assaulted by fellow passengers or strangers; liability based on implied contract to protect. *Winnegar v. Cent. Pass. R. Co.*, 85 Ky. 547.

Ignorance of intention to do wrong was no defense to an action for injury caused by failure to keep a white person out of a colored person's coach. *Quinn v. Louisville &c. R. Co.*, 98 Ky. 231.

Failure to take any steps to segregate intoxicated and disorderly negroes from a crowded car other than to put them out upon the platform, was negligence, where there was plenty of room in the rear car. *Louisville &c. R. Co. v. McEwan*, (Ky.) 51 S. W. Rep. 619.

Conductor had performed his duty, where, upon an assault by an intoxicated passenger upon another, he quieted the former, remained between the two during a subsequent difficulty and turned the former over to a policeman at the next station. *Kinney v. Louisville &c. R. Co.*, 99 Ky. 59.

A railroad is not an insurer against assault from fellow passengers; it was held to have performed its duty where contending parties were separated apparently for good, but upon the resumption of the difficulty defendant's captain intervened and did his best to prevent injury. *Tall v. Baltimore Steam-Packet Co.*, 90 Md. 248; s. c., 47 L. R. A. 120.

If conductor interferes and does his duty in preventing the assaults no right of action exists. *Mullan v. Wisconsin Cent. Co.*, 46 Minn. 474.

See *Louisville &c. R. Co. v. Logan*, 88 Ky. 232; *Peary v. Georgia R. Co.*, 81 Ga. 485; *Vinton v. Middlesex R. Co.*, 11 Allen, 304.

Where defendant's servants permit insult and abuse by a drunk and disorderly fellow passenger within their presence without interference, it is liable. *Lucy v. Chicago &c. R. Co.*, 61 Minn. 7; s. c., 31 L. R. A. 551.

Liability attaches to a company who permit a passenger, a foreigner,

to be threatened by other passengers, so that in his fear he jumps from the train and is injured. *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417.

Where a passenger is a lady, defendant must protect her from insult, abuse, obscenity or wanton approach. *Collins v. Texas &c. R. Co.*, 15 Tex. Civ. App. 169.

That defendant's agent regarded an assault by a drunken man upon passenger, in the waiting room, as a joke was no defense. *Houston &c. R. v. Phillio*, (Tex. Civ. App.) 67 S. W. Rep. 915.

Failure to protect passengers against the violence of one who is dangerously insane or at least to give notice thereof so as to enable them to protect themselves is negligence. *St. Louis &c. R. Co. v. Greenthal*, 77 Fed. Rep. 150.

#### XIV. Injuries from Assault of Third Persons.

While a carrier of passengers is bound to exercise the utmost vigilance in protecting his passengers from the violence of strangers, yet, for a neglect to perform this duty, his liability is no more extensive than in cases of negligence by which injury comes to the person or property of the passenger from other causes. *Weeks v. N. Y. & N. H. R. Co.*, 72 N. Y. 50; 9 Hun, 669.

Defendant did not fail to exercise the high degree of care it owes for the protection of passengers where its servants were not present and had no reason to apprehend plaintiff's danger from ejection by a fellow passenger. *Lake Erie &c. R. Co. v. Arnold*, 26 Ind. App. 190.

A conductor must protect passengers from insult and injury from fellow passengers, and for a failure to do so the company is liable; but it must appear that the conductor had knowledge or opportunity of knowing, that injury was threatened, and that he could have averted it by the means at his disposal. *New Orleans &c. R. Co. v. Burke*, 53 Miss. 200.

See, also, *Pittsburg R. Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Norwich Transf. Co.*, 34 Conn. 554.

Carriers should protect passengers from assaults of and annoyance from strangers and fellow passengers. *Duggan v. Baltimore &c. R. Co.*, 159 Pa. St. 248.

#### XV. Injuries to Passengers from Negligence of Third Persons.

Although a carrier may, by its negligence, contribute to a collision with the train of another company, whereby its passenger is hurt, yet, if such other company also contributed to the accident, the plaintiff may recover against it. *Chapman v. New Haven R. Co.*, 19 N. Y. 341, aff'd judg't for pl'ff.

A passenger injured by the negligence of two companies may sue them jointly. Both corporations used the same track under an arrangement between them sanctioned by statute, according to which they were to be governed by a common code of regulations in respect to the management of their trains. *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492, aff'g judg't for pl'ff.

It is no defense to a carrier, when a passenger has been injured in a collision with the train of another company, that such latter company also contributed, by its negligence, to the injury. *Webster v. Hudson River R. Co.*, 38 N. Y. 260.

*Sheridan v. Brooklyn & H. R. R. Co.*, 36 N. Y. 39. Distinguishing *Brown v. N. Y. C. R. Co.*, 32 id. 597; *Thoroughgood v. Bryan*, 8 Com. B. 115.

When two cars collided, if the servants of both companies were negligent yet both are liable to a passenger injured on one line. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628, rev'g nonsuit.

*Hill v. N. A. R. Co.*, 109 N. Y. 239.

The plaintiff, riding on the footboard of a sleigh with other passengers, was injured by a collision with another's sleigh. Contributory negligence was for the jury. Negligence of the driver of the second sleigh did not relieve it. *Spooner v. B. C. R. Co.*, 54 N. Y. 230.

A gate suitably closed was lifted out of place by an unauthorized person, and it gave way so that the plaintiff was pushed overboard through the gangway by the crowding of the passengers to that side of the boat. No recovery was allowed. *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; 5 Hun, 523; s. c., 89 N. Y. 627; 125 id. 299.

A passenger alighted from the cars of one company, and while going from the depot, which it used in common with the defendant, was injured by the defendant's train entering the station without signal. *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589; aff'g judg't for pl'ff.

Standing on the platform of a car is usually a defense in an action against the immediate carrier, but not *when injury is caused by a third person*; and the action is against said person. Contributory negligence was for the jury. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, aff'g judg't for pl'ff.

A wagon containing lumber was proceeding in the opposite direction from the horse car, and when abreast of the car, drove across the track so that the lumber was thrust through the window and struck the plaintiff, who was a passenger in the car. The driver, happening to see in his mirror, the wagon, used every effort to stop the car. It was alleged that the car was traveling at an unusual speed. The evidence failed to show this, and even if it were so, had nothing to do with the accident.

The defendant was not liable. *Alexander v. R. C. & B. R. Co.*, 128 N. Y. 13, rev'g judg't for pl'ff.

Distinguishing *Hill v. N. A. R. Co.*, 109 N. Y. 239.

Plaintiff was riding on one of the cars of a railroad having a traffic arrangement with defendant to run its cars over the latter's tracks. He was struck by a tree growing in close proximity to the track. Defendant was not liable having no contractual relation with him; his agreement for carriage being with a separate and independent company. *Lias v. Rochester R. Co.*, 169 N. Y. 118; aff'g s. c., 51 App. Div. 618.

The plaintiff was injured on defendant's cars, which collided with a team approaching its track at right angles, which could be seen 250 feet away, and the car could have stopped in twelve feet. For the jury. *Watkins v. Atlantic Ave. R. Co.*, 20 Hun, 237; reversing nonsuit.

A coal car was trying to back the load on to a walk to drop it in the coal hole; the horse could not hold it and it went into the street and hit a horse car, that did not stop to avoid the coal cart. A passenger was hurt and sued the car company for not stopping the car, and the owner of the cart for the negligent manner in which he tried to dump the coal. *Seidlinger v. B. C. R. Co.*, 28 Hun, 503, affirming judgment for the plaintiff; s. c. aff'd, 97 N. Y. 642.

Defendant was negligent in permitting the maintenance of a gravity road of stone quarry across its tracks so as to endanger the safety of its passengers; especially where it had notice of the previous escape of cars loaded with stone. *Lynch v. New York &c. R. Co.*, 8 App. Div. 458.

Failure to anticipate natural and probable result of the negligent practice of a postal clerk in the employ of the United States to throw mail bags out upon the platform was negligence. *St. Louis &c. R. Co. v. Waggoner*, 90 Ill. App. 556.

That the act of a third person in driving along the street contributed to the injury did not relieve defendant from the consequences of the part its negligence played therein. *West Chicago Street R. Co. v. Tuerk*, 90 Ill. App. 105.

A passenger, in train of one company, may sue another company for injuries received by reason of the negligence of both. *Fitchburgh &c. R. Co. v. Spencer*, 98 Ind. 186.

*Albion v. Hetrick*, 90 Ind. 545; *Bennett v. N. J. &c. R. Co.*, 7 Vroom. (N. J.) 225; *Danville &c. Co. v. Stewart*, 2 Mete. (Ky.) 119; *Steamer New Philadelphia*, 1 Black, (U. S.) 62.

Improper conduct of third persons, contributing to the injury, will not excuse the negligence of a carrier who permits his boats to be overloaded. *Commonwealth v. Coburn*, 132 Mass. 555.

Passenger injured by a bundle thrown from an express car. The ex-

press agent was not a servant of the railroad company and it was not liable under L. 1894, chap. 469, sec. 3. *Winship v. New York &c. R. Co.*, 170 Mass. 464.

Railroad was not liable for the condition of a station in the hands of a terminal company. Its duty to the passengers was performed when it saw that he safely alighted from a train. *Frazier v. New York &c. R. Co.*, (Mass.) 62 N. E. Rep. 731.

Defendant was liable for the consequences to a passenger of the scuffling of hackmen, which it had permitted in its station, though none of the participants were its employes. *Exton v. Central R. &c.*, 62 N. J. L. 7; s. c. aff'd, 63 id. 356.

A passenger injured by the joint negligence of his carrier and another has a remedy against his carrier alone. *Philadelphia &c. R. Co. v. Boyer*, 1 Out. (Pa.) 91.

*Lockhart v. Lichtenthaler*, 10 Wright (Pa.) 151. See *Carlisle v. Brisbane*, 113 Pa. St. 544.

That an express company had a particular car set apart for it on a train under the railroad's exclusive control, did not bring it within a statute giving a cause of action for death caused by "the negligence or carelessness of the proprietor, owner, or charterer of any railroad" or his agents. *Houston &c. R. Co. v. Liscomb*, (Tex.) 64 S. W. Rep. 923; s. c., 55 L. R. A. 869; modifying s. c., 62 S. W. Rep. 954.

Negligence of a street car driver cannot be imputed to a passenger so that he cannot recover for injuries caused by steam railroad company's failure to close gates. *Whelan v. N. Y. &c. R. Co.*, 38 Fed. R. 15.

*R. Co. v. Cooper*, 85 Va. 939; *R. Co. v. Kutac*, 72 Tex. 643.

Where the state had taken out of the defendant's hands the work of elevating its tracks, it was not liable for the acts of those engaged therein, in the absence of negligence in failing to anticipate and avoid dangers arising therefrom. *New York &c. R. Co. v. Baker*, 98 Fed. Rep. 694.

Carrier is liable for the negligence of the servants of the road over which it has an arrangement to run its trains. *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100.

Though a union depot was in the hands of a separate concern, a railroad company using it was liable for failure to keep its approaches in a safe condition. *Herrman v. Great Northern R. Co.*, (Wash.) 68 Pac. Rep. 82.

## XVI. Injuries to Passengers from External Causes.

It is *per se* negligent for a passenger unnecessarily to expose his person, or any part thereof, beyond the exterior line of a moving car, and the question whether he was negligent in so doing is not for the determination of

the jury, unless there be some qualifying circumstances present. If, however, a passenger's arm or elbow so protrude from the window of a street car, or even of a steam car, the question of contributory negligence has not infrequently been held to be a question of fact for a jury.

In an action for negligence, whereby a passenger was hit by something outside of the car, no presumption of negligence arose from the fact of the injury, but the circumstances showed that the external object was on the grounds of the carrier and attached to an adjoining car of defendant, and hence a presumption of negligence arose. If the plaintiff, at the time, had her arm out of the window, she was guilty of contributory negligence. *Holbrook v. Ulica & Schenectady R. Co.*, 12 N. Y., 236, aff'g judg't for pl'ff.

The plaintiff left his seat in an open car and started to go on the outside step to another seat, and was hit by an iron column in the street and hurt. If he did this without reasonable cause, the defendant would not be liable. *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Dixon v. Brooklyn City & N. R. R. Co.*, 100 id. 171; *Todd v. O. C. & F. R. R. Co.*, 3 Allen 18; 7 id. 207; *Hickey v. B. & L. R. R. Co.*, 14 id. 429; *Torrey v. B. & A. R. R. Co.*, 117 Mass. 412; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294; *Indiana &c. v. Rutherford*, 29 Ind. 82; *Pittsburgh &c. R. R. Co. v. Andrews*, 39 Md. 329; *Dun v. Seaboard &c. R. R. Co.*, 78 Va. 645. *Coleman v. Second Ave. R. Co.*, 111 N. Y. 609; reversing 41 Hun. 380, and judgment for plaintiff.

Similar accident and nonsuit granted in *Vroman v. Houston &c. R. Co.* (City Ct. N. Y.) 7 Misc. 234.

It is not negligence *per se* for a passenger in a street railroad car to have his arm out of a window; otherwise as to steam road.

Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passageway or bridge across this trench, with uprights at each end, which supported a handrail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff, a passenger, in the summer time, was sitting at an open window of a car and had his arm broken as the car passed the bridge. *Francis v. N. Y. Steam Co.*, 114 N. Y. 380; aff'g 13 Daly 510, and judg't for pl'ff.

**From opinion.**—"In *Dale v. Delaware, Lackawanna & Western Railroad Company* (73 N. Y. 468) the court charged that if the plaintiff negligently, whether consciously or unconsciously, put his arm outside of the window, and thus contributed to the injury, he could not recover: but if his arm, while resting on the sill, was thrown out by a sudden lurch of the car, that fact would not defeat his right to recover. The plaintiff had a verdict, on which a judgment was entered,

which was affirmed at General Term, but was reversed by the Court of Appeals for an error in the admission of evidence, the validity of the instruction not being considered. In *Hallahan v. N. Y., L. E. & W. R. R. Co.* (102 N. Y. 194), and in *Breen v. N. Y. C. & H. R. R. Co.* (109 id. 297), the records show that the jury was instructed that, if they found that the plaintiff was riding with his arm protruding from the open window, it was contributory negligence, and no recovery could be had. The plaintiff recovered a verdict in each case, and the validity of the instructions was not and could not be reviewed.

The courts of Massachusetts and Pennsylvania have held that it is negligent, as matter of law, for a railway passenger to ride with his arm extending through the window, and that no recovery can be had for an injury received by reason of the arm being in this position. (*Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; 7 id. 207; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294.) In other states it has been held that, whether such conduct is contributory negligence, is a question of fact. (See cases cited in *Beach on Contrib. Neg.*, sec. 56; 2 *Shear. & Red. on Neg.* (4th ed.) sec. 519; 2 *Wood's R. Law*, 1103, sec. 303; *Bishop's Non-contract Law*, secs. 1106, 1107.) In *Dahlberg v. Minnesota Street Railway Company* (32 Minn. 404) and in *Summers v. Crescent City Railroad Company* (34 La. Ann. 139), it was held that whether a passenger upon a street car was negligent in riding with his arm out of the window was a question of fact."

No contractual relation is involved in this case.

The plaintiff, passing along the steps of an open car, was hit by the body of a closed car going in the opposite direction. The smallest distance from the edge of the steps to the side of the other car was seventeen inches, and the cars were passing each other at every one-half minute, and passengers were accustomed to stand between the tracks, and thousands of passengers had ridden on the steps of open cars for twenty years without accident.

Held, that the defendant was not negligent in failing to make the accident a physical impossibility. *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, rev'g judg't for pl'ff.

The plaintiff, a passenger, standing about midway upon a continuous step running along the outside of a crowded car was struck by a car running in the opposite direction. The tracks at this point were nearer to each other than at any other place on the road, and by the sinking of the rail at this point the car was pushed toward the other track. *Gray v. R. & B. R. Co.*, 61 Hun. 212, aff'g judg't for pl'ff.

Distinguishing *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609; *Craighead v. B. C. R. Co.*, 123 id. 391.

Plaintiff was negligent *per se* in unnecessarily leaving a car, after he had been prevented from putting his head out of the window on account of the danger of striking trees along the way, and going upon the platform, where he leaned out and was struck by one of them. *Sias v. Rochester R. Co.*, 18 App. Div. 506; appeal dismissed, 159 N. Y. 567.



Defendant was negligent in attempting to pass a wagon in the street so close to the car that he must have known that parties on the running board, the car being crowded, would have to lean inward in order to protect themselves from it. *Henderson v. Nassau Electric R. Co.*, 46 App. Div. 280.

Defendant was negligent in having its tracks so close together that car could not pass without injury to one whose arm was inadvertently projected but three inches beyond the car window. The jury were warranted in finding plaintiff not negligent. *Tucker v. Buffalo R. Co.*, 53 App. Div. 571; s. c. aff'd, 169 N. Y. 589.

Plaintiff, standing on a step running the length of a horse car, was injured by the driver of another car belonging to the defendant driving his horses against him and knocking him off. The seats were occupied and the rear platform was crowded. Contributory negligence was for the jury. *Bruno v. Brooklyn City R. Co.*, 5 Misc. 327, aff'g judg't for pl'ff. (City Court of Brooklyn.)

Plaintiff, without signaling either conductor or driver, stepped on the foot rail of a street car, when it started and his body came in contact with a truck which he had seen as he approached the car: but there was no evidence that the driver or the conductor saw either the truck or the plaintiff, or perceived the danger. *Littman v. Dry Dock &c. R. Co.*, 6 Misc. 34, aff'g nonsuit. (New York City Court.)

A person passed from the easterly to the westerly side of a car and then along a step at the side, for the purpose of obtaining a seat, when he was struck by a column of the elevated railway structure. Nonsuit should have been granted. *Murphy v. Ninth Ave. R. Co.*, 6 Misc. 298, rev'g judg't for pl'ff. (New York Superior Court.)

Failure to warn plaintiff of the dangerous proximity of poles, which he was in ignorance of, while he was riding on the footboard of a car, was negligence. *West Chicago Street R. Co. v. Marks*, 182 Ill. 15; aff'g s. c., 82 Ill. App. 185.

Where company permitted persons to ride on footboards of cars, who, while so riding, were injured by the running of the train too near the intersection of a switch, the carrier was liable. *Topeka City R. v. Higgs*, 38 Kas. 375.

Defendant was not liable where plaintiff was injured when he put his head out of a window, without the knowledge of its employes, to vomit. *Shelton v. Louisville &c. R. Co.*, (Ky.) 39 S. W. Rep. 812.

Plaintiff was not allowed to recover, where his arm, while resting on the window sill of the car, was struck by a defective mail crane. *Baltimore &c. R. Co. v. Sims*, (Ind. App.) 63 N. E. Rep. 485.

Boy of 10 was negligent in putting his head out of the car window so

as to come in contact with a car on a side track. *Knauss v. Lake Erie &c. R. Co.*, (Ind. App.) 64 N. E. Rep. 95.

Plaintiff was negligent *per se* in putting his elbow out of the window in passing through a tunnel, though but an inch and a half, where the natural oscillation often caused the side of the car to strike adjoining timbers therein. *Clarke v. Louisville &c. R. Co.*, 101 Ky. 34; s. c., 36 L. R. A. 123.

Plaintiff was denied recovery for injury to his eye by cinders coming in at an open window that could not be closed, at which he persisted in sitting, though there were other vacant seats. *O'Donnell v. Louisville &c. R. Co.*, (Ky.) 42 S. W. Rep. 846.

Negligence in projecting arm out of window was for the jury, where the car it struck was placed on a switch dangerously near the main track. *Clere v. Morgan's &c. R. Co.*, (La.) 31 South. Rep. 886.

Plaintiff on front platform was negligent in putting his head out beyond the car and looking toward the rear, where the post he collided with could have been seen in time to have avoided injury, had he looked forward. *Cummings v. Worcester &c. Street R. Co.*, 166 Mass. 220.

Where coal bins were placed so near the track that they struck a person standing on the running board of a car, he was not *per se* negligent. *Dickinson v. Port Huron &c. R. Co.*, 53 Mich. 43.

Though plaintiff had gotten on the running board after the car had slowed down pursuant to his signal, he was negligent, where, upon its failing to stop, he leaned so far out in endeavoring to signal the conductor that his head struck an adjoining wagon. *Flynn v. Consolidated Traction Co.*, 64 N. J. L. 315.

Where a passenger on a street car was injured by a passing load of hay, he must prove not only negligence in the railroad company, but absence of negligence on his part. *Street R. Co. v. Gibson*, 96 Pa. St. 83.

Sitting with arm resting on the window sill and within the car, was not *per se* negligent. *Germantown &c. R. Co. v. Brophy*, 105 Pa. St. 38.

See *Dun v. R. Co.*, 78 Va. 645; *Dahlberg v. Minneapolis Street R. Co.*, 32 Minn. 404; *Fordham v. London &c. R. Co.*, L. R. 3 C. P. 368; *Seigle v. Eisen*, 41 Cal. 109; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Spencer v. Mil. & P. R. Co.*, 17 Wis. 487.

Defendant was not liable, because, by reason of excessive speed, its car was under a tree when it fell. *Barry v. Sugar Notch*, 191 Pa. St. 315.

Negligence of a motorman in failing to take into account the dangerous proximity of an ice wagon near the car, so as to protect, in passing, one compelled to ride on the running board by reason of the

crowd in the car, was for the jury. *Bumbear v. United Traction Co.*, 198 Pa. St. 198.

When elbow extended out of a car window, unnecessarily, and without qualifying circumstances, it was *per se* negligent. *Pittsburg v. McClurg*, 6 P. F. Smith (Pa.) 209.

*Todd v. Old Colony &c. R. Co.*, 3 Allen, 18; s. c., 7 Allen, 207; *Landerbach v. People's R. Co.*, 4 Penn. (Pa.) 406; *Pittsburg &c. R. Co. v. Andrews*, 39 Md. 329. See, however, *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Seigel v. Eisen*, 41 Cal. 109; *Chicago &c. R. Co. v. Pondrum*, 51 Ill. 333; *Houston &c. R. Co. v. Hampton*, 64 Tex. 427; *Louisville &c. R. Co. v. Sickings*, 5 Bush. 1; *Denn v. Seaboard &c. R. Co.*, 78 Va. 645; *Favre v. L. & N. R. Co.*, 13 K. L. R. 116; *Georgia Pac. R. Co. v. Vanderwood*, 90 Ala. 49.

One may ride with arm on sill if it does not protrude. *Farlow v. Kelly*, 108 U. S. 288.

When passenger's arm rested on the window and was thrown outside by a collision, the carrier was liable. *Farlow v. Kelly*, 108 U. S. 288.

*Summers v. Crescent City R. Co.*, 34 La. Ann. 139.

It is not negligence *per se* for a passenger on a street car to rest his arm upon the sill of an open window. *Schneider v. New Orleans &c. R. Co.*, 54 Fed. R. 466.

One who lets his arm protrude from the car window cannot maintain an action for injuries. *Richmond &c. R. Co. v. Scott*, 16 Va. L. J. 362.

See, also, *Carrieco v. W. Va. &c. R. Co.*, 35 W. Va. 389.

Defendant is not bound to exert physical force to prevent passengers getting within a dangerous proximity to a burning oil tank. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

## XVII. Collision with Cars of the Same Line.

Where one car or train of a carrier collides with another of its trains, or with some object under the usual control of the carrier, a presumption of negligence arises and places the burden of explanation upon the carrier.

*Holbrook v. Utica & Schenectady R. Co.*, 12 N. Y. 236, where the car was struck by a stick protruding from the car on an adjoining track.

*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 291, where a passenger, while sitting by an open window with his arm upon the sill, was struck on the arm by the swinging door of a passing freight train.

See *Hallihan v. N. Y., L. E. & W. R. Co.*, 102 N. Y. 194, where a passenger, with his elbow on a window sill, was struck by a crane used to deliver mail to passing trains.

See, also, 13 Daly 511; *Webster v. Rome, Watertown & Ogdensburgh R. Co.*, 115 N. Y. 112; *Wynn v. Central Park N. & E. R. R. Co.*, 133 id. 575.

The failure of an employé, confronted by a sudden emergency, to ex-

ercise the best possible judgment does not establish lack of care or skill. Upon a down grade the driver of a street car applied the brake; the chain broke and the car collided with another ahead and the plaintiff was injured. The driver did all that could be done after the chain broke to prevent the accident, and remained at his post until his car was within four feet of the one in front. It was left to the jury to determine whether the defendant employed skillful servants on the car and whether it was managed with proper care and skill. It was held error, inasmuch as if the driver, in handling the brake, did not use more force than was absolutely necessary to check the speed of the car, this did not raise a question of lack of skill or of negligence, nor did the failure of the driver to shout to the driver of the forward car, at least in the absence of the evidence that this would have been of service in securing safety.

The case was properly submitted to the jury on the question as to whether there had been, on the morning in question, a proper inspection of the brake, but not upon the question of the plan and method by which the brake was constructed. The rule would be the same, if the collision was between cars of different companies using the same track. *Wynn v. Central Park, N. & E. R. Co.*, 133 N. Y. 575.

Defendant was not negligent, though its car was running at high speed, where it collided with another car, which had collided with a wagon and was thrown on the track from 150 to 200 feet ahead of it, and while it was but three to five seconds away; everything being done to avoid accident. *Snediker v. Nassau Electric R. Co.*, 41 App. Div. 628.

Failure of a motorman to apply the brakes within 20 or 25 feet of a car which he has seen slow up when 50 feet ahead, where the tracks are slippery, was negligence. *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. 414.

Stopping a car around a curve on a down grade with slippery tracks within two minutes of a following car, which could not see it until within 150 feet, without warning the latter, was held sufficient to sustain a finding of negligence. *Blanchette v. Holyoke Street R. Co.*, 175 Mass. 51.

Slight negligence is sufficient to charge a carrier with liability for a collision injuring a passenger, which could, with ordinary foresight, have been prevented. *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334.

Defendant was liable, where a car, taken out of a car barn to assist another stalled on the track, was negligently allowed to collide with the latter. *Quinn v. Shamokin &c. Electric R. Co.*, 7 Pa. Super. Ct. 19.

That a brakeman of a train went the usual distance back to flag a following train does not necessarily prevent recovery, where, owing to the darkness, the grade and the slipperiness of the track, he did not go

far enough to prevent a collision. *Gulf &c. R. Co. v. Brown*, 16 Tex. Civ. App. 93.

That cars were driven onto the main track by a severe storm did not prevent recovery, where collision might have been averted except for defendant's negligence in failing to flag the passenger train on the main track. *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 519.

Defendant was negligent in arranging its schedule on a single track so that an outgoing car is to turn off on a switch only two minutes before an incoming train crosses on to the main line and without means of telling whether the former has taken the switch. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48.

### XVIII. Collisions with Cars of Other Companies.

A street car came in collision with a steam car at a crossing. Under such circumstances, that the defendant was bound to use the highest degree of care and prudence, the utmost human skill and foresight, is the settled law. (*Ingalls v. Bills*, 9 Mete. 1; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 410; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9; *Maverick v. Eighth Ave. R. Co.*, 36 id. 378; *Caldwell v. N. J. Steamboat Co.*, 41 id. 282). *Coddington v. The Brooklyn C. R. Co.*, 102 N. Y. 66, aff'g judgt for plff.

The plaintiff, a passenger on one of the defendant's cars, was injured by a collision of that car with a train of another company at the intersection of the tracks. The evidence showed that the defendant's driver, when within sixty-five feet of the crossing, could have seen the train seventy-five feet from the intersection, and when within forty feet he could have seen such approaching train one hundred and forty feet away, and that he was driving at about six miles per hour. The question of the driver's negligence was properly submitted to the jury. *Schneider v. Second Ave. R. Co.* and the *Houston &c. Co.*, 133 N. Y. 583.

A car driven at an unusual rate came in contact with a truck and a passenger was injured. This state of facts put explanation on the company and was for the determination of the jury. *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239.

See *Passenger R. Co. v. Bondrou*, 92 Pa. St. 475, when a passenger on platform was injured by pole of following car and recovered.

In an action by a passenger, injured in a collision between cars of intersecting lines, against both companies, the accident raised a presumption of negligence against the carrying company, but not against the other. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; rev'g s. c., 16 App. Div. 152.

Carrier must abandon his rights of way at a crossing if required for

the safety of his passengers. *Zimmer v. Third Ave. R. Co.*, 36 App. Div. 265.

Negligence of one train in starting towards a crossing while the other was passing, was not the proximate cause of collision, when the latter suddenly stopped and backed before the former got past. *Kansas City &c. R. Co. v. Lackey*, 114 Ala. 152.

Where injury is the result of negligence of the cars of two companies having trackage agreements with a third, plaintiff may recover of all three. *Chicago &c. R. Co. v. Meech*, 59 Ill. App. 69.

Negligence of one colliding carrier contributing to an injury was no defense to action against the other. *Chicago &c. R. Co. v. Lacey*, 62 Ill. App. 535; *Chicago &c. R. Co. v. McDonnell*, 91 Ill. App. 488.

Motorman was not justified in assuming that an approaching train would not cross before him, because it had not given the statutory signals therefor. *Hammond &c. Electric R. Co. v. Spyzchalski*, 17 Ind. App. 7.

Negligence of one company is not excused because that of another is greater. *Chicago &c. R. Co. v. Ransom*, 56 Kan. 559; *Chicago &c. R. Co. v. Groves*, id. 601.

Street railway was negligent when the collision was due to the inexperience of its motorman, as well as failure to supply a conductor to assist in braking in the rear, on steep grades leading to railroad tracks. *Flournoy v. Shreveport Belt R. Co.*, 50 La. Ann. 635; *Russel v. Shreveport Belt R. Co.*, id. 501.

Negligence in colliding was not the proximate cause of injury, where the plaintiff, in leaving the cars, following the example of others, crossed adjoining flat cars to jump to the ground, but caught his foot in doing so. *Vandercook v. Detroit &c. R. Co.*, 125 Mich. 459.

There was no excuse for collision at a crossing on the part of either car, where it occurred at a wide, level, well lit street, though one had the right of way: negligence of both was for the jury. *Goorin v. Allegheny Traction Co.*, 119 Pa. St. 321, 333.

The highest degree of care to prevent collisions is required of a company whose track crosses another's. *Ft. Worth &c. R. Co. v. Enos*, (Tex. Civ. App.) 50 S. W. Rep. 595; s. c. aff'd, id. 928.

## XIX. Rules, Regulations and Usages.\*

A common carrier may make and enforce all reasonable rules and regulations relating to the transportation of passengers and compel the observance of them even to the forcible ejection of a passenger. *Avery*

\* NOTE.—As to the validity, form and effect of conditions in tickets limiting liability, see "Common Carrier of Goods, Limitation of Liability," *ante*, p. 237.

v. *N. Y. C. R. Co.*, 121 N. Y. 31, rev'g judg't for plff. *Commonwealth v. Powers*, 7 Mete. 596; *Chicago &c. R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago &c. R. Co.*, 36 Wis. 450; see, *Browning v. L. J. R. Co.*, 2 Daly (N. Y.) 117; *Chicago v. People*, 56 Ill. 365.

Whether such regulations are reasonable is a question of law. *Vedder v. Fellows*, 20 N. Y. 126; *Barker v. Central Park &c. R. Co.*, 151 N. Y. 237.

*Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31; *C. & N. W. R. Co. v. Williams*, 55 Ill. 185; *Illinois Cent. R. Co. v. Whittimore*, 43 Ill. 420. See, however, *Morris &c. R. Co. v. Ayres*, 29 N. J. L. 393.

A rule limiting the amount of change which a conductor is required to furnish on tender of a fare, being reasonable, defendant was not bound to give personal notice of the existence thereof. *Barker v. Central Park &c. R. Co.*, 151 N. Y. 237; s. c., 35 L. R. A. 489; aff'g s. c., 3 Misc. 635.

Where a company is required by statute to furnish a mileage book on specified terms, there is no consideration for the imposition of conditions such as that a ticket shall be purchased with coupons from it at the station before entering the train, and such a condition is not binding though printed in the mileage book and signed by the purchaser. *Corcoran v. New York &c. R. Co.*, 25 App. Div. 419; s. c. aff'd, 164 N. Y. 587.

A rule requiring a transfer to be used within ten minutes, regardless of a company's inability to furnish accommodations in its cars within that time, is unreasonable, in view of statute requiring a continuous trip over lines controlled by a company for a single fare. *Jenkins v. Brooklyn &c. R. Co.*, 29 App. Div. 8.

Nor is a company justified in imposing, as a condition to the issuance of such mileage book, that the purchaser shall disclose the names of the members of his family, or sign an agreement as to compliance with the company's rules contained thereon. *Trotan v. New York &c. R. Co.*, 31 App. Div. 320.

Reasonableness of a rule is for the court. Held, error not to charge that a rule providing that passengers shall not carry cumbersome or dangerous package is reasonable and to leave the reasonableness thereof to the jury. *Dord v. Albany R. Co.*, 17 App. Div. 202.

Rule requiring employes, when off duty in uniform, not to sit on the front seat of cars so as to divert the attention of the motorman, is reasonable. *Bowe v. Brooklyn Heights R. Co.*, 15 N. Y. Supp. 893.

A railroad company cannot require a passenger to agree, as a condition of issuing it, that a mileage book shall be forfeited upon presentment by anyone else. *Watson v. New York &c. R. Co.*, 24 Misc. 628.

Shipper traveling with his stock, and returning free of charge, in the absence of specific agreement, is required to take the shorter of two routes. *Milroy v. Chicago &c. R. Co.*, 98 Iowa, 188.

The refusal to comply with a reasonable regulation works a forfeiture of the rights acquired by the purchaser of a ticket, so that return of money paid therefor cannot be demanded. *Gregory v. Chicago &c. R. Co.*, 100 Iowa, 345.

A passenger upon payment of the full fare is not bound to the special limitations of time for its use, of which he had no notice and to which he did not agree. *Boyd v. Spencer*, 103 Ga. 828.

In the absence of fraud, plaintiff was bound by stipulations in ticket purchased and signed for by her, though she could not read. *Southern R. Co. v. White*, 108 Ga. 201.

Where the rate of a round trip ticket was reduced in consideration of complying with certain conditions as to identification and stamping, non-compliance justified expulsion. *Wenz v. Savannah &c. R. Co.*, 108 Ga. 290.

By accepting a ticket containing a time limit for its use, one assents to such terms. *Hanlon v. Illinois C. R. Co.*, 109 Iowa, 136.

Requirement of a higher fare where it is paid on the train than where a ticket is purchased at the station is reasonable. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Carriers have the right to require of passengers the observance of all such reasonable rules as tend to promote the comfort and convenience of passengers. *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420.

*Chicago &c. R. Co. v. Parks*, 18 Ill. 460; *Hillard v. Gould*, 34 N. H. 230; *Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580; *Cheney v. Boston &c. R. Co.*, 11 Mete. 121; *Marquette v. Chicago &c. R. Co.*, 33 Iowa 562; *DeLucas v. New Orleans &c. R. Co.*, 38 La. Ann. 930.

Though a ticket contains terms including a time limit a purchaser is not bound, where there is a place for a signature thereto which has not been filled out and he purchased it for use without limitation as to time. *Walker v. Price*, 9 Kan. App. 720.

Defendant cannot enforce a regulation that night passengers to a certain point should be carried to another and returned in the morning, in the absence of notice to the public thereof. *Louisville &c. R. Co. v. Cayer*, (Ky.) 34 S. W. Rep. 896.

Rule forbidding passengers to ride on the front platform of a street car does not prevent recovery by one so riding, if he reasonably believes from the company's conduct that it is not in force. *Sweetland v. Lynn &c. R. Co.*, 177 Mass. 574; s. c., 51 L. R. A. 783.

In an action for refusal to carry, where the holder of a ticket, sold as



good on any train, was excluded from a train not stopping at his destination, defendant was held entitled to a peremptory instruction. *Yazoo &c. R. Co. v. Rogers*, (Miss.) 31 South. Rep. 581.

A passenger should have an opportunity to become acquainted with rules and regulations, or they should be brought to his notice or knowledge. *B. & M. R. Co. v. Rose*, 11 Neb. 177.

*Lake Shore &c. R. Co. v. Greenwood*, 29 Smith (Pa.) 373; *Maroney v. Old Colony R. Co.*, 106 Mass. 153.

Where passengers have been allowed to change cars without a transfer ticket, defendant could not change the custom without notice. *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1; s. c. aff'd, 58 N. J. L. 408.

See, also, *Runyan v. Central R. Co.*, 61 N. J. L. 542.

Forbidding a train to enter Cherokee outlet for six hours before it was opened by settlement and that no one should enter such train for thirty minutes therefore, was reasonable, being adopted to carry out a similar order of the Secretary of the Interior. *Decker v. Atchison &c. R. Co.*, 3 Okla. 553.

Requirement in a mileage ticket that holder must procure an exchange ticket is reasonable, and failure to comply justifies an expulsion, on refusal to pay fare, though plaintiff was unable to procure one through station agent's negligence. *Robb v. Pittsburg &c. R. Co.*, 14 Pa. Super. Ct. 282.

Tender of five dollar bill in payment of five cent fare held unreasonable as matter of law. *Muldowney v. Pittsburg &c. Traction Co.*, 8 Pa. Super. Ct. 335.

Requirement that claim for damages should be presented in writing within 60 days held reasonable. *Kirby v. Western &c. Teleg. Co.*, 7 S. D. 623; s. c., 30 L. R. A. 621; *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213.

See, also, "Common Carriers of Goods, Limitation of Liability," *ante* p. 237.

Time limit or other conditions merely stamped on the back of a general ticket does not bind a passenger unless his attention is called thereto and his assent obtained and it is based on some consideration. *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213.

Conditions on a general ticket, though referred to on the face thereof, are not binding unless they are reasonable. One that a passenger shall go through an elaborate process to see that its servant had made no mistake is not reasonable; nor is one requiring the purchaser to apply, within three days, to the company's office to get his money refunded in

case of a double charge as a result of a dispute. *O'Rourke v. Street R. Co.*, 103 Tenn. 124; s. c., 46 L. R. A. 614.

Requirement that rear door on the rear car be locked is reasonable and is not negligence as against one getting on rear platform with knowledge thereof. *Missouri &c. R. Co. v. Brown*, (Tex. Civ. App.) 39 S. W. Rep. 326.

#### (a). PASSENGER MUST PAY FARE OR SHOW TICKET.

Payment of fare, or presentation and showing of ticket when required is a prerequisite to passenger's right to ride on the train of a common carrier. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455.

*Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1; *Magee v. Oregon R. Co.*, 46 Fed. R. 734.

A regulation requiring the procuring and exhibition, upon reasonable demand, of a ticket as evidence of one's right to ride, is reasonable. *Wiggins v. King*, 91 Hun, 340.

Failure to repay fare when one has changed from one car to another, without evidence of having already paid it, warranted ejection. *Lasker v. Third Ave. R. Co.*, 27 Misc. 824.

Forbidding freight conductor to allow passengers to ride from ticket stations without tickets was reasonable. *McCook v. Northrup*, 65 Ark. 225.

Where a conductor permits a trespasser to remain on the car and treats him as a passenger by demanding fare, which the latter offers to pay, he cannot eject him for non-payment of fare. *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602.

Plaintiff cannot recover for an ejection, where, upon refusal to carry her sister without fare, she receives back her own and voluntarily leaves at the next station. An offer by a third person to pay the fare was not available to passenger, where no tender was made. *Cox v. Los Angeles &c. R. Co.*, 109 Cal. 100.

Commutation ticket conditioned good only on presentation on demand by conductor will not avail passenger if left at home by mistake, he must pay fare or submit to removal from the train. *Downs v. N. Y. &c. R. Co.*, 36 Conn. 287.

Retention of a void ticket by the conductor does not permit recovery for failure to transport. *Comer v. Foley*, 98 Ga. 678.

Rule requiring extra fare from passengers failing to obtain tickets is reasonable. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Though a passenger on reaching a given place holds a ticket from thereon, he may be ejected upon refusing to pay his fare thereto. *Chicago &c. R. Co. v. Adams*, 60 Ill. App. 571.

Failure to exhibit a rebate ticket through forgetfulness did not prevent recovery, where, upon demand for a second fare, plaintiff stated that he had already paid it. *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123.

Refusal to pay fare beyond one's destination, at which the train did not stop, did not warrant expulsion, where another volunteered to pay to the first stopping place. *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189.

Failure to procure a ticket or pay fare in the train renders one a trespasser, subject to ejection. *Atchison &c. R. Co. v. Brown*, 2 Kan. App. 604.

A statute permitting ejection from "street railway cars" for refusal to pay fare, construed to apply to electric cars. *Hudson v. Lynn &c. R. Co.*, 178 Mass. 64.

Failure to produce one's mileage book as evidence that his fare was paid after having changed his seat, prevented recovery for an ejection; especially, where he is recognized thereafter and invited to return. *White v. Grand Rapids &c. R. Co.*, 107 Mich. 681.

A passenger was held entitled to use a ticket between two points on the line, where he paid his fare on the cars to the first point, though the fare from the point where he boarded the train to the second point exceeded the fare paid plus the price of the ticket. *Kissane v. Detroit &c. R. Co.*, 121 Mich. 115.

In a crowded suburban train, where two employes start at the ends of the train toward each other to collect fares, it was reasonable to permit no one to pass either without giving evidence that he had paid his fare. *Faber v. Chicago &c. R. Co.*, 62 Minn. 433; s. c., 36 L. R. A. 789.

Where a parent refuses to pay the fare of his child, the former may be expelled with the latter, though the parent tenders his own fare; though, where the latter has paid his own fare, it must be returned as a condition of expelling either. *Braun v. Northern P. R. Co.*, 79 Minn. 404; s. c., 49 L. R. A. 319.

Payment of fare, or presentation and showing of ticket when requested is a prerequisite to passenger's right to ride. *Woods v. Metropolitan Street R. Co.*, 18 Mo. App. 125.

A commuter who loses his ticket must pay his fare, where the contract stipulated that the ticket should be shown to conductor when required, and no duplicate would be issued. *Ripley v. New Jersey &c. R. Co.*, 2 Vroom (N. J.) 388.

*Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580.

Parent and child may be expelled for non-payment of child's fare, on return of parents' fare, or so much thereof as is in excess of the fares for the distance traveled, or, if a stop-over ticket, a stop-over check from

the point of expulsion. *Lake Shore &c. R. Co. v. Orndoff*, 55 Oh. St. 589; s. c., 38 L. R. A. 140.

A passenger is entitled to a reasonable time to comply with a demand for a ticket or a fare, and has the right to change his mind after a refusal; but tender after the engineer has been signaled to stop for the purpose, will not authorize recovery for ejection. *Guy v. Pittsburg &c. R. Co.*, 6 Oh. N. P. 3.

A person on a train must show ticket or pay fare, and for failure to do so may be ejected. *Peabody v. O. R. &c. R. Co.*, 21 Ore. 121.

Where a child of seven in the charge and custody of her aunt of 15, were both ejected for the latter's refusal to pay sufficient fare for the former, no recovery was allowed. *Warfield v. Louisville &c. R. Co.*, 104 Tenn. 74.

A regulation that a passenger embarking outside the limits of a transfer station must pay again, though he had paid once, was reasonable. *Nashville Street Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

Failure to tender the proper fare, or a proper ticket, did not prevent recovery for a threatened ejection upon refusal to pay an improper demand. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

Proof that plaintiff had not the money to pay a fare was competent on the question of justification for ejection. *Atchison &c. R. Co. v. Cuniffe*, (Tex. Civ. App.) 57 S. W. Rep. 692.

It was error to charge that defendant must keep its ticket office open for half an hour before "arrival" of trains, the statute specifying half hour before "departure." *Missouri &c. R. Co. v. Mills*, (Tex. Civ. App.) 65 S. W. Rep. 74.

When passenger lost conductor's check given him in lieu of ticket, he must either pay fare or submit to being ejected. *Jerome v. Smith*, 48 Vt. 230.\*

See, also, *State v. Delaware &c. R. Co.*, 19 Vroom (N. J.) 55, where mandamus was allowed for failure to issue commutation ticket to relator.

Plaintiff could not complain of an ejection for refusal to pay his fare where he did not exhibit his ticket or conductor's check upon request. *Price v. Chesapeake &c. R. Co.*, 46 W. Va. 538.

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\*NOTE.—Chap. 565, L. N. Y. 1890, sec. 43. CONDUCTORS AND EMPLOYÉS MUST WEAR BADGES.—Every conductor and employé of a railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office or employment, and the initial letters of the corporation employing him, and without such badge he shall not demand or receive from any passenger, any fare or ticket or meddle or interfere with any passenger, his baggage or property, or exercise any of the powers of his employment.

(b). RULE REQUIRING PASSENGERS TO PURCHASE TICKET BEFORE ENTERING CARS OR PAY EXTRA FARE ON TRAIN IS REASONABLE.\*

When common carriers require the purchase of tickets, as a condition of entrance into the train-house, and forbid that entrance until a reasonable time before the departure of trains, they consult the public interests, and when they require the checking of trunks and articles committed to their care, they simply adopt reasonable measures with respect to their liability, as common carriers; which in no sense can be said to conflict with any right of the public, and in this particular case, invades no interest of the plaintiff. It is the duty of such corporations, and they have the right, to make rules and regulations, as to the management of the railroad business of conveying passengers and their baggage. *Every v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31, rev'g judg't for pl'ff.

Where the regulation limiting the time for the use of a ticket also provides for refunding money where it is not so used, it is reasonable as matter of law. *Southern R. Co. v. Watson*, 110 Ga. 681.

A higher rate may be charged passenger on a train than he would have paid for ticket. *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28.

Where the conductor accepted the ticket rate upon the statement of passenger that he had lost his ticket, he could not thereafter demand the additional train rate. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Expulsion after tender of the legal fare, because of refusal to pay the excess usually charged, gave right of recovery. *Chamberlain v. Lake Shore &c. R. Co.*, 110 Mich. 614.

For refusal to pay train rate for passage, passenger may be ejected. *Wardell v. Chicago &c. R. Co.*, 46 Minn. 514.

*Louisville &c. R. Co. v. Johnson*, 92 Ala. 204.

For failure to pay the extra fare in such a case, the passenger may be ejected at the first stopping beyond his destination. *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663.

Rule requiring passengers on train without tickets to pay a higher rate is reasonable. *Poole v. Northern Pac. R. Co.*, 16 Or. 261.

*Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

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\*NOTE.—Chap. 38, L. of N. Y. 1889, provides as follows: "Section 1. It shall be lawful for any company owning or operating a steam railroad in this state, to demand and collect an excess charge of ten cents over the regular or established rate of fare, from any passenger who pays fare in the car in which he or she may have taken passage, except where such passage is wholly within the limits of any incorporated city in this state, provided, however, that it shall be the duty of such company to give to any passenger paying such excess, a receipt or other evidence of such payment, and which shall legally state that it entitles the holder thereof to have such excess charge refunded, upon the delivery of the same at any ticket office of said company, upon the line of their railroad, and said company shall refund the same upon demand; and provided further that this act shall not apply to any passenger taking passage from a station or stopping place when tickets cannot be purchased during half an hour previous to the schedule time for the departure of said train, on which such passenger takes passage."

Rule of company charging higher rates on a train than when ticket is purchased at the office is reasonable, provided suitable opportunity was afforded passenger to purchase at the office. *Reese v. Penn. R. Co.*, 131 Pa. St. 422.

*McGowen v. Morgan's Steamship Co.*, 41 La. Ann. 732; *State v. Hungerford*, 39 Minn. 6; *Chicago &c. R. Co. v. Brisbane*, 24 Ill. App. 463; *Atchison &c. R. Co. v. Dwelle*, 44 Kans. 394; *Hall v. R. Co.*, 25 S. C. 564.

Rule requiring extra fare if passenger neglects to purchase ticket is reasonable; and for refusal to show ticket or pay fare, such an one may be ejected at any place where the train may be stopped. *Moore v. Columbia &c. R. Co.*, 38 S. C. 1.

(c). PASSENGER MUST HAVE AN OPPORTUNITY TO PURCHASE TICKET BEFORE HE IS REQUIRED TO PAY EXTRA TRAIN RATE.

Plaintiff recovered, where he was told by the station agent to leave his permit to ride on the freight train with him for delivery to the conductor and was ejected for failure to present it to the conductor. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Where a passenger is unable to procure a ticket because of the absence of the ticket agent, he has a right to be carried on paying the price of a ticket. *Georgia Southern &c. R. Co. v. Asmore*, 88 Ga. 529.

Offer to purchase a ticket after the ticket office was properly closed was no excuse for refusal to pay the train rate. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Carrier must afford passenger a reasonable opportunity for purchasing a ticket before it can charge a higher rate. *Phillips v. Southern R. Co.*, 114 Ga. 284.

Company required to keep its ticket office open only until advertised departure of trains. *St. Louis &c. R. Co. v. South*, 43 Ill. 176.

Failure to obtain a ticket, after the time for the train to leave and before it actually leaves, by reason of the agent's preoccupation, was no excuse for refusal to pay the train rate. *Illinois C. R. Co. v. Bauer*, 66 Ill. App. 124.

Refusal of an agent upon proper application to furnish the proper exchange ticket, upon presentment of a mileage book, rendered the company liable for the consequences of such refusal, but not for expulsion for failure to present it or pay fare. *Pittsburg &c. R. Co. v. Daniels*, 90 Ill. App. 154.

Opening a station for business in a village of less than fifty inhabitants, only from 7 A. M. to 7 P. M., was reasonable. *Louisville &c. R. Co. v. Wright*, 18 Ind. App. 125.

Plaintiff, who has been refused a ticket at the ticket office has the

right to be carried on the train upon the payment of the price of a ticket at the office. *Indianapolis &c. R. Co. v. Rinard*, 46 Ind. 293.

When statute requires ticket office to have been open thirty minutes prior to train starting, conductors cannot charge train rates of passengers without tickets, if it has not been complied with. *Atchison &c. R. Co. v. Hoque*, 50 Kas. 40.

Failure to keep the office open as required by statute authorizes recovery for expulsion for refusal to pay more than the ordinary fare on the train. *Atchison &c. R. Co. v. Dickerson*, 4 Kan. App. 345.

Passenger entered station after advertised time of train to leave, and finding ticket office shut, got on train and offered the price of a ticket to the conductor, who, in accordance with the rules of the company, demanded a sum larger than that asked at the office. On refusal to pay the sum demanded, passenger was ejected and court held the rule of the company to be reasonable and not violating statute prescribing that fare for all persons between the same points should be the same. *Swan v. Manchester &c. R. Co.*, 132 Mass. 116.

*State v. Goold*, 53 Maine 279.

A reasonable opportunity should be afforded passengers to purchase tickets; what is a reasonable opportunity is a question for the jury. *Du Laurens v. St. Paul &c. R. Co.*, 15 Minn. 49.

*Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *St. Louis &c. R. Co. v. Myrtle*, 51 Ind. 566.

Whether an ejection for failure to produce a permit to ride on freight trains, notwithstanding offer to pay fare, was justifiable, depended upon whether plaintiff had a reasonable opportunity to procure one. *Reed v. Great Northern R. Co.*, 76 Minn. 163.

If reasonable opportunity is not given passenger to purchase a ticket before entering cars, it is unlawful for the railroad company to eject him from the train upon refusal to pay the car rate. *Forsee v. Alabama &c. R. Co.*, 63 Miss. 66.

See, also, *Evans v. M. & C. R. Co.*, 56 Ala. 246; *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *Jeffersonville R. Co. v. Rogers*, 38 id. 116; *State v. Goold*, 53 Me. 279; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116; *Smith v. Pittsburg &c. R. Co.*, 23 Oh. St. 10; *White v. R. Co.*, 26 W. Va. 800.

Rule that no baggage shall be checked until a ticket is procured is valid; but one that no baggage shall be received in the baggage room until a ticket is procured is void. *Coffee v. Louisville &c. R. Co.*, 76 Miss. 569.

Rule for keeping a waiting room closed except within 30 minutes of the time of the arrival of the train, was reasonable, as applied to one who

came from the place in which the station was situated; though *quaere*, as to through passengers. *Phillips v. Southern R. Co.*, 124 N. C. 123.

Where failure to procure a ticket is due to the absence of defendant's agent, one is not required to pay the train rate to avoid ejection. *Gulf &c. R. Co. v. Sparger*, (Tex. Civ. App.) 39 S. W. Rep. 1001.

(d). PASSENGER IS ENTITLED TO A SEAT.

Inability to enter a car by reason of a crowd is no justification for riding on the platform contrary to a city ordinance; although expulsion is justified, the passenger may recover, where his fare had been collected, and had not been returned to him. *Hanna v. Nassau Electric R. Co.*, 18 App. Div. 137.

Passenger is entitled to a seat and may sue for failure to provide him with one; but he must pay his fare in any case, and if ejected from train for failure to do so, no action lies. *St. L. &c. R. Co. v. Leigh*, 45 Ark. 368.

*Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

Passenger need not pay his fare if he is not provided with a seat. *Hardenbergh v. St. Paul &c. R. Co.*, 39 Minn. 3.

A carrier is liable in tort for the refusal of a conductor to provide, without sufficient excuse, for the seating of ticket holders, accompanying his refusal with insulting language. *Louisville &c. R. Co. v. Patterson*, 69 Miss 421.

A passenger who exhibits his ticket and demands a seat need not surrender his ticket until the seat is furnished. *Davis v. Kansas &c. R. Co.*, 53 Mo. 317.

A carrier is bound to use a high degree of care to provide seats. *Galveston &c. R. Co. v. Morris*, (Tex. Civ. App.) 60 S. W. Rep. 813; s. c. aff'd, 61 S. W. Rep. 709.

(e). REQUIREMENT THAT TICKET BE STAMPED IS REASONABLE.

If stipulations of a round trip ticket are performed, mistake of agent in stamping it does not invalidate it. *Head v. Georgia Pac. R. Co.*, 79 Ga. 358.

Arbitrary refusal by station agent to date and stamp a return ticket upon sufficient identification, and consequent ejection of plaintiff upon the conductor's refusal to honor it without such marks. Nonsuit set aside. *Morse v. Southern R. Co.*, 102 Ga. 302.

See, also, *Southern R. Co. v. McKenzie*, 102 id. 313; *Southern R. Co. v. Barlow*, 104 id. 213.

Refusal to pay one's fare justified an ejection, where one knows that



the conditions necessary to the validity of a return trip have not been complied with, though due to the fault of the station agent; plaintiff's remedy being to sue for a breach of contract. *Western R. Co. v. Stockdals*, 83 Md. 245.

A stipulation on a thousand mile ticket requiring to be signed and stamped is waived if, without such formalities, conductors permit the passenger to use the ticket. *Kent v. R. Co.*, 45 Oh. St. 284.

A regulation requiring round trip ticket to be stamped before it will be accepted on return trip is reasonable. *Bowers v. Pittsburg &c. R. Co.*, 158 Pa. St. 302.

Though an unstamped return ticket, which by its terms is required to be stamped, confers no rights, plaintiff was allowed to recover, where the conductor received and punched it and told him that it was all right but subsequently ejected him. *Louisville &c. R. Co. v. Blair*, 104 Tenn. 212.

Where the condition, as to having a return ticket stamped before returning, was printed on the ticket and was made in consideration of a reduced fare, it was reasonable and binding, though plaintiff could not read it, and was not informed of its contents, and it is no excuse that others had violated such a condition; especially where he did not know it at the time. *Watson v. Louisville &c. R. Co.*, 104 Tenn. 194; s. c., 49 L. R. A. 454.

To stamp a return ticket was unjustifiable. Plaintiff was not allowed to recover for expulsion. *Russell v. Missouri &c. R. Co.*, 12 Tex. Civ. App. 627.

Holder of a round trip ticket with a condition that it be stamped upon identification at destination before returning showed it to the ticket agent and was told that it was all right, but he did not request the agent to stamp it. The conductor refused the ticket and the passenger was expelled for refusal to pay his fare. Verdict for plaintiff was set aside and judgment rendered for defendant. *Houston &c. R. Co. v. Arey*, 18 Tex. Civ. App. 451.

Condition of round trip ticket that it be stamped must be complied with, and agent of the company cannot waive it. *Mosher v. St. Louis &c. R. Co.*, 127 U. S. 390.

Requirement that ticket be stamped by agent to make it good for return passage must be complied with. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146.

See *Bethea v. R. Co.*, 26 S. C. 91; *Edwards v. Lake Shore &c. R. Co.*, 81 Mich. 364.

The lack of the stamp did not justify ejection, where plaintiff had presented it to the agent and received it back under circumstances leading

him to infer that it had been properly stamped. *Northern P. R. Co. v. Pauson*, 70 Fed. Rep. 585; s. c., 30 L. R. A. 130.

A carrier cannot repudiate a traffic arrangement with another road so as to invalidate a ticket in the hands of an innocent purchaser. *Winters v. Cowen*, 90 Fed. Rep. 99.

(f). REQUIREMENT OF IDENTIFICATION BY SIGNING IS REASONABLE.

Special contract, requiring passenger to sign his name before company's agent at terminal point, must be complied with before his return ticket can be used. *Moses v. East Tennessee &c. R. Co.*, 13 Ga. 356.

*Rawitzky v. Louisville &c. R. Co.*, 4 La. Ann. 47; *Mosher v. St. Louis &c. R. Co.*, 23 Fed. R. 326.

The requirement in a special return ticket that the purchaser sign it before an agent who is to witness and officially execute it, reasonably includes proper identification. *Southern R. Co. v. Barlow*, 104 Ga. 213.

Plaintiff could not complain of an agent's refusal to be satisfied as to his identity, where he printed his name instead of writing it as he was cautioned to do. Agent was justified in requiring other means of identification than handwriting. *Central &c. R. Co. v. Cannon*, 106 Ga. 828.

Where the return portion of a ticket is required to be signed by purchaser and stamped by company's agent before it is good, the company must furnish an agent at the time and place for the purpose a reasonable time before train time. *Southern R. Co. v. Wood*, 114 Ga. 140; s. c., 55 L. R. A. 536.

Plaintiff could not complain of ejection for failure to comply with the conditions of a return ticket in having it signed in the presence of the agent, where he failed to present himself for that purpose within the reasonable hours during which the station was open. *Louisville &c. R. Co. v. Wright*, 18 Ind. App. 125.

The condition of a round trip ticket requiring identification at the point of return is not unreasonable. *Dangerfield v. Atchison &c. R. Co.*, 62 Kan. 85.

Plaintiff was not entitled to ride on the mileage book of another to whose use it was restricted, by the fact that the latter's signature thereto had not been obtained as assumed in the wording of the conditions thereof, and the conductor being authorized therein to take it up if presented by another than the original holder "whose signature is hereon," its return was not a condition precedent to the right to eject for non-payment of fare. *Rabilly v. St. Paul &c. R. Co.*, 66 Minn. 153.

Requirement that round trip ticket be stamped by agent at destination held not binding unless signed by purchaser. Mere acceptance of the ticket with such a stipulation was insufficient even though ticket is issued

at reduced rate, which was usual in holiday season. *Lake Shore &c. R. Co. v. Mortal*, 8 Oh. C. D. 134.

Plaintiff could not complain of an agent's refusal to validate a return ticket upon his only signing his initial to his Christian name and his middle name without affixing his surname, though that was the way the ticket was originally signed. *Sinnott v. Louisville &c. R. Co.*, 104 Tenn. 233.

Regulation requiring identification of holder of an excursion ticket is reasonable. *Abram v. Gulf &c. R. Co.*, 83 Tex. 61.

Refusal to sign a ticket when called upon to do so by conductor, pursuant to its printed condition, justified ejection without refunding the money, though ticket agent sold the ticket after a refusal so to sign. *Ketcheson v. Southern P. R. Co.*, 19 Tex. Civ. App. 288.

Requirement that return ticket be stamped by agent at destination is reasonable and failure to comply justifies an ejection. *Reed v. Texas &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 432.

A commutation ticket required identification of holder by signing or otherwise; upon refusal of conductor to accept offer of identification by signing, passenger may refuse to make identification by other means, and if ejected, may recover. *Norfolk &c. R. Co. v. Anderson*, 17 Va. L. J. 377.

#### (g). CARRIER IS BOUND BY THE DIRECTION OR MISTAKE OF ITS CONDUCTOR RESPECTING TICKETS AND TRAINS.

A passenger with a ticket good for train No. 59, leaving Weehawken on January 15th, on the evening of the 14th presented his ticket to the company's doorkeeper at Weehawken and was shown the train which his ticket called for, which he took. The conductor put him off at Haverstraw and informed him that the ticket called for the first train coming behind the train which he had taken. On January 15th, train No. 59 came along, stopped at Haverstraw and the passenger entered it and was again ejected on the ground that, by the condition of his ticket, the passage must begin at Weehawken. In an action brought by the passenger to recover damages by the refusal of the company to carry him, it was held that the company was bound to receive the passenger on board the train No. 59 at Haverstraw and was liable for damages resulting from his removal. *Elliott v. N. Y. C. & H. R. R. Co.*, 53 Hun, 78; affirming judgment for plaintiff.

If, in violation of the rights of a passenger, a railroad company, by its conductor, proceeds to forcibly eject him from the car in which he is rightfully seated as a passenger, notwithstanding the fact that the conductor personally may be justified by his instructions in doing so,

by reason of the passenger, because of the mistake of another conductor, not having proper evidence of his right to ride on the car, yet the railroad company is no more justified in the attempted act of ejection than it would be if such passenger had at the time held and presented the evidence of his right to remain as a passenger in the car without further payment. *Muckle v. Rochester Ry. Co.*, 19 Hun. 32.

**From opinion.**—"There is a reason for limiting the time within which a transfer ticket may be effectually used for the purpose of a continuous passage in the fact that otherwise the opportunity might be taken to use, or permit it to be used, for other than the contemplated continuous passage to the prejudice of the company. Regulations are essential to the proper conduct and management of the business of any railroad corporation. And upon a given state of facts the question whether or not they are reasonable is one of law to be determined by the court. (*Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455; *Vedder v. Fellows*, 20 id. 126; *Northern R. R. Co. v. Page*, 22 Barb. 130; *Illinois Central R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138; *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40; 23 Am. St. Rep. 506; *Pittsburg C. & St. L. Ry. Co. v. Lyon*, 123 Penn. St. 140; 10 Am. St. Rep. 517.)

In some of the states it is held to be a question of fact, or a mixed question of law and fact, to be submitted to the jury with proper instructions. It is so held in *State v. Overton*, 4 Zab. 435; 61 Am. Dec. 671; *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62; *Bass v. Chicago & N. W. Ry. Co.*, 36 Wis. 450; 17 Am. R. 495.

There may be cases where the disposition of the controversy about the reasonableness of certain regulations is dependent upon the determination of controverted questions of fact. It may be seen that then such facts are for the jury. But then the view of the facts which will render the regulations reasonable is a question of law for the court.

It appears that the system adopted by the defendant for the practical operation of its road is such as to give the requisite frequency to the running of its cars on all parts of its lines for the supply to its patrons of continuous passage for single fares by the observance and execution of the regulations in question. And, in view of the facts as they appear by the record, the conclusion is required that such regulations of the defendant are reasonable. *The failure of the plaintiff to obtain the continuous passage to which he was entitled, on the payment of his fare, did not arise from any defect in those regulations, but solely from the mistake of the conductor in the execution of them.* The question is, therefore, presented whether the defendant is liable in tort for the act of the conductor of the West Avenue car, who was justified by such regulations in refusing to permit the plaintiff to ride in the car without payment of his fare. The question has seemingly been one where diverse views have been held by judicial writers.

In *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295, the plaintiff, having a ticket for passage from Sing Sing to Rhinebeck, took a train which went no further than Poughkeepsie. Before the train reached there the ticket was taken up by the conductor, and no evidence of his right to proceed further on the defendant's road was given to him. He took passage on the next train to complete his trip to Rhinebeck, and, on his refusal to pay fare, for the reasons before mentioned, and which he stated to the conductor, the latter forcibly ejected him from the train.

The views of Judge Grover, expressed in his opinion, were to the effect that the defendant was not liable in tort for the consequences of the wrongful act of the first conductor in taking up the plaintiff's ticket. The court did not, however, necessarily determine that question, as there was another ground for the reversal of the court below.

The plaintiff recovered on the retrial, and the recovery was sustained by the General Term. (6 T. & C. 495.) And Mr. Justice Learned cites in support of his conclusion *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, in which the opinion was also delivered by Judge Grover, who in the later case refers to the *Hamilton* case for the purpose of distinguishing the questions presented in the two cases. Our attention is called to no other case in this state necessarily bearing upon the question. There are elsewhere, however, cases having some relation to it. Amongst those in which the actions founded upon principle similar to that of the plaintiff's proposition in the present action have been sustained are the following cases: *Palmer v. R. R. Co.*, 3 S. C. 580; 16 Am. Rep. 750; *Burnham v. G. T. Ry. Co.*, 63 Maine 298; 18 Am. Rep. 220; *L. E. & W. Ry. Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464; *Murdock v. B. & A. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307; *Head v. Georgia P. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Kansas City M. & B. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309.

And of those tending to the contrary are *Yorton v. Milwaukee, Lake Shore & W. Ry. Co.*, 54 Wis. 234; 41 Am. Rep. 23; *Frederick v. M., H. & O. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Bradshaw v. S. B. R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481. \* \* \* \* \*

The plaintiff was given by the statute the right to a continuous passage to his place of destination on payment of the single fare, and it cannot be said that it was by any fault or neglect on his part that the right was denied to him. It is a general rule that a carrier of passengers is answerable for all the consequences to a passenger of the willful conduct or negligence of the persons employed by it in the execution of the duty it has assumed towards him.

The defendant had, by its contract with the plaintiff, undertaken, for a consideration paid, to carry him to his place of destination, and pursuant to it he had the right of passage, and as between him and the defendant, he was at liberty to refuse to repay his fare and to insist upon having his continuous passage. In violation of that right, the defendant, by its conductor, proceeded to forcibly eject him from the car in which he was rightfully seated as a passenger. Although the conductor personally may have been justified by his instructions to do so, the defendant was put in the wrong by the act of the other conductor, and was no more justified in the attempted act of ejection than it would have been if the plaintiff had at the time had and presented the evidence of his right to remain as a passenger in the car without further payment.

It follows, if these views are correct, that the defendant is liable to the plaintiff for the consequences of such violence upon his person as was used by the conductor for the purpose of ejecting him from the car."

Conductor's statement to passenger that he may get off the train and resume his journey by next train on same ticket estops the company. *Tarbell v. N. C. R. Co.*, 24 Hun. 51; affirming judgment for plaintiff.

Citing *Story's Agency*, sec. 452; *Penn. R. Co. v. McCloskey*, 23 Pa. St. 526; and distinguishing *Denny v. N. Y. Cent. R. Co.*, 5 Daly. 50; *Dietrich v. Penn. R. Co.*, 71 Pa. St. 432; *Oil Creek & C. R. Co. v. Clark*, 72 id. 231.

Where a conductor makes a mistake in taking up the wrong coupon of a return ticket, the passenger may recover therefor; but, unless the mistake is undiscoverable by ordinary care, he may be ejected for refusal to pay fare on the return trip. *Wiggins v. King*, 91 Hun. 340.

Passenger was allowed to recover for an ejection upon presentation of tickets purporting to give stop-over privileges issued by a conductor of the same line in violation of rules of the company, which, however, were not brought home to the passenger. It was held that the conductor had apparent authority to issue such tickets. *Ray v. Cortland &c. T. Co.*, 19 App. Div. 530.

So passenger was not bound to look for and discover the mistake of conductor in punching time on a transfer. *Eddy v. Syracuse &c. R. Co.*, 50 App. Div. 109.

Where a passenger enters a car in reliance on the conductor's statement that the fare to a given point is only six cents, the company is bound thereby and the conductor cannot thereafter exact a higher fare. *Wright v. Glens Falls &c. Street R. Co.*, 24 App. Div. 617.

Failure to dispute a conductor's right to take up a ticket does not prevent recovery for wrongful ejection. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668.

A through ticket, which was surrendered to first of two conductors, should have carried passenger the entire distance, providing the conductor following the first one is satisfied of the facts, and notwithstanding the company regulations requiring second conductor to demand ticket or payment of fare. *East Tennessee &c. R. Co. v. King*, 88 Ga. 413.

Passenger who was told by conductor that the next stopping place was her destination, and got off when train stopped several miles from her station, may recover. *Penn. R. Co. v. Hongland*, 78 Ind. 203.

See, also, *Atkinson v. Southern R. Co.*, 114 Ga. 146; s. c., 55 L. R. A. 223.

If it be proven that passenger offering conductor the going instead of the returning coupon of a round trip ticket, explained to him that the return coupon had been taken on the former trip by mistake, he may recover for being ejected on refusal to pay fare. *Penn. R. Co. v. Bray*, 125 Ind. 229.

See, also, *Georgia R. Co. v. Dougherty*, 86 Ga. 744.

Plaintiff bought a ticket over defendant's road, made of two parts, one of which was detached by the first conductor and the remainder offered the second conductor. By mistake the first conductor had detached the wrong part, and on passenger's refusal to pay fare, the second conductor ejected him. *Rouser v. North Part &c. R. Co.*, 91 Mich. 565.

That an employé, unconnected with the running of the car, informed plaintiff that it passed her door, does not justify her boarding, where the

conductor in charge tells her that it does not. *Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

Defendant can not avoid the consequences of the negligence of its conductor, by repudiating his act after he has treated plaintiff as passenger by receiving her ticket. *Case v. Delaware &c. R. Co.*, 191 Pa. St. 450.

Plaintiff can not complain of an ejection, where he has resumed his journey after stopping over, contrary to the express provisions of his ticket, which he has signed. *International &c. R. Co. v. Best*, (Tex. Civ. App.) 55 S. W. Rep. 315.

An action will lie if a conductor ejects a passenger who, relying on another conductor's statement that his ticket was good, took passage on the first conductor's train. *N. Y. &c. R. Co. v. Winter*, 143 U. S. 60.

Passenger must use ordinary care to ascertain that the train he boards is the one he wishes to take. *St. Louis &c. R. Co. v. Campbell*, (Tex. Civ. App.) 69 S. W. Rep. 451.

#### (h). CONNECTING LINES.

A statute requiring transfers on leased lines to be given "any passenger desiring to make one continuous trip between such points for a single fare" does not embrace parties who ride to the point of transfer simply to demand a transfer with no intention of going further, and they cannot recover the penalty of the act for a refusal of the transfer. *Meyers v. Brooklyn &c. R. Co.*, 10 App. Div. 335.

Where two roads are separate and only agree between themselves to carry passengers on transfers, the second is not liable for ejecting a passenger whose transfer was not acceptable under its reasonable rules, owing to a mistake of the conductor of the first. *Jacobs v. Third Ave. R. Co.*, 69 N. Y. Supp. 981; rev'g s. c., 68 N. Y. Supp. 623.

Defendant was liable for expulsion of a passenger for failure to show her ticket, which had been taken up by a previous conductor, who had directed her to change cars. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668; s. c., 32 L. R. A. 193.

Conductor's unfulfilled promise to awaken a passenger does not make carrier liable. *Nunn v. Georgia R. Co.*, 71 Ga. 710.

That a passenger boarded with an apprehension that his ticket would not be accepted, was no defense to an unlawful expulsion. *Southern R. Co. v. Barlow*, 104 Ga. 213.

While defendant was liable for giving plaintiff a wrong transfer, subjecting her to ejection from a connecting line, she could not complain of injuries received by reason of her attempting to enforce her rights by resisting ejection, instead of seeking redress in the courts. *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384.

Where defendant, a member of an association of roads which issued an interchangeable mileage ticket, was unable to furnish the exchange ticket when requested, it was liable for plaintiff's ejection upon presentation of the mileage ticket without exchange ticket to the conductor and refusal to pay fare. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

The conductor of a connecting line was not warranted in ejecting a passenger, though the other conductor had taken the wrong coupon, where the part still held entitled plaintiff to ride beyond the point at which he was ejected. *Vining v. Detroit &c. R. Co.*, 122 Mich. 248.

First conductor tore off wrong coupon of a ticket, the last conductor refused to accept that remaining and ejected plaintiff. He could only recover the extra fare he had to pay on the next train. *Brown v. Rapid R. Co.*, (Mich.) 90 N. W. Rep. 290.

Plaintiff riding upon defendant's road from "B." to "D." changed to the cars of another company at an intermediate station, "W.," and was ejected on the latter line because he refused to pay the fare from "W." to "D." supposing he had paid at "B." for the through trip to "D." It appearing that conductors on road from "B." to "W." had no authority to collect fare on road from "W." to "D." no recovery was allowed. *Haggerty v. Flint &c. R. Co.*, 59 Mich. 366.

No duty rests on company's employes to awaken a passenger who is asleep when his station is called. *Nichols v. Chicago &c. R. Co.*, 90 Mich. 203.

Plaintiff did not recover for the ejection itself, where he entered the car of a line, for which the privileges of transfers had been withdrawn, with a transfer on its face not good on that line. *Keen v. Detroit Electric R. Co.*, 123 Mich. 247.

Failure to present for passage and surrender a monthly commutation ticket, on the last trip, as required by its terms, because it had been lost, justified ejection. *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703.

Though transfers, issued without authority but under the assurance that they are valid, have actually been accepted, they are not sufficient to found rights upon. *Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

Plaintiff was allowed to recover for an ejection, where he showed that the mistake as to the transfer was due to the negligence of the first conductor. *O'Rourke v. Citizens' Street R. Co.*, 103 Tenn. 124; s. c., 46 L. R. A. 614.

Where two companies use the same track and have a joint ticket agent, either is liable for his mistake in selling ticket of wrong road, resulting in purchaser's ejection. *Texas &c. R. Co. v. Dye*, (Tex. Civ. App.) 33 S. W. Rep. 551.



Where plaintiff, at an intermediate point, asked a ticket agent to telegraph for "through" tickets from one point to another, and the agent, without doing so, gave him tickets officially stamped as surrendered at such point by others passing on, the plaintiff was not chargeable with notice of the agent's fraud on the company so as to preclude recovery for ejection. *Mexican &c. R. Co. v. Goodman*, (Tex. Civ. App.) 55 S. W. Rep. 372.

Misinformation as to connections, held not proximate cause of injuries to woman in delicate health from rough ride in bad weather to make the connection. *Fowlks v. Southern R. Co.*, 96 Va. 742.

Company using a union depot was bound by the representation concerning the running of its trains made by a ticket agent therein in charge of the sale of its tickets. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

Plaintiff may recover for an ejection by reason of failure to produce a ticket which a former conductor had negligently taken up. *Lovings v. Norfolk &c. R. Co.*, 47 W. Va. 582.

#### (i). CARRIER IS LIABLE FOR MISTAKES OF TICKET AGENT.

That the conductor was not at fault in one's expulsion was no defense where the ticket agent improperly made out the ticket. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177.

Error in making a non-transferable ticket to the husband, although intended for the wife, does not permit wife to ride. *Chicago &c. R. Co. v. Bannerman*, 15 Bradw. 100.

A ticket is the only evidence of passenger's contract, but his failure to receive the one he paid for is not his fault, and he cannot be ejected on that ground. *Georgia R. Co. v. Olds*, 77 Ga. 673.

One has no right to rely on the statement of a ticket agent that a train was an hour late. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Where a passenger, unable to understand the ciphers as to date on the back of a ticket, is told that it is still good and allowed to pass through the gate to the train, he cannot thereafter be ejected. *Pennington v. Illinois C. R. Co.*, 69 Ill. App. 628.

One who knowingly retains a wrong ticket will be held to its terms. *Godfrey v. Ohio &c. R. Co.*, 116 Ind. 30.

The mistake of a union ticket agent in giving the wrong ticket is not that of the company whose ticket was given but that of the one whose ticket was desired. *Scott v. Cleveland &c. R. Co.*, 144 Ind. 125; s. c., 32 L. R. A. 154.

Information by a ticket agent upon presentation of an interchangeable mileage ticket, that his supply of exchange tickets was exhausted but that the holder would be allowed to ride without one, was within the scope

of his authority so as to render the company liable for an ejection. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

Company was liable for an ejection, where a mistake as to the ticket, made by the agent, was explained to the conductor by plaintiff. *Evansville &c. R. Co. v. Cates*, 14 Ind. App. 172.

Passenger purchasing a ticket was justified in relying on the statement of the agent, telling him that it was all right, where he was unable, owing to the poor light, to see that its date limitation had passed. Recovery for expulsion was allowed. *Callaway v. Mellett*, 15 Ind. App. 366.

It is a matter of fact whether company's agent was justified in supposing plaintiff understood the instructions given her; as where she was directed to enter a caboose, but mistaking directions was injured in consequence. *Allender v. C., R. I. &c. R. Co.*, 43 Iowa 276.

Representations as to the validity of a ticket beyond the time limit mentioned thereon made subsequent to the sale thereof, were not binding, where none at all were made at the time of the sale. *Hanlon v. Illinois C. R. Co.*, 109 Iowa, 136.

Where, by mistake of ticket agent passenger was supplied with a limited ticket good only for the day of its purchase, he was allowed to recover for expulsion for insisting on using it the next day, which was after the time limit. *Louisville &c. R. Co. v. Gaines*, 99 Ky. 411.

Passenger cannot recover for ejection for non-payment of additional fare, where the ticket agent gave him a ticket to a point short of his destination, as his remedy is to sue for the breach of contract. *Spink v. Louisville &c. R. Co.*, (Ky.) 52 S. W. Rep. 1067.

The purchase of a punched ticket on assurance by agent that it was valid, does not justify expulsion. *Murdock v. Boston &c. R. Co.*, 137 Mass. 293.

By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained for; if, on refusing to pay for the space beyond, the plaintiff is ejected from the train no recovery lies, on the theory that the printed ticket and not his statement was obligatory upon the conductor. *Frederick v. M. H. &c. R. Co.*, 37 Mich. 312.

*Downs v. N. Y. &c. R. Co.*, 36 Conn. 287; *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore &c. R. Co.*, 29 Oh. St. 214.

A female passenger relying on the directions of a ticket agent took an express train which did not stop at the place of her destination. In an action against the company for being carried beyond her station she should count on the negligence of the agent, not on the conduct of the conductor in failing to stop the train. *Marshall v. St. Louis &c. R. Co.*, 78 Mo. 610.

See *Pittsburg &c. R. Co. v. Nuzum*, 50 Ind. 141; *South. &c. R. Co. v. Huffman*, *quære* as to whether failure to give information before taking up the ticket would have given right of action. *I. & G. N. R. Co. v. Hassel*, 62 Tex. 256.

Misinformation by station agent as to trains stopping at a given place did not permit recovery for arrest for non-payment of fare to the next stopping place, where passenger's information was corrected by the conductor and he received an opportunity of changing cars at the first stopping place short of his destination. *Stricker v. Pennsylvania R. Co.*, 60 N. J. L. 230.

Where the ticket entitled one to passage only on trains stopping at his destination, but the holder boarded the wrong train through misinformation of the agent, he recovered for an ejection. *Pittsburg &c. R. Co. v. Reynolds*, 55 Oh. St. 370.

Recovery may be had for selling passenger second, instead of first rate tickets. *St. Louis B. &c. R. Co. v. Mackee*, 41 Tex. 491.

One may assume that a ticket embodies the terms of the contract. *Gulf &c. R. Co. v. Copeland*, 17 Tex. Civ. App. 55.

Where a purchaser states that the ticket is to be used by his wife and is told that it is all right for him to sign it, the defendant can not object that the condition requires her to sign it. *Mexican C. R. Co. v. Goodman*, (Tex. Civ. App.) 43 S. W. Rep. 580.

It was not the duty of defendant to volunteer information as to the departure and places of stopping of its trains, where it may be had upon application. *Missouri &c. R. Co. v. Walden*, (Tex. Civ. App.) 46 S. W. Rep. 87.

One may rely on the authority of one, other than the ticket agent, to sell tickets with the understanding that a train will stop at a certain place, where he had been permitted to do so with defendant's knowledge. *Gulf &c. R. Co. v. Moorman*, (Tex. Civ. App.) 46 S. W. Rep. 662.

Evidence as to subsequent violation of a rule forbidding passengers in freight trains was inadmissible on the question of plaintiff's excuse for acting upon the conductor's apparent authority to permit him to ride. And prior violations are not sufficient excuse where the company was making all reasonable effort to enforce the rule. *San Antonio &c. P. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 511.

It was for the jury to say whether the depot master of a connecting carrier was negligent in putting plaintiff's wife and children into a wrong car after they had waited some time to make connections; the test to be applied in such a case was ordinary care, as the relation of carrier and passenger had ceased, while they were at the depot. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 59 S. W. Rep. 844.

The passenger's ticket and not his statement, is the conductor's guide:

passenger's remedy in case wrong ticket is sold him, is for negligent mistake of ticket agent. *Poulin v. Canadian Pac. R. Co.*, 6 U. S. App. 298.

Under regulation requiring conductor to demand fare of persons without tickets, no liability attaches if passenger, riding on special agreement, which conductor cannot recognize, is removed from the train on refusal to pay fare. *Hall v. Memphis &c. R. Co.*, 9 Fed. Rep. 585.

That a ticket agent at a union station acts for other companies also, does not prevent his representations as to running of trains from binding defendant. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

One may rely on the information of a carrier concerning the feasibility of a trip which it is its duty to be posted upon. *Smith v. North American Transp. &c. Co.*, 20 Wash. 580; s. c., 44 L. R. A. 557.

#### (j). MISTAKE OF BRAKEMAN.

An agent pointed to a train that would take the plaintiff to Lyons; the passenger took it but did not make the necessary change. The defendant was not liable for the miscarriage, if it used means to inform the passenger suited to a person of ordinary intelligence. After passing the junction the conductor offered to send the passenger back to it, in time to make his way to Lyons. Upon the passenger's refusal, the defendant had the right to eject him. *Barker v. N. Y. C. R. Co.*, 24 N. Y. 599, aff'g judg't for def't.

See *Tarbell v. North Cent. R. Co.*, 24 Hun, 50.

Direction to cross the track to get a train in connection with information as to time of its arrival gave no warranty of safety in doing so. *Roberts v. New York &c. R. Co.*, 175 Mass. 296.

A brakeman is authorized, though not directed by the conductor, to give notice of a deviation as to route. *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

Plaintiff on defendant's train by mistake, and put off at a flag station on the road she wished to go on, could recover if it were proven that upon entering defendant's train she showed her ticket to the brakeman. *Patry v. Chicago &c. R. Co.*, 77 Wis. 218.

One who showed her ticket to brakeman or conductor, and was helped on the train by him is not a trespasser, and may have an action for removal from the train at an inconvenient place, although the ticket was over a different road. *Patry v. Chicago &c. R. Co.*, 82 Wis. 408.

#### (k). TICKETS FOR STATION WHERE TRAIN DOES NOT STOP.

The conductor of an express train may lawfully stop the train and expel a passenger, who holds a ticket to a station between the place

where fare is demanded and the first stations at which the train, by the published time tables, is to stop, if such passenger refuses to pay the fare which, in addition to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so, notwithstanding the train may occasionally stop at the station for which the passenger has a ticket, if at the time the fare is demanded, facts do not exist which call for its stoppage there.

When the company acts in good faith it is only liable for actual damages. *Fink v. Albany & S. R. Co.*, 4 Lansing, 147, granting new trial after verdict for plaintiff.

Where the roads are separate though operated under one management, a passenger is entitled in the absence of express contract, to stop over at the end of each road, so long as he comes within the general time limit. *Spencer v. Lovejoy*, 96 Ga. 657.

Tender by a friend of fare to next stopping place beyond plaintiff's destination, makes ejection for non-payment actionable and defendant cannot justify it on the ground that plaintiff started an altercation with the conductor. *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189.

A complaint alleging wrongful ejection after tender of fare to a certain point, without showing that said point is a scheduled stopping place for the train, held defective. *Lake Erie &c. R. Co. v. Lucas*, 18 Ind. App. 239.

A train is not bound to stop contrary to its schedule. An intending passenger must inform himself before getting aboard. *Louisville &c. R. Co. v. Miles*, 100 Ky. 84.

Regulations limiting the stoppage of certain trains to certain stations is reasonable, where adequate provision is made for the others, and a passenger himself is bound to seek the information where it may be had upon application. *Evansville &c. R. Co. v. Wilson*, 20 Ind. App. 5.

A passenger, who, on mistaken information of a ticket agent, boards a train not scheduled to stop at his destination, must alight and change cars when correctly informed by the conductor. If he refuses and is ejected he can recover for the misdirection of the ticket agent only and not for his expulsion. *Turner v. McCook*, 77 Mo. App. 196.

If plaintiff's destination is not one at which his train is scheduled to stop, he has no right of action for the failure to stop there. *Wells v. Alabama &c. R. Co.*, 67 Miss. 24.

See, however, *Florida &c. R. Co. v. Katz*, 23 Fla. 139; where passenger traveled on mileage book and train failed to make his station.

Where plaintiffs on a train, scheduled to stop at their destination, were directed to go into a rear car, which was shifted to a through train, they

were allowed to recover for an expulsion. *Chicago &c. R. Co. v. Spirk*, 51 Neb. 167.

It was negligence to board a train, which one knows does not stop at his station, in reliance upon the statement of conductor of another train, that, if he did so, the train would be obliged to stop for him. *Allen v. Wilmington &c. R. Co.*, 119 N. C. 710.

Refusal to pay fare to the station beyond, justifies ejection at the first station short of plaintiff's destination, where the regulation prohibiting the stopping of such train at his destination is proper. To establish a special contract with a ticket agent contrary to the company's general regulations requires clear evidence of intention on both sides. *Noble v. Atchison &c. R. Co.*, 4 Okla. 534.

A passenger with a ticket to Whitesburg, Tenn., on a mail train that did not stop at Whitesburg, but at a junction some miles beyond, must pay fare from Whitesburg to the junction and cannot recover for being put off the train at the junction. *Trottinger v. R. Co.*, 11 Lea, (Tenn.) 533.

One who takes passage on a train, under a regulation that it will not stop at a certain place, must get off at a regular stopping place, and cannot recover if the conductor puts him off at such a place. *I. & G. &c. R. Co. v. Hassel*, 62 Tex. 256.

Where a conductor has frequently made agreements as to stopping at certain stations pursuant to an apparent authority to do so, though against the company's rule, plaintiff was warranted in relying thereon. *Texas &c. R. Co. v. Elliott*, 22 Tex. Civ. App. 31.

Where a ticket is purchased for a certain train, purchaser may recover for being ejected from it and compelled to ride on another. *Alley v. Gulf &c. R. Co.*, (Tex. Civ. App.) 35 S. W. Rep. 735.

A person who has a ticket on a train which does not stop at his destination cannot recover for removal at the station next before his stopping place. *Texas &c. R. Co. v. Ludlow*, 57 Fed. R. 481.

Conductor held to have no apparent authority to change schedule and bind the company by promise to stop, though he had accepted fare. *Schiffler v. Chicago &c. R. Co.*, 96 Wis. 141.

(1). TICKET TAKEN UP OR CANCELLED ON TRAIN FOR POINT SHORT OF PASSENGER'S DESTINATION GIVES NO RIGHT TO RIDE ON SUBSEQUENT TRAIN.

A regulation of a carrier required the passenger, either to present evidence to the conductor of a right to a seat or to pay fare. This was reasonable and for non-compliance a passenger might be lawfully put off the train, although the conductor of a previous train had unlawfully taken up the ticket.

Passenger's ticket was taken upon one train, that did not go as far as his destination, passenger took next train, explained to conductor how his ticket had been taken up, but was expelled for non-payment of fare. *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295, rev'g judg't for pl'ff.

See *Shelton v. Lake Shore & E. R. Co.*, 29 Oh. St. 214. But see in opposition to this doctrine, *Pittsburg & E. R. Co. v. Hennigh*, 39 Ind. 509; *Jerome v. Smith*, 48 Vt. 230; *Palmer v. Charlotte & E. R. Co.*, 3 S. C. 580.

A ticket from "St. Paul to Anoka," is not good, if having been punched on one of defendant's trains running to Minneapolis only, it is offered on another which plaintiff boarded at Minneapolis. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210.

See *O. C. & E. R. Co. v. Clark*, 22 Pa. St. 231; *Dietrich v. Penn. R. Co.*, 71 id. 482; *McClure v. P. W. & E. R. Co.*, 34 Md. 532; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Hatten v. R. Co.*, 39 Oh. St. 375; *State v. Overton*, 4 Zab. (N. J.) 435; *Cleveland & E. R. Co. v. Bartram*, 11 Oh. St. 457.

Holder of a through ticket entered a train covering only a part of the distance; the ticket having expired he could not thereafter enter a through train, although it might have been the one he should have taken in the first instance. *Gulf & E. R. Co. v. Henry*, 84 Tex. 678.

#### (III). TICKET FOR A CONTINUOUS PASSAGE.

Ticket "good for this day and train only," and dated on the day issued, can be used to ride on any train on such day, but one cannot ride part of the way on one train, and the other part on another train without being liable to expulsion. *Gale v. D., L. & W. R. Co.*, 7 Hun. 670, aff'g nonsuit.

*Pier v. Finch*, 24 Barb. 516; *Beebe v. Ayres*, 28 id. 275; *Elmore v. Sands*, 54 N. Y. 515.

Ticket stating, "good until three days after date, excursion ticket," does not allow stop-over, and passenger cannot take train that stops short of the place to which he desires to go. *Terry v. Flushing, N. S. & E. R. Co.*, 13 Hun. 359, aff'g judg't for pl'ff entered on nonsuit.

Citing *Elmore v. Sands*, 54 N. Y. 515; *Beebe v. Ayres*, 28 Barb. 275; *Gale v. D., L. & W. R. Co.*, 7 Hun. 670; *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn. 432.

Passenger purchasing tickets was shown one marked "special first-class continuous passage," and also one not marked in that regard; the latter he accepted. That did not give him the right to stop at intermediate station. The ticket is evidence of the contract. *Kelsey v. Michigan Central R. Co.*, 28 Hun. 160, rev'g judg't for pl'ff.

**From opinion.**—"The plaintiff was bound to a continuous passage over the defendant's road, that is, the plaintiff could not enter one train of the defendant's

cars and then leave it and subsequently take another. *Auerbach v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 281. See, also, *Kessler v. Same*, 61 id. 538. These decisions accord with numerous adjudications on the same subject. All show that the omission of a stipulation for a continuous passage affords no implication of a right to break the journey on either of the roads before reaching the terminus thereof, without the assent of the carrier on the particular road. *Barker v. Coffin*, 61 Barb. 556; *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 100; *Gale v. D., L. & W. R. Co.*, 7 Hun, 670; *Terry v. The Flushing, N. S. & C. R. Co.*, 13 id. 359; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; *Vankirk v. Pennsylvania R. R. Co.*, 76 id. 66."

Permission of a conductor to stop over at Little Falls without endorsement on the ticket to that effect, does not give right to stop over at Amsterdam as well. *Denry v. N. Y. &c. R. Co.*, 5 Daly, (N. Y.) 50.

Where there is no limitation on the face of a ticket as to its use and no notice of the rules of the company prohibiting the giving of stop-over privileges except at points of transfer, other than the wording on the ticket "subject to the rules of the company," the apparent authority of the conductor to do so, binds the company. *Ray v. Cortland &c. T. Co.*, 19 App. Div. 530.

That a ticket for a number of single trips provided that they be continuous, did not prevent entering or leaving at an intermediate station upon surrendering a coupon for one of the trips. *Georgia R. &c. Co. v. Clarke*, 97 Ga. 706.

Passenger on a delayed train got off because he was sick and spent the night at a hotel near by; on the following day he entered another of defendant's trains and proffered conductor's check of day before or price of ticket, but conductor demanded train rate. Company is liable in ejecting such a passenger if conductor knew of these facts. *Lou v. Nash. R. Co.*, 11 Ky. L. R. 419.

A ticket "not good to stop off" on, will not avail a passenger who knowingly takes a train not going as far as his destination. *Johnson v. Philadelphia &c. R. Co.*, 63 Md. 106.

A ticket not limited to any train authorized a passenger to make his journey upon a train not contemplated for that class of tickets, unless the rule were brought to the knowledge of the passenger. *Maroney v. Old Colony &c. R. Co.*, 106 Mass. 153.

After unauthorized stop-over and failure on resuming journey, to pay fare, carrier has a lien on passenger's baggage. *Roberts v. Kochler*, 30 Fed. Rep. 94.

#### (n). TICKETS LIMITED IN TIME.

A carrier may insist that passenger ticket shall be used upon the day issued, and that every passenger, when entering a train, shall pay his fare or



produce a ticket showing his right to ride upon that train. The ticket bore the stamp "good this day only," and the date was stamped thereon. An attempt to ride on any other day justified expulsion. *Elmore v. Sands*, 54 N. Y. 512, aff'g judg't for pl'ff.

Citing *Boston &c. R. Co. v. Proctor*, 1 Allen, 267; *Barker v. Coffin*, 31 Barb. 556; *Boyce v. H. R. R. Co.*, 61 id. 611; *Shed v. Troy &c. R. Co.*, 40 Vt. 88; *Dietrich v. Pa. R. Co.*, 71 Penn. St. 432.

Plaintiff attempted to ride on a limited ticket, the time having expired. Rightly ejected, although baggage-master had checked baggage and punched ticket. *Wentz v. Erie R. Co.*, 3 Hun, 241, rev'g judg't for pl'ff.

Where plaintiff, having notice of a time limit, is ejected for offering the ticket, he cannot complain, especially, where, immediately thereafter, he re-enters and pays his fare. *McGhee v. Drisdale*, 111 Ma. 597.

Passage must be begun but need not be completed before the expiration of the stipulated time. *Lundy v. Central Pac. R. Co.*, 66 Cal. 191.

Ticket issued during the day of December 6th and limited to be used within two days from the date sold did not expire until twelve o'clock on the night of December 8th. *Georgia &c. R. Co. v. Bigelow*, 68 Ga. 219.

*Evans v. St. Louis &c. R. Co.*, 11 Mo. App. 462.

Where a ticket issued by a company from which defendant was organized was still within the time limit, ejection was improper. *Tompkins v. Augusta &c. R. Co.*, 102 Ga. 436.

A time limit, prescribed in consideration of a reduced fare, is binding. *Central &c. R. Co. v. Ricks*, 109 Ga. 339; *Southern R. Co. v. Howard*, 111 id. 842.

Where a regulation limiting time for passage gives ample opportunity for safe convenient transit, it is proper and becomes a part of the contract of carriage. *Southern R. Co. v. Watson*, 110 Ga. 681.

Plaintiff, who purchased a lay-over ticket, good for thirty days, was rightfully ejected from defendant's train, if after the expiration of that time he took passage on the same and refused to pay the regular fare. *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390.

Company is not estopped because ticket had been used several times after it had expired. *Sherman v. R. N. &c. R. Co.*, 40 Iowa. 45.

That plaintiff regarded a limitation of time on a ticket as unreasonable did not justify him in boarding a train with such a ticket knowing that the time limit had expired. *Trezona v. Chicago &c. R. Co.*, 107 Iowa. 22.

In the absence of a general custom, the acceptance of one ticket after

its period of limitation had expired was not a waiver of the time limit condition in another. *Hanlon v. Illinois C. R. Co.*, 109 Iowa, 136.

A ticket dated and marked "good only two days after date" ceases to be valid at expiration of two days. *Boston &c. R. Co. v. Proctor*, 83 Mass. 267.

*Penn. R. Co. v. Hine*, 41 Oh. St. 276; *Pennington v. Wilmington &c. R. Co.*, 62 Md. 95.

Regulation of a street car company that a transfer ticket from one route to another shall not be valid unless used within fifteen minutes of time it was issued, is reasonable. *Heffron v. Detroit &c. R. Co.*, 92 Mich. 406.

Where the period of limitation appears by the face of the ticket to have expired and the conductor has no means of knowing that the ticket agent has made a mistake, the passenger cannot increase his damages by inducing an ejection by force. *Krueger v. Chicago &c. R. Co.*, 68 Minn. 445.

There was no recovery, where one attempted to ride on a ticket, the time limit of which had expired. *Illinois C. R. Co. v. Marlett*, 75 Miss. 956.

Where the time limit of a ticket by its face has expired, an excuse to the conductor that the agent refused to identify him in time to enable him to use the ticket did not make ejection improper. Under the wording of the ticket that it shall not be good "later than the date" stamped, the journey must be completed before the expiration of the time limit, provided no delay due to inevitable accident or negligence of the carrier intervenes. *Mitchell v. Southern R. Co.*, 77 Miss. 917.

Mileage ticket, good for six months, is void after expiration of that time, although the mileage is not exhausted. *Lillis v. St. Louis &c. R. Co.*, 60 Mo. 646.

A full fare ticket gives no stop-over privileges. *Louisville &c. R. Co. v. Klyman*, (Tenn.) 67 S. W. Rep. 472.

A provision that a ticket be used "on and from" a date, requires the journey to be commenced on that day, though it may continue through others. *Demille v. Texas &c. R. Co.*, 91 Texas 215; aff'g s. c., 41 S. W. Rep. 147; *Texas &c. R. Co. v. Powell*, 13 Tex. Civ. App. 212.

Though the ticket is so mutilated as to make it uncertain whether it has expired, the conductor is justified in refusing it, only if, in the exercise of reasonable diligence, he is satisfied it is not good. *Houston &c. R. Co. v. Crone*, (Tex. Civ. App.) 37 S. W. Rep. 1074.

Where a ticket is expressly limited as to time in consideration of reduced fare and contains a statement that no agent can waive a condition, it cannot be presented to a connecting carrier, in the course of the

journey, a day after the limit has expired, though the agent who issued it said that it would be good. *Landers v. Missouri &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 528.

Plaintiff contracted for a stop-over privilege, which, however, did not appear on face of the ticket. Conductor denied the privilege and took up the ticket. Plaintiff resumed journey on later train, insisting on her contract without a ticket, and was ejected. Was held entitled to recover for the ejection, and was not negligent *per se* in attempting to ride without a ticket. *Scofield v. Pennsylvania R. Co.*, 112 Fed. 855.

#### (c). NON-TRANSFERABLE TICKET.

Where one receives the power to sell or transfer a ticket, the use of which is expressly limited in the ticket to the first purchaser, it can be sold but once, and used only by the vendee. *Davis v. South Carolina &c. R. Co.*, 107 Ga. 420.

A special ticket signed by the purchaser restricting use to him is non-transferable, and a purchaser from him is not warranted in relying on the statement of the agent that it will be good in his hands; especially where the ticket itself denies the authority of the agent to alter its conditions. *Coyle v. Southern R. Co.*, 112 Ga. 121.

That one conductor failed to discover an imposition by a holder of a ticket, restricted to the original purchaser, and accepted it, was not such a waiver as prevented a second conductor, on discovering it, to take it up and demand the fare. *Dangerfield v. Atchison &c. R. Co.*, 62 Kan. 85.

No restriction appearing, a round trip ticket may be sold after it has been used one way, and the purchaser is a passenger on the train. *Carsten v. Northern Pac. R. Co.*, 41 Minn. 454.

A ticket restricted to personal use is not forfeited, where the party with whom the purchaser leaves it permits others to use it without authority. *Mueller v. Chicago &c. R. Co.*, 75 Minn. 109.

Condition for forfeiture on presentation by another than the purchaser, held valid. *Eastman v. Maine C. R. Co.*, 70 N. H. 240.

One is not entitled to a receipt upon surrendering a non-transferable ticket as a condition to payment of his fare. *Houston &c. C. R. Co. v. Ritter*, 16 Tex. Civ. App. 482.

A carrier may take up a ticket, by its terms non-transferable in consideration of reduced rates, when presented by one not the purchaser. *Lerinson v. Texas &c. R. Co.*, 17 Tex. Civ. App. 617.

In the absence of the stipulation required by statute as to limitation of transfer on a ticket it is transferable. *International &c. R. Co. v. Ing*, (Tex. Civ. App.) 68 S. W. Rep. 722.

In consideration of a reduced rate carrier may require that its ticket be non-negotiable. *Delaware &c. R. Co. v. Frank*, 110 Fed. Rep. 689.

A cut rate ticket with provision that it shall be void if presented by any but the original holder will not avail a purchaser in good faith relying on the statement of unauthorized agent that it would be accepted. *Drummond v. Southern Pac. R. Co.*, 7 Utah, 118.

#### (p). LOST TICKET.

Passenger should be allowed a reasonable time to find lost ticket; time between two stations is a reasonable time. *Chicago &c. R. Co. v. Willard*, 31 Ill. App. 435.

One on a train is not a trespasser because he cannot find his ticket; he becomes a trespasser, however, upon failure to produce his ticket, or pay his fare. *Ham v. Del. & H. Canal Co.*, 142 Pa. St. 617.

Plaintiff under mistake as to amount of fare demandable, tendered the fare he was used to paying and declined to tender more. A reasonable time should be given him to tender the amount demanded. *Texas &c. R. Co. v. Bond*, 62 Tex. 442.

Passenger should be allowed a reasonable time to find his ticket; what is reasonable time is for the jury. *International &c. R. Co. v. Wilkes*, 68 Tex. 617.

#### (q). DETACHING COUPON FROM TICKET.

A ticket not good if detached, may be detached by passenger in the presence of conductor. *Chicago &c. Co. v. Holdridge*, 118 Ind. 281.

See *Norfolk &c. v. Wyson*, 82 Va. 250.

Plaintiff's coupon book stated that coupons were invalid if detached. He detached one and presented it but refused to show the book. He did not offer, nor the conductor demand, cash fare. He was not permitted to recover for ejection. *United R. &c. Co. v. Hardesty*, (Md.) 51 Atl. Rep. 406.

Condition that detached coupons shall not be accepted by conductor, is binding upon the passenger. *Boston &c. R. Co. v. Chipman*, 146 Mass. 107.

*Louisville &c. R. Co. v. Harris*, 9 Lea, (Tenn.) 180.

Detachable ticket with words "not good for passage" on one part, and "if detached" on the other side, is valid although detached, if both parts be presented together. *Wightman v. Chicago &c. R. Co.*, 73 Wis. 169.

## (r). FAILURE TO STOP TRAIN AT SCHEDULED STATION.\*

Refusal of carrier to carry the plaintiff, a dancing master, on a train scheduled to leave at a certain time, by which he failed of an appointment, renders it liable. *Savannah &c. R. Co. v. Bonaud*, 58 Ga. 180.

Failure of a conductor to discover before reaching a flag station whether there is a passenger to alight thereat, does not excuse the latter, upon seeing that he has been overlooked, in failing to call attention to it. *Central &c. R. Co. v. Dorsey*, 106 Ga. 826.

Failure to stop a train at a station as scheduled, by reason of which plaintiff was left, gives right of action. *I. B. &c. R. Co. v. Birney*, 71 Ill. 391.

Regulation of not stopping train at scheduled station cannot be established without notice to the public. *Louisville &c. R. Co. v. Cayce*, (Ky.) 34 S. W. Rep. 896.

A carrier is chargeable with damages for delay in running its train according to schedule time, and any person sustaining damage from a failure to run its trains upon such time is entitled to recover for the same. 2 Woods Railway Law p. 1174, sec. 312.

When company has advertised starting of trains in newspaper, it cannot change same by posting hand bills at stations; and when one has bought a ticket and presents himself to go, he may recover damages for delay.

Person hired livery to carry him, and damages, if liable at all, were stipulated at \$10. *Sears v. Eastern R. R. Co.*, 14 Allen 433.

See *Buckmaster v. Gt. East. Ry. Co.*, 23 Law T. Rep. (N. S.) 471.

Where, however, without fault of defendant its train was over-loaded, and it was obliged to leave without the plaintiff but returned later and transported him, no action lies. *Gordon v. R. Co.*, 52 N. H. 596.

Citing *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; *Sears v. Eastern R. R. Co.*, 14 Allen, 433; *Lafayette &c. R. Co. v. Sims*, 27 Ind. 59; *Dunlap v. Edin. &c. R. Co.*, 16 Jurist, pt. 2, 497-8; *New Orleans &c. R. Co. v. Hurts*, 36 Miss. 660; *Heiar v. McCaughan*, 32 Miss. 17; *Angell on Carriers*, 4th ed. sec. 527 (a). See *Glabholm v. Hays*, 2 Man. & G. 257; *Crockwit v. Fletcher*, 1 Hurl. & Norm. 893; *Howard v. Cobb*, 19 Monthly L. Rep. 377; *Hawcroft v. Great Northern R. Co.*, 16 Jurist. 196; 8 Eng. L. & Eq. 362; L. J. vol. 30, N. S.; vol. 21 Q. B. 178.

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\* NOTE.—"Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junction of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from, and to, such places, on the due payment of the fare or freight legally authorized therefor. No preference for the transaction of business upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations or corporations competing in the same business, or in the business of transporting property for themselves or others." Sec. 34, chap. 565, Laws of New York, 1890.

## (s). CARRYING PASSENGER BEYOND DESTINATION.\*

Passenger may recover, where a passenger was carried a mile beyond his destination. *East Tenn. &c. R. Co. v. Lockhart*, 79 Ala. 315.

*Mobile &c. R. Co. v. McArthur*, 43 Miss. 180.

No recovery was allowed a passenger carried beyond her destination if she knew that the train was scheduled not to stop there; notwithstanding the conductor had agreed to let her off. *Alabama &c. R. Co. v. Carmichael*, 90 Ala. 19.

A female passenger carried several hundred yards beyond her station and obliged to walk back in the rain with a baby in her hands, and encumbered with a valise, may recover exemplary damages. *Alabama &c. R. Co. v. Sellers*, 93 Ala. 9.

Where a conductor promised to inform plaintiff when she reached her destination she was not chargeable with failure to listen for its announcement. *Louisville &c. R. Co. v. Quick*, 125 Ala. 553.

Where plaintiff fails to avail herself of the reasonable opportunity for alighting at her destination, she can not complain of being put off a quarter of a mile beyond it, defendant not being obliged to take her back to it. *St. Louis &c. R. Co. v. Lewis*, 69 Ark. 81.

Announcement of the station is sufficient; personal information is not necessary. *Southern R. Co. v. O'Bryan*, (Ga.) 42 S. E. Rep. 42.

See, also, *Southern R. Co. v. O'Bryan*, 112 Ga. 127.

Passenger may recover where train failed to stop and plaintiff was carried beyond his destination. *Chicago &c. R. Co. v. Fisher*, 66 Ill. 152.

One may recover compensatory damages for being negligently carried beyond her destination. *Louisville &c. R. Co. v. Jackson*, (Ky.) 36 S. W. Rep. 173.

Passenger who alights from a train after being negligently carried past her station without requiring the conductor to back cannot complain because the place was an improper one for her to alight at. *Louisville &c. R. Co. v. Keith*, (Ky.) 58 S. W. Rep. 468.

Conductor promised to see that a girl of eight got off at her destination. She was helped off at an intermediate station by one not shown to be the conductor. Carrier was not liable. *Louisville &c. R. Co. v. Jordan*, (Ky.) 66 S. W. Rep. 27.

Holder of a ticket to a flag station failed to notify the conductor and was carried by. She was not allowed to recover for the mere inconvenience, having suffered no other damage. *Pence v. Louisville &c. R. Co.*, (Ky.) 61 S. W. Rep. 905.

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\* NOTE.—For damages for failure to duly carry, see "Damages."

Fear that still more passengers will board a crowded train was not a "legal or just excuse" within a statute imposing a penalty for failure to discharge a passenger at his station without such an excuse. *Hoyt v. Cleveland &c. R. Co.*, 112 Mich. 638.

The plaintiff who was sick on defendant's train sued for failure to back the train after learning that he had been unable to get off at the regular stopping place; held, that it was the duty of the plaintiff to have notified conductor if he wished to have the train delayed at the station; and for failure to do so he could not recover. *New Orleans &c. R. Co., v. Statham*, 42 Miss. 607.

The plaintiff's train had passed several hundred yards beyond the station and upon failure to back it as he requested, plaintiff got off and was injured on the ice; the company was liable. *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466.

See, also, *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346.

No recovery was allowed a plaintiff who was asleep when the train reached his station and being told, on awakening, that he was still near it, got out and was obliged to walk a mile back over the track. *Wilson v. New Orleans &c. R. Co.*, 68 Miss. 9.

Promise to look after a small boy did not bind the company so as to make it liable for carrying him beyond his destination, especially, where he was safely returned the same day. *Gage v. Illinois C. R. Co.*, 75 Miss. 17.

Defendant failed to stop at a flag station which plaintiff's ticket called for and refused to back up to it. It was for the jury to say whether plaintiff was contributorily negligent in walking back on the track at night, unfamiliar with the surroundings, though he could not go off it on account of water on each side. *Yazoo &c. R. Co. v. Aden*, 77 Miss. 382.

The loss of time, inconvenience and expense in traveling back may be recovered for, if plaintiff was not imprudent in leaving the train under the circumstances. *Owens v. Wabash R. Co.*, 84 Mo. App. 113.

Conductor of a trolley car was not negligent *per se* in directing one, carried past his destination, to walk on the track which crossed a trestle. *Camden &c. R. Co. v. Young*, 60 N. J. L. 193.

Plaintiff is entitled to at least nominal damages for being carried by, as failure in the statutory duty to stop is negligent *per se*. *Cable v. Southern R. Co.*, 122 N. C. 892.

Nonsuit was proper, where plaintiff was carried by her destination to next stopping place, but suffered only such injuries as she would have suffered had she gotten off at her proper station. *Smith v. Wilmington &c. R. Co.*, (N. C.) 41 S. E. Rep. 481.

Where one had been carried by through his own negligence and was let off at his own request and for his accommodation he was not permitted to recover for injuries received in walking back upon the track. *Fisher v. Paxon*, 182 Pa. St. 457.

Falling into a ditch at night while looking for a road to a friend's home, is embraced in damages for negligently carrying one past his destination. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 32 S. W. Rep. 710.

Plaintiff was not permitted to complain of being carried by, where the station was announced and a reasonable time allowed to alight, though the conductor failed to inform her, as he promised to do. *St. Louis &c. R. Co. v. McCullough*, (Tex. Civ. App.) 33 S. W. Rep. 285.

So where passenger failed to hear the announcement on account of his preoccupation. *Central &c. R. Co. v. Hoard*, (Tex. Civ. App.) 49 S. W. Rep. 142; *St. Louis &c. R. Co. v. Ricketts*, 22 Tex. Civ. App. 515; *Houston &c. R. Co. v. Cohn*, id. 11 (asleep when station called).

A passenger, after being negligently carried by, alighted without objection and in walking back on the track fell through a bridge. He was not allowed to recover. *Gulf &c. R. Co. v. Jordan*, (Tex. Civ. App.) 33 S. W. Rep. 690.

Defendant was held liable for carrying a young girl two miles beyond her station, putting her off at 2 o'clock on a damp morning with a twenty-pound bundle. *International &c. R. Co. v. Sampson*, (Tex. Civ. App.) 64 S. W. Rep. 692.

Where plaintiff asked to be put off at a given place, where she had a conveyance waiting for her, defendant was chargeable with notice that, if carried by, such conveyance might not be there when she returned. *Missouri &c. R. Co. v. Hennessey*, 20 Tex. Civ. App. 316.

In the absence of statute, a carrier is not *per se* negligent in failing to announce stations. *Houston &c. R. Co. v. Goodyear*, (Tex. Civ. App.) 66 S. W. Rep. 862.

Where plaintiff knew that the train was at her station she could not complain of a conductor's failure to give her notice thereof as promised. *Missouri &c. R. Co. v. Miles*, 20 Tex. Civ. App. 510.

Passengers compelled to go out of their way by reason of company's failure to carry them to their destination, may recover for the inconvenience suffered. *Hobbs v. London &c. R. Co.*, L. R. 10 Q. B. 111.

#### (1). SPECIAL TICKETS.

Where company's rule provides for special tickets for freight trains, conductor is justified in ejecting passenger from such train on failure to present a freight ticket. *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110.



*Indianapolis &c. R. Co. v. Kennedy*, 77 Ind. 507; *Falkner v. Ohio &c. R. Co.*, 55 Ind. 369.

A commutation ticket containing red and black figures representing miles on the eastern and western division respectively of defendant railroad, and providing for the canceling of the same according to which division the passenger rode on, will not permit him to ride on either division when all the figures representing miles on that division have been canceled. *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79.

A rule requiring persons riding on freight trains to present a written permit from one in authority is reasonable. *Thomas v. Chicago &c. R. Co.*, 72 Mich. 355.

But where custom had been to take money for fare in freight trains, passengers are entitled to notice of change. *Lane v. E. T. &c. R. Co.*, 5 Lea. (Tenn.) 124.

*Lake Shore &c. R. Co. v. Greenwood*, 29 P. F. Smith (Pa.) 373. See *Jones v. Wabash &c. R. Co.*, 17 Mo. App. 158.

A station agent has no authority to abrogate a rule of his company requiring permits on freight trains, and, where a passenger with knowledge of the rule, relies on the agent's statement that he could ride without one, he can not complain of ejection. *Houston &c. R. Co. v. Stell*, (Tex. Civ. App.) 67 S. W. Rep. 537.

Plaintiff may recover for being ejected for failure to pay cash, where he was informed by the agent that his regular ticket entitled him to passage on the freight train, which arrangement the conductor assented to before he got aboard. *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592.

#### (11). AT WHAT PLACE AND UNDER WHAT CIRCUMSTANCES PASSENGERS MAY BE EJECTED.

Where a person was in a condition of sickness accompanied by nausea, which necessitated his violating either a rule against spitting on the floor or one against standing on the rear platform, he was in such a condition as justified his being expelled from the car, especially where his appearance gives no indication of his condition. *Montgomery v. Buffalo R. Co.*, 165 N. Y. 139; aff'g s. c., 24 App. Div. 454.

Drunken passenger could not pay fare or show ticket; his companion offered to pay for him; conductor demanded ticket and put him off in a cut twenty feet deep. He traveled 1,500 feet, and then fell or laid down on the track and was killed by the following train. Expulsion was unlawful and the defendant was liable as the conductor was bound to receive the money. (*O'Brien v. N. Y. Cent. &c. R. Co.*, 80 N. Y. 236.) *Guy v. N. Y., O. & W. R. R. Co.*, 30 Hun 399, rev'g judg't for def't on nonsuit.

Question properly left to jury whether farm house twenty-five or thirty rods from crossing, which was itself five rods away from the place, where the passenger was expelled on a dark night for non-payment of fare, was "near any dwelling house," as provided by statute. *Loomis v. Jewett*, 35 Hun, 313, aff'g judg't for pl'ff.

Passenger was ejected from train for non-payment of fare over a mile from the station, and about 115 rods from the nearest accessible dwelling on a dark, cold and stormy Saturday night at 7.30 o'clock. On the Monday following, at 7.30, he was found on the opposite side of the track, dead from suffocation and drowning in partially frozen mud and water. If more than necessary force were used, whereby he was rendered *incapable of taking care of himself, the defendant was liable*. Distance from farm house not discussed. The case seems to have proceeded upon the ground that the passenger was too drunk to be ejected, and that unnecessary force was used. *Gill v. P. R. R. Co.*, 37 Hun, 107, rev'g judg't for pl'ff.

See, as to intoxication, *post*, p. 703.

One has not a right to board a car and ride on the front platform in violation of an ordinance because there is no room inside for him; he is bound to wait until a car comes into which he can enter. But his transfer must be returned before he can be legally ejected. *Hanna v. Nassau Electric R. Co.*, 18 App. Div. 137.

Ejection of one, irresponsible from intoxication, at night, where he must follow a roughly ballasted track, with a bridge over a creek on one side and cattle guards on the other, was improper. *Louisville &c. R. Co. v. Johnson*, 108 Ala. 62; s. c., 31 L. R. A. 372.

Failure to purchase a ticket before boarding, as required by rule of company, is virtually a refusal to pay fare and requires ejection at a usual stopping as provided by statute in cases of refusal to pay fare. *McCook v. Northrup*, 65 Ark. 225.

And, though plaintiff has boarded at a place where defendant does not receive passengers, the statute applies, after being treated as a passenger by the conductor's demanding the fare. *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602.

Such statute applying only to ejection for non-payment of fare does not apply where plaintiff is carried by, by reason of her failure to alight at her destination. *St. Louis &c. R. Co. v. Lewis*, 69 Ark. 81.

Ejection for failure to possess a ticket is within the scope of the authority of a brakeman charged with the duty of preventing entry without one. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

Passenger must be ejected at a regular station, and an action will lie

if he be ejected at any other. *Toledo &c. R. Co. v. Patterson*, 63 Ill. 304.

See, however, *Railroad Co. v. Skillman*, 39 Oh. St. 444.

Where a passenger, too intoxicated to understand that he must pay extra fare if he would ride beyond his destination, was lawfully removed from train, on failure to pay, and subsequently wandered upon the track, and was killed, the company was not liable. *McClelland v. Louisville &c. R. Co.*, 94 Ind. 276.

See *R. Co. v. Valleley*, 32 Oh. St. 345.

But, expelling a child from a train, two miles from its home, and too young to take care of itself, without putting it in any one's care, is negligence in a conductor. *Indianapolis &c. R. Co. v. Pitzey*, 109 Ind. 179.

That the train was not one which carried passengers did not prevent recovery where conductor compelled plaintiff to jump off in the dark and while train was moving. Plaintiff had boarded upon the agent's advice that it would carry him. *Indiana &c. R. Co. v. Ditto*, (Ind.) 64 N. E. Rep. 222.

Failure to return to the station, a distance of a mile and a half, instead of proceeding to his home, a distance of seven miles did not prevent recovery for an unlawful ejection of plaintiff on a dark, stormy night, without money in his pocket. *Atchison &c. R. Co. v. Lamoreux*, 5 Kan. App. 813.

Notwithstanding refusal of plaintiff to pay, if he was helpless from drink and the weather freezing, it was negligence in the company to expel him at a distance of a mile from a station. *Louisville &c. R. Co. v. Sullivan*, 81 Ky. 624.

It was held not negligence to eject a drunken passenger at a station where other passengers alighted, and at which there were hotel porters. *Brown v. Louisville &c. R. Co.*, 103 Ky. 211.

Where plaintiff entered a train with knowledge that it did not stop at his station, but did stop at a coal chute nearer his home than the station, that was regarded as his destination, and where he was put off there no recovery was allowed as for an ejection at a dangerous place. *Bohammon v. Southern R. Co.*, (Ky.) 65 S. W. Rep. 169.

Plaintiff was in charge of a child whose fare was demanded of plaintiff and refused; the father of the child was on the train and conductor had knowledge of this fact. Held, that plaintiff could recover from the company for expulsion from the train due to her refusal to pay the child's fare. *Philadelphia &c. R. Co. v. Hoeflich*, 62 Md. 300.

Putting off one, who is so drunk that he had to be aroused to pay his fare, at a place unlighted where street cars and teams are likely to pass,

three miles distant from shelter was negligence. *Hudson v. Lynn &c. R. Co.*, 178 Mass. 64.

Ejecting a trespasser at a distance from any dwelling or station is not actionable at common law; and if the conductor was animated by wantonness and malice he, and not the company, is liable. *Great Western R. Co. v. Miller*, 19 Mich. 305.

See, also, *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *St. L. &c. R. Co. v. Branch*, 45 Ark. 524; *R. Co. v. Skillman*, 39 Oh. St. 444.

It is proper for the jury to consider the question of defendant's negligence, when a conductor removed passenger who had fallen into a deep sleep to which he was subject, and, on awaking offered to show his ticket before he was put off. *Ferguson v. Michigan Cent. R. Co.*, 98 Mich. 533.

Where a drunken man after expulsion went with two others to a point 25 or 30 feet from the track it was held that the fitness of the place for expulsion was eliminated. *Gaukler v. Detroit &c. R. Co.*, (Mich.) 90 N. W. Rep. 660.

It was error to direct a verdict for defendant where it had ejected at a station two miles from his destination, one so sick that he had to be supported. *Eidson v. Southern R. Co.*, (Miss.) 23 South Rep. 369.

So it was negligence to eject a woman in a deserted swamp on a cold stormy night, where there was no station within three miles. *Jackson v. Alabama &c. R. Co.*, 76 Miss. 703.

Rule that street cars must not go back to a crossing after passing it, though properly signaled, is unreasonable, where the road is muddy, it is dark and rainy, and the car runs fifty feet beyond it. *Jackson Electric R. &c. Co. v. Lowry*, 79 Miss. 431.

Offer to pay at the time of stopping the train for ejection to avoid being put off should have been accepted. *Holt v. Hannibal &c. R. Co.*, 87 Mo. App. 203.

Where defendant not only accepted plaintiff while he was drunk, but negligently carried him by his station, it was liable for his ejection at the next station from which he was also ejected while waiting for a return train, where it was night, and cold and stormy, and there were no accommodations for travelers in the place. *Haug v. Great Northern R. Co.*, 8 N. D. 23; s. c., 42 L. R. A. 664.

Ejection held not the proximate cause of injury by another train. *Edgerly v. Union Street R. Co.*, 67 N. H. 312.

(v). PASSENGER CANNOT BE EXPOSED TO DANGER OR UNNECESSARY FORCE IN REMOVAL.

A passenger may resist an attempt to eject him from a *moving* car,

as if it were a direct attack on his life, and his resistance does not present a case of contributory negligence.

Defendant had right to remove passenger for non-payment of fare, but question was whether he was negligent in doing so.

The conductor told passenger that he must pay or leave the car, and without stopping the car, led him to the forward platform and forcibly ejected him therefrom. There was some conflict of evidence as to the extent of the deceased's resistance. It was dark and cold. There was an embankment of frozen snow and ice on each side of the track. As the deceased fell from the car he struck upon this embankment, rolled or slid down between it and the projecting part of the car, and was so crushed and jammed between the embankment and the car as it proceeded on its course, that he died in a few days afterwards at the hospital. *Sandford v. Eighth Ave. R. Co.*, 23 N. Y. 343, aff'g judg't for pl'ff.

See, also, *McCullen v. New York & C. R. Co.*, 68 App. Div. 269.

In an action for injuries resulting from being forcibly put off a street car plaintiff and two witnesses testified that the conductor accused him of being drunk and shoved him off with such force that he fell, and that he was sober. The conductor and driver testified that plaintiff was disorderly and refused to leave the car and that the conductor put him off, but did not pitch him off. Other witnesses, who did not see him until after he was ejected, testified as to his condition, and it appeared that the starter put him on another car to go and make a complaint if he desired. Held, that a verdict in plaintiff's favor would not be disturbed. *Caldwell v. Central Park, North & East River R. Co.*, 7 Misc. 67.

Though ejection was justified for refusal to pay fare, the rude and insulting manner of doing so was not. *St. Louis & C. R. Co. v. Brown*, 62 Ark. 254.

So where ejection was made with unnecessary force. *St. Louis & C. R. Co. v. Osborn*, 67 Ark. 399.

If conductor ejects one riding on freight train contrary to rule, violently, and uses obscene and insulting language, company is liable. *Western & C. R. Co. v. Turner*, 72 Ga. 292.

That the ejection was not within the scope of a servant's duties was no defense where unnecessary force was used. *Brunswick & C. R. Co. v. Bostwick*, 100 Ga. 96.

But such rule does not apply where the excessive force was the result of undue provocation. *City Electric R. Co. v. Shropshire*, 101 Ga. 33.

Defendant was liable, where, upon deceased's refusal to pay more money for his ride on the freight train, defendant's employé attempted to take it from him and threw him off while train was moving rapidly. *McIver v. Florida & C. R. Co.*, 110 Ga. 223.

Refusal to leave does not warrant wantonness in ejection. *Schaefer v. North Chicago Street R. Co.*, 82 Ill. App. 473.

Contributory negligence no defense where passenger was ejected with unnecessary force. *Chicago &c. R. Co. v. Bills*, 118 Ind. 221.

Excess of authority is no defense to the exertion of unnecessary force in making the ejection. *Lake Erie &c. R. Co. v. Matthews*, 13 Ind. App. 355.

Where one is unlawfully and forcibly ejected the doctrine of contributory negligence does not apply. *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123.

Rule of the company prohibiting passengers from riding on freight trains unless they present their tickets, did not justify conductor in ejecting plaintiff from moving train because he had no ticket. *Law v. Illinois Cent. R. Co.*, 32 Iowa, 534.

The jury must decide whether blows struck in expelling passenger from train were justifiable and to overcome force used by him. *Coleman v. New York &c. R. Co.*, 106 Mass. 160.

See, also, *Chicago &c. R. Co. v. Bills*, 104 Ind. 13; *C. & N. W. R. Co. v. Peacock*, 48 Ill. 253.

Forcibly ejecting drunken man through a dark passage way, used as a means of approach to the station, so as to injure one coming through it, was negligence. *Gray v. Boston &c. R. Co.*, 168 Mass. 20.

Where a driver of a street car used unnecessary violence in expelling one who would not pay his fare, the company was liable. *N. Y. &c. R. Co. v. Haring*, 18 Vroom (N. J.) 137.

See, also, *Bland v. Southern Pac. R. Co.*, 65 Cal. 626; *Ware v. Swann*, 79 Ala. 330; *Brown v. Hannibal &c. R. Co.*, 66 Mo. 588.

Defendant was liable where train hand used more force than was necessary to repel an assault upon him. *Haver v. Central R. Co.*, 64 N. J. L. 312.

Plaintiff cannot complain of rude language, in ejecting, which was not abusive. *Daniels v. Florida &c. R. Co.*, 62 S. C. 1.

Though defendant's rule requiring an extra fare where one boards its cars beyond the limits of the transfer station was reasonable and justified an ejection for refusal to comply, liability was incurred by the use of more force than was necessary in the ejection. *Nashville Street R. Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

It was error to charge that one riding on a freight train on an unauthorized permit must be ejected in such manner as any "humane person of ordinary prudence" would employ, as requiring a higher standard of care than that imposed by law. *Fort Worth &c. R. Co. v. Peterson*, 24 Tex. Civ. App. 548.

It was negligent to obey an order to leave under circumstances of great peril, where it is not accompanied with force or overpowering intimidation. *Bosworth v. Walker*, 83 Fed. Rep. 58.

Liability attaches to a company whose conductor compels a person with a ticket, but on the wrong train, to get off while it is in motion. *Boggess v. Chesapeake &c. R. Co.*, 37 W. Va. 297.

#### (W). RE-ENTRY AFTER LAWFUL EXPULSION.

**A passenger expelled justly for violation of a rule forfeits his right to ride unless at a regular station, he creates anew the relation of passenger and carrier. It has also been held that the passenger must in addition pay the fare for which he is delinquent. Showing the ticket after the train has stopped does not restore the right to ride.** *Hibbard v. N. Y. & Erie R. Co.*, 15 N. Y. 455, rev'g judgt for plff.

Where a passenger on a railroad, by an illegal refusal to pay his fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars, and the refusal and resistance of the passenger continues until after force had been required and applied to remove him, he cannot, by offering to pay his fare, make the continuance of the process of expulsion unlawful, *and although he is ejected after an offer to pay his fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable.*

A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules, after knowledge of the same, or may after such refusal lawfully eject those, who have been received.

Plaintiff boarded a train on defendant's road, presented an invalid ticket, which the conductor refused to accept and demanded fare. Plaintiff refused to pay. The conductor informed him that he would be obliged to put him off unless he paid. He replied that he would sue the company, if he was put off. This occurred as the train reached a place, where the track was crossed by another railroad at grade, and where, in compliance with the statute, trains on defendant's road stopped for a moment, and where passengers were in the habit of getting on and off. The conductor called for assistance, and began removal. Plaintiff resisted, until he was landed on the track. When he reached the car door and again while on the platform he stated he would pay the fare. The court charged that if the train had stopped at a station and before it started again plaintiff offered to pay his fare, any subsequent effort to remove him was unlawful, and rendered defendant liable for damages. *Pease*

*v. Delaware, Lackawanna & Western R. Co.*, 101 N. Y. 367, rev'g 11 Daly, 350 and judg't for pl'ff.

**From opinion.**—"It was held in *O'Brien v. N. Y. C. & H. R. R. Co.*, 80 N. Y. 236, that if the stoppage of a train is rendered necessary to expel a passenger therefrom, for a fractious refusal to pay fare, that he does not, by offering to pay it before expulsion, become entitled to continue the trip. This authority is quite conclusive upon the question, that a mere offer to pay fare under all circumstances does not establish new relations between the passenger and carrier, and entitle the passenger to continue his passage. *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455, 460, is to the same effect. There the passenger had bought a ticket which entitled him to transportation from Hornellsville to Scio. After having once shown his ticket to the conductor, he refused to show it again, upon a second request, at a point between the commencement and terminus of his journey. After the train had been stopped for the purpose of expelling him therefrom for such refusal he exhibited his ticket, but the defendant put him off the train notwithstanding. It was held that this expulsion was justifiable, because of the refusal of the passenger to comply with the reasonable requirements of the carrier. \* \* \*

"A railroad company has the right, and it is the duty to enforce order in its cars, and to eject therefrom those, who by indecent or obscene language or by violent and boisterous behavior, cause danger, discomfort, or annoyance to other passengers; and in the exercise of his right, the officers of the company must determine as to the propriety of their action, being responsible for the reasonable exercise of their discretion. 1 Redf. on Railways, 91, 92, 105; *People v. Jillson*, 3 Park. Cr. 234; *People v. Caryl*, id. 326; *Rorer on Railroads*, 958, 959.

"It would be quite absurd to say, that one whose unlawful conduct had provoked a breach of the peace, should be able to throw upon his adversaries the blame of the affray, by simply withdrawing his challenge, and declaring his change of mind. He has provoked an unlawful affray and his rights are to be determined by the rules which apply to persons thus engaged. The act of expulsion is made legal by his unlawful refusal to pay fare, and any necessary force required to completely execute it, would be justifiable.""

Where in consequence of the fractious refusal of a passenger upon a railroad to pay the full fare the company has a right to demand, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip, on paying the fare, but may be removed from the train.

But where the train stops at a regular stopping place, and the passenger, before being ejected, or others in his behalf, offer to pay the full fare, it is the duty of the conductor to accept it; and if he refuses and ejects the passenger the company is liable. *O'Brien v. New York Central & Hudson River R. Co.*, 80 N. Y. 236, aff'g judg't for pl'ff.

Passenger put off car for refusal to comply with rules, cannot demand as a matter of right to be taken back on complying with rules, unless

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\* NOTE. See *Jeffersonville Co. v. Rogers*, 28 Ind. 1; *Hoffaner v. D. & N.W. Co.*, 52 Iowa 342; *O'Brien v. B. & W. Co.*, 15 Gray 24; *People v. Jillson*, 3 Park. Cr. 234; *Stone v. C. & N. W. Co.*, 7 Iowa 82; *Hibbard v. N. Y. & E. Co.*, 15 N. Y. 457; *Louisville, &c., Co. v. Harris*, 9 La. 180; *State v. Campbell*, 32 N. J. L. 309; *Nelson v. L. I. Co.* 7 Hun, 140; *Hall v. M. & C. Co.*, 9 Am. & Eng. R. R. Cas. 318; *T. & P. Co. v. Casey*, 52 Tex. 112; *Swan v. M. & L. Co.*, 132 Mass. 116.



he be at a regular station and tender fare. *Nelson v. L. I. R. Co.*, 7 Hun, 140, rev'g judgt for pl'ff.

The passenger left the train because of the refusal of the conductor to accept the ticket already used on a previous trip for a portion of the route covered by it, and thereupon purchased a ticket from the station where he so left the train to the place of his destination. The railroad company could not insist, as a condition of his further transportation, that he should pay the fare chargeable for that portion of the road over which he had been carried, and for a refusal to pay the fare for which (when his ticket was refused), he had been directed to leave the train. It appears that a passenger leaving a train at a station before reaching the place for which he has purchased a ticket without having it endorsed for a "stop-over" does not forfeit his right to the further use of his ticket for his transportation to the station named thereon. Verdict for plaintiff. *Ward v. N. Y. C. & H. R. R. Co.*, 56 Hun, 268, affirming order denying new trial.

When once expelled from a car a person cannot immediately thereafter get upon it again without becoming a trespasser, and for injuries resulting from ejecting a passenger there can be no recovery. *North Chicago St. R. v. Olds*, 40 Ill. App. 421.

See, also, *South Carolina R. Co. v. Wise*, 68 Ga. 572.

Where one peaceably submits to ejection at a station for non-payment of fare to a station beyond, he may change his mind and reboard the train. *Louisville &c. R. Co. v. Breckinridge*, 93 Ky. 1.

Plaintiff, trying to get on after being ejected and while train was moving, fell. Conductor was not bound to stop to see if he was injured. *Chesapeake R. Co. v. Saulsberry*, (Ky.) 66 S. W. Rep. 1051.

A person who has been ejected from a railway train for non-payment of fare, has not the right to purchase a ticket at the same station and resume his journey on the same train *without payment of fare for the distance already traveled*. The reason for this rule is that a person ought not to be permitted to take the train at a station where he could not have taken it, had he not stolen a ride up to that point. In other words, the intending passenger, though physically ready to take the train, is treated as being constructively left behind at the point where he began to steal his passage and so he is deprived of the advantage unlawfully gained.

*Swan v. Manchester &c. R. Co.*, 132 Mass. 121; *Stone v. Chicago &c. R. Co.*, 47 Ia. 82; *State v. Campbell*, 3 Vroom, 309; *Beach on Railways*, sec. 854.

The reason of the rule is thus concisely put by the Alabama Supreme Court in *Manning v. Louisville &c. R. Co.*, 95 Ala. 392; s. c., 16 L. R. A. 55.

“If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for the attempted undue advantage of the railroad?”

It has even been held that where a stoppage of the train becomes necessary for the express purpose of removing a person who refuses to pay fare, he cannot even by tendering his fare for the full trip, including the part already traveled, acquire a right to be carried as a passenger, though the rule is otherwise where he is ejected at a regular passenger station.

*O'Brien v. Boston &c. R. Co.*, 15 Gray, 20; *Gould v. Chicago &c. R. Co.*, 18 Fed. Rep. 155.

#### (x). EMPLOYMENT OF FORCE TO COMPEL OBSERVANCE OF RULES.

Whether a trainman can use force to compel him to go in the car, *quære*; but he can eject him for refusal. Judgment for plaintiff reversed on account of error in refusing to charge that “although there were no seats inside the car, and people were standing therein, yet if there was room for the plaintiff he was bound to go there.” *Graville v. Manhattan R. Co.*, 105 N. Y. 525, rev'g judg't for pl'ff.

**From opinion.**—“The safety of passengers on railroads requires that they should comply with reasonable regulations and acquiesce in reasonable directions of persons to whom the management of the train is committed. It is obvious that the crowding of passengers on the platform of a steam railroad car may seriously embarrass the trainmen in the performance of their duties, and it is, we think, the plain duty of a passenger standing on a platform, to go inside the car when requested so to do by a person having charge of the train. \* \* \* The fact that there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside. \* \* \* The car was crowded when the plaintiff entered it at Houston street. He placed himself immediately in a position where he was compelled to submit to some inconvenience, and he was not freed from the obligation to obey the reasonable directions of the trainmen, made with a view to the general convenience and safety, because there was no vacant seat.”

If a passenger arrive in due time, and the gates being closed against him, enter the platform of the rear car, contrary to the manifest prohibition of the company, by leaping over the gate enclosing the same, and, upon the door leading therefrom to the car being locked, overpower the trainman and gain admission to the car by force, an attempt to remove him, after having gained such entrance, is unlawful, especially if he shall, at the first station thereafter, go upon the station platform and re-enter the car.

The plaintiff upon finding the gates of the car on an elevated railway closed against him, while he was standing on the platform of a depot in time, as he claimed, for the train, dropped his valise over on to the plat-

form of one car, as the train was moving away and himself leaped over the gates of the platform of the last car, although such gates were closed and locked and there was a sign forbidding the entry of passengers at that place. The door of the car being locked, he rode on the platform until the guard opened the door, but refused to admit him and demanded, who he was and where he was going, which information was not given. Thereupon the plaintiff made a movement to enter the car and the guard moved so as to intercept his passage. Respecting the collision with the brakeman the plaintiff testified: "And as I attempted to pass him he laid his hand on me violently; he grabbed me by the shoulder. He detained me there until I overpowered him and passed into the car. In the struggle which ensued we both fell to the floor, I think; I do not know but what we fell on to a seat first and then slid off on to the floor. \* \* \* I don't say positively that I seized him by the throat, but my impression is that I did. It was applied with the same amount of force that he was applying to me; *I put in what force was necessary to get into the car.* He did not try to get away. I forced him back into the car, first into the seats running lengthwise of the car, and eventually on to the floor; the guard was under and I was over, that was the way we went down. I don't recollect our positions exactly; I may have been under at one time; and when I got him down there I released him. Then I got by him some way and went to the fore part of the car; *I went immediately to the platform. We had then reached Hanover Square.*"

When the plaintiff reached the forward platform, he found that his bag had been removed to the station platform, where the train was then stopping. He hastily left the train and got the bag and was re-entering the car by the platform, when one of the guards obstructed his entrance into the car, and he was ordered to leave the train. An attempt of the entire train force to remove him resulted in such stout and violent resistance, that, from sheer powerlessness, the carrier was obliged to allow him to ride to his destination.

In an action brought by the passenger for assault, it was held by the Court of Common Pleas and affirmed by the Court of Appeals:

I. That the attempt to remove the plaintiff was an unjustifiable assault.

II. That the plaintiff, whatever the irregularity of his entry, was thereafter a passenger of such peaceful and safe deportment, that he had a right to continue his journey.

III. That the facts connected with his entry were not a subject of consideration by the jury, and that the only question was one of damages.

IV. That whatever the means or manner of his entry, the assumption by the passenger of an orderly mien after such entry made him derelict

only as to the past, and not as to the time when the attempt to remove him took place.

V. That the power of the carrier was limited to physical opposition and prevention to his entry, and did not extend to a forcible ejection after such entry was accomplished.

VI. That when the plaintiff stepped off on to the station platform, where the train had arrived and stopped at the time when his entry was accomplished, for the purpose of recovering his valise, that had been set off by the guards preparatory to setting him off also, his return to the platform of the car so rehabilitated him, that his previous character of a wrongdoer, if such he had been, was merged into the inviolable character of an innocent and unoffending passenger. *Smith v. Manhattan Railway Company*, 45 N. Y. State R. 865, aff'g judg't for plff., aff'd without opinion in 138 N. Y. 623.

Citing *Steamboat Co. v. Brockett*, 121 U. S. 637.

In this connection attention is called to some formerly authoritative cases holding that contractual rights cannot be asserted by violence. *Wood v. Leadbitter*, 13 N. & W. 838; *Burton v. Scherpf*, 1 Allen, 133; *McCrea v. Marsh*, 12 Gray, 211.

The same has been held respecting the right to remain in a railway station awaiting a train. *Commonwealth v. Power*, 7 Mete. 596; *Harris v. Stevens*, 31 Vt. 79.

And so in case of contractual rights to enter upon lands. *McMillan v. Cronin*, 75 N. Y. 474; *Parsons v. Brown*, 15 Barb. 590; *Hyatt v. Wood*, 3 Johns. 239; *Churchill v. Hulbert*, 110 Mass. 42; *Drury v. Hervey*, 126 id. 521.

In *North Chicago Street Railway Co. v. Olds*, 40 Ill. App. 421, it was held that a passenger who has once been expelled from a street car, although wrongfully, has no right to attempt to return, and that for a second expulsion he can have no damages. The court says:

"The appellee had no right of property or interest in the car; that, and the authority to control it, belonged to the company. They owed a duty to the public, a refusal to perform which would subject them to an action. Out of that duty sprang a license to every person, having no notice to keep off, to go upon the cars; but with such notice the license was withdrawn; whether rightly or wrongly withdrawn it could not be enforced, *vi et armis*. The remedy of any person aggrieved was by action, if the assault was unjustifiable. \* \* \*

"Having been put off, he knew that the conductor of the car would not let him ride. He says he was angry. For refusal to carry him, if unjustifiable, he had his action, but he had no legal right to use force to compel the company to carry him. The license implied by law for persons to get upon a street car, had been as to him and as to that car, revoked. In attempting to compel the company to carry him, he was himself a trespasser."

The court quotes, as applicable to such circumstances, the language of the Supreme Court of Illinois in *C. B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499:

"A party will be entitled to quite as much damage for any wrong or injury quietly endured, as if violently resisted; indeed, the policy of the law ought to be to award him a higher measure of damages. Whatever personal injuries may result from his violence should be attributed to his own want of subordination for which the law will afford him no redress. He has no more right to redress by his own strong arm what he may deem an annoyance committed by a railroad employé than he has to resist in like manner any other supposed invasion of his convenience or rights. The courts afford opportunity to redress every civil injury, no matter what its character, and the party must pursue the remedy given by law."

A passenger's violation of a rule prohibiting the entrance of a station by way of the tracks, a rule designed for the protection of passengers on account of the danger incident to crossing them, did not justify the station agent, once he has entered, in compelling him to retrace his steps and enter by the ordinary way, as such action was designed to punish him for the violation of the rule and not to secure his protection. *Peunfield v. Cleveland &c. R. Co.*, 26 App. Div. 413.

Defendant was entitled as a matter of law to eject one who boarded with such dangerous articles as bayonet mounted rifles, under its reasonable rule prohibiting carrying of dangerous articles. *Dowd v. Albany Railway*, 47 App. Div. 202.

Actual physical force is not prerequisite to recovery for an unlawful ejection, and the indignity sustained is an element of damages. *Ray v. Cortland &c. T. Co.*, 19 App. Div. 530; *Eddy v. Syracuse &c. R. Co.*, 50 App. Div. 109.

Where the car has arrived at a station, where the conductor and brakeman, by reason of plaintiff's refusal to pay his boy's fare, who, it is claimed, is over five, have proceeded to eject him out on the platform, the conductor is not bound then to accept his offer to pay the fare, but may continue the ejection. *Behr v. Erie R. Co.*, 69 App. Div. 416.

Where a passenger is unable to procure a ticket at the ticket office by reason of the absence of the agent, he is, upon informing the conductor of the fact, entitled to resist ejection and may recover for the injuries consequent upon the attempt to overcome resistance. He may sue for the assault and battery, as well as for the unlawful ejection. *Monnier v. New York &c. R. Co.*, 70 App. Div. 405.

A conductor is not negligent in expelling one who fails to comply with the conditions as they are set forth in his ticket, though such failure is the result of the negligence of the ticket agent. Recovery may be had

for the latter, but not for the former. *McGhee v. Reynolds*, 117 Ala. 413.

The question of the degree of care in making ejection does not arise where it was made without cause. *St. Louis &c. R. Co. v. Osborn*, 67 Ark. 399.

Where a train has been stopped to expel one who has not paid his fare, it is too late then to offer to pay it. *Illinois C. R. Co. v. Bauer*, 66 Ill. App. 124.

Plaintiff can not complain where no more than necessary force is used to prevent his entry into a train without the ticket as required by the rules of the company. *Illinois C. R. Co. v. Louthan*, 80 Ill. App. 579.

Plaintiff can not recover for an ejection where no more than necessary force is used, as it is one's duty when required, to leave peaceably. *Chicago &c. R. Co. v. Casazza*, 83 Ill. App. 421.

See, also, *Consolidated Traction Co. v. Tabern*, 58 N. J. L. 1; s. c. aff'd, 58 id. 408; *Light v. Harrisburg &c. R. Co.*, 4 Pa. Super. Ct. 427.

Plaintiff assumes the risk of the injuries he receives by resisting lawful effort to eject him with necessary force. *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384.

The conditions on the ticket are conclusive as far as the conductor is concerned. *Callaway v. Mellett*, 15 Ind. App. 366.

A conductor is warranted in ejecting a passenger who refuses to comply with defendant's rules by removing a dog he has with him. *Gregory v. Chicago &c. R. Co.*, 100 Iowa, 345.

Where plaintiff had requested an exchange ticket as required by his mileage ticket, but was not supplied therewith because the agent had run out of them, he was entitled to ride upon presentation of the mileage ticket only with a statement of the facts and recover for expulsion without payment of the regular fare. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

Defendant cannot set up that plaintiff might have escaped ejection by paying unlawful charges. *Atchison &c. R. Co. v. Dickerson*, 4 Kan. App. 345.

Ejection was lawful where plaintiff was drunk, boisterous and violent. *Chesapeake &c. R. Co. v. Saulsberry*, (Ky.) 66 S. W. Rep. 1051.

That refusal to give one's name on request for the purpose of identification with the name on the ticket presented constitutes a failure to comply with a reasonable rule, does not warrant arrest on the charge of fraudulently evading the payment of fare. *Pulmer v. Maine C. R. Co.*, 92 Me. 399; s. c., 41 L. R. A. 673.

In the absence of reasonable evidence to the contrary a conductor is

warranted in relying on the terms of the ticket as expressing the contract of carriage. *Alabama &c. R. Co. v. Drummond*, 73 Miss. 813.

And the fact that the relations of the parties arose from a contract does not prevent liability for expulsion as for a tort. *Book v. Chicago &c. R. Co.*, 75 Mo. App. 604.

The remedy for a failure of passenger to remove packages which he has no right to carry is removing him with the packages, not forcibly taking of them from him and placing them in the express car. *Bullock v. Delaware &c. R. Co.*, 60 N. J. L. 24; s. c., 37 L. R. A. 417.

In an action in tort for forcibly excluding plaintiff from train because he was carrying small packages of merchandise which it was established was sanctioned by the regulations of the company, it was held, in the absence of *mala fides*, that the passenger was justified in reasonable efforts to exercise his right, secured by private contract and public law, and, if the act was not done for the purpose of provoking resistance or insult, the physical force used by defendant's servants in excluding him could not be regarded as an injury brought upon himself by his own misbehavior, but was actionable as a tort and that the accompanying injury was a legitimate element of compensatory damages. *Rungon v. Central R. Co.*, 65 N. J. L. 228.

Defendant was not liable for the use of the force necessary to secure one's ejection for refusing to comply with its regulation forbidding riding on platforms. *McMillan v. Federal Street &c. R. Co.*, 172 Pa. St. 523.

Failure to comply with a condition requiring an exchange ticket by one having a mileage ticket, prevented recovery for ejection though such failure was due to the absence of the ticket agent at the station. *Robb v. Pittsburg &c. R. Co.*, 14 Pa. Super. Ct. 282.

The gist of an action for an insult to a passenger by a motorman is the violation of the obligation safely to carry and not the specific tort of the motorman. *Knorrville Traction Co. v. Lane*, 103 Tenn. 376.

Railroad company is not liable where the mutilated condition of a passenger's ticket raised a reasonable doubt as to its validity, and was the result of his own acts. *Houston &c. R. Co. v. Crone*, (Tex. Civ. App.) 31 S. W. Rep. 1074.

Plaintiff was not allowed to recover special damages, where his sole purpose in refusing to pay an illegal toll was to induce the use of force to eject him, and, when that was done, he paid it and took a receipt. *Patterson v. Southern P. R. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 308.

One who becomes abusive upon demand made for his ticket forfeits his right to remain on the train, and he may be ejected therefrom al-

though he makes a tender of fare. *Gould v. Chicago &c. R. Co.*, 5 McCrary, (U. S.) 502.

Upon the question of injury to one's feelings for an ejection, defendant was entitled to a charge as to plaintiff's conduct, whether he sought to avoid or cause trouble. *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

Where a conductor warns plaintiff that his mileage ticket is invalid and advises him to investigate, he cannot complain of an ejection upon subsequently offering it and refusing to pay fare, though he had used it considerably before, and the conductor, when he warned him, left it with him, though required by the rules to take it up. *Moore v. Ohio River R. Co.*, 41 W. Va. 160.

(y). TICKET; NON-SURRENDER OF AT GATE—DETENTION AND IMPRISONMENT FOR.

Plaintiff purchased a ticket for a passage upon defendant's railway, and entered one of its cars; before reaching his destination he lost his ticket, and when he attempted to pass through the gate, from the station platform, he was stopped by the gatekeeper and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss and insisted on passing out, but was pushed back by the gatekeeper, who sent for a police officer and ordered his arrest; he was arrested, taken to the police station, where the gatekeeper made a complaint against him, and he was locked up over night. In the morning plaintiff was examined before a police magistrate, the gatekeeper appearing against him, and he was discharged. Defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets. In an action for false imprisonment, held, that the detention was unlawful, that defendant was responsible for the acts of the gatekeeper, and that plaintiff was entitled to recover. *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77, aff'g 24 Hun. 506, and judg't for pl'ff.

**From opinion.**—"The defendant had the right to make reasonable rules and regulations for the management of its business and the conduct of its passengers. It could require every passenger before entering one of its cars to procure a ticket and to produce and deliver up the ticket at the end of his passage *or again pay his fare*. The Northern R. R. Co. v. Page, 22 Barb. 130; Hibbard v. The N. Y. & Erie R. R. Co., 15 N. Y. 455; Vedder v. Fellows, 20 id. 126; Townsend v. The N. Y. C. & H. R. R. Co., 56 id. 295; 15 Am. Rep. 419. The defendant had such a regulation and no complaint can be made of that. But it had no regulation and could legally have none that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and if he did not, that he should then and there be detained and imprisoned until he did so. At most the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be



enforced against him by the same remedies, which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process of trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. \* \* \* These views have the sanction of very high authority. In *Sunbolf v. Alford* (3 M. & W. 248), it was held that an innkeeper could not detain the person of his guest in order to secure payment of his bill. Lord Abinger said: 'If an innkeeper has a right to *detain* the person of his guest for non-payment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law a man who owes a small debt for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. \* \* \* Where is the law that says a man shall detain another for his debt without process of law?' In *Chilton v. The London &c. Railway Co.* (16 M. & W. 212), the defendant was organized under an act conferring much broader powers than are possessed by the defendant in this case, and yet it was held that it could not arrest a passenger for refusing to pay a fare which it was entitled to demand. In *Standish v. Narragansett Steamship Co.* (111 Mass. 512), the plaintiff purchased a ticket before going upon defendant's steamboat for a passage from Fall River to New York. The defendant's regulation was that the passenger should, upon leaving the boat at the end of his passage, deliver up his ticket or pay his fare. When the plaintiff reached New York, he found that he had lost his ticket, and when he attempted to leave the boat he was prohibited, and told that he could not pass until he produced a ticket or paid his fare. He was detained two hours and then, under protest, paid his fare and was permitted to leave the boat. He sued the company for false imprisonment and recovered \$50. \* \* \*

A municipal corporation authorized to make by-laws and pass ordinances, and inflict penalties for their violation, cannot enforce obedience to them by imprisonment, unless expressly authorized so to do by statute. *Potter on Corp.*, sec. 81; *Clark's Case*, 5 Coke's Rep. 64."

A constable, called to eject a person from defendant's train may be its special agent for that purpose, but, if, thereafter, he unwarrantably subjects him to imprisonment, the defendant cannot be held in damages therefor. *Southern Pac. R. Co. v. Hamilton*, 54 Fed. Rep. 468.

See "Willful and Malicious Acts of Servants," *ante*, p. 22.

## (z). LADIES' CAR.

A regulation by a carrier setting apart, in the first instance, a car for females, traveling alone or with a male escort, is a proper one and the reservation of the car for that purpose, may be enforced to the extent of forcibly removing a passenger, disqualified by the regulation from entering, but the carrier would be liable for excessive force, exercised without malice, used by its brakeman in removing a person violating

the regulation. *Peck v. N. Y. C. R. Co.*, 70 N. Y. 587, affirming 8 Hun, 286, and judg't for pl'ff.

See same as to ladies' waiting-room, *Toledo &c. R. Co. v. Williams*, 77 Ill. 354; *Bass v. Chicago &c. R. Co.*, 36 Wis. 450; *Chicago &c. R. Co. v. Williams*, 55 Ill. 185.

Company may set apart a car for exclusive use of women and men traveling with women. *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

## XX. Drawing-room and Sleeping Cars.\*

Passengers upon a railroad, taking a drawing-room car, have a right to assume that they are under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402; *Carpenter v. N. Y., N. H. & H. R. Co.*, 124 id. 53; *Dwinelle v. N. Y. C. R. Co.*, 120 id. 117; *Penn. Co. v. Roy*, 102 U. S. 451.

The owners of drawing-room or sleeping cars are entitled to charge compensation beyond the railway fare for the use of such additional facilities, and although not liable as innkeepers, it is their duty to use reasonable care and vigilance to protect from loss or harm the persons and property of passengers riding in such cars; but they are only liable for loss of such property as is suitable and appropriate for the journey undertaken. *Carpenter v. N. Y., N. H. & H. R. Co.*, 124 N. Y. 53; *Dwinelle v. N. Y. C. R. Co.*, 120 id. 117; *Lewis v. N. Y. S. Co.*, 143 Mass. 273; *Woodruff &c. Co. v. Diehl*, 84 Ind. 474; *Pullman P. C. Co. v. Gaylor*, 23 Am. L. Reg. (N. S.) 788; 6 Ky. L. 279; *P. P. C. Co. v. Smith*, 73 Ill. 360; *Palmeter v. Wagner*, 11 Alb. L. J. 149; *Welch v. P. P. C. Co.*, 16 Abb. Pr. (N. S.) 352; *I. C. R. R. Co. v. Handy*, 63 Miss. 614.

A passenger not provided with a seat in the common cars may enter the drawing-room car and refuse to pay the extra fare, and for wrongful ejection from the drawing-room car may recover compensation. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402. The carrier must use the same care and diligence respecting the sufficiency of the car as is required in the case of ordinary cars. *Penn. Co. v. Roy*, 102 U. S. 451.

A pass contained this stipulation: "In consideration of receiving this ticket, the person who uses it voluntarily assumes all risks of accident, and expressly agrees, that the company shall not be liable under any circumstances, whether by negligence of their agents, or otherwise, for any

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\* NOTE. Chap. 565, L. of N. Y. 1890. "Sec. 41. *Extra Fare for Sleeping Cars*.—Any patentee of a sleeping car, or his legal representative, may place his car upon any railroad, with the assent of the corporation owning or operating such road and may charge for the use of the same, in all cases, to each passenger occupying it, forty cents, which shall entitle the passenger to the use of a berth for one hundred miles, and at the rate of three mills for every additional mile, but in no case shall the charge exceed eighty cents. The railroad corporation permitting the use of any such car shall be liable for damages for injuries received to the same extent as if received in its own car; and it shall keep sufficient first class cars of other kinds for the convenient use of passengers not wishing to use a sleeping car. Every person using a sleeping car shall be furnished with a ticket having plainly written or printed thereon 'sleeping car,' and no railroad corporation shall be interested in the additional sum paid for the use of berths in sleeping cars run upon its road."

injury to his person, or for any loss or injury to his property, and that as for him, in the use of this ticket, he will not consider the company as common carriers, or liable to him as such." This exempted the defendant from liability for injury, although the injured passenger purchased a drawing-room seat. Such drawing-room ticket was not for the purpose of transportation but for the passenger's accommodation. *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 N. Y. 80; reversing 13 Daly, 129, and judg't for plff.

Distinguishing *Thorpe v. N. Y. C. & H. R. Co.*, 76 N. Y. 402.

Money necessary for the expenses of a journey, carried by a passenger in his clothing, worn by him, is not in the custody of the carrier (*Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267), and it is not chargeable for the loss of the same unless negligence on its part be shown.

A carrier running sleeping coaches on its road with sections separated from the aisle only by curtains, must keep an employé carefully and constantly watching the interior of the car occupied by the passengers. Mere proof of the loss of money by the passenger, while occupying a berth, does not make out a *prima facie* case against the corporation. When plaintiff went to bed he placed his pocket book, containing the money in question, in the inside pocket of his vest, which he placed under his pillow on the side next to the window; the next morning he found his vest under his pillow on the side next to the passage-way, with his pocket book in the pocket but the money had been stolen. The upper berth was occupied by a stranger, but was unoccupied when the plaintiff arose in the morning. At one end of the car was the porter's closet. A full view of the passage-way of the car could not be had from all parts of the space at that end. The train made a number of stops at large cities during the night. The porter was the only employé on the car; he acted as conductor, and for his own profit blackened the passenger's boots. The defendant should have had a person constantly watching the interior of the car, and absence of evidence on this point raised a question for the jury. *Carpenter v. N. Y. & N. H. R. R. Co.*, 124 N. Y. 53, rev'g nonsuit.

Passenger could find no seat in the common car, so he went into the drawing-room car and refused to pay the extra fare. Cases cited showing liability of the railroad company for use of drawing-room cars.

Wagner placed his drawing-room cars on defendant's road, kept the interior in order and supplied his own servants; railroad conductor could enter car to collect fares and keep order. Wagner paid the defendant twenty per cent. of the gross receipts of the car. Defendant was liable for the wrongful ejection of a passenger from such car by the

porter. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402, aff'g 13 Hun, 70, and judg't for pl'ff.

**From opinion** of Supreme Court.—“The Illinois Central Railroad was held liable for an injury to one of its own passengers on its own road, caused by a fault of a train of the Michigan Central Railroad running on the same road by the owner's permission. *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90, 104, and authorities cited. Drawing-room cars under a contract like that in evidence in this case, were seized for taxes against the company owning the road, but not the cars. *Kennedy v. St. Louis & C. R. Co.*, 62 Ill. 395; 7 Am. Railway Cases, 346. The owner of a road was held responsible for the use of a patented improvement on cars run on its road, although another road held all its stock, provided the cars and worked the road under a special contract. *York & C. R. R. Co. v. Winans*, 17 How. (U. S.) 30, especially top of page 40. See, also, *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450, 451; 1 Redf. Law of Railways, chap. 22, sec. 1, page 598; *Macon and Augusta R. R. Co. v. Mayes*, 49 Ga. 255.”

A person who is a passenger on a sleeping car has a right to expect to find the conveniences which are furnished by such cars and for which he has paid.

It is a matter of common knowledge that on sleeping cars passengers are expected to use the conveniences of the car during the night, and also are awakened in time that they may both dress and make their toilet before arriving at their destination.

It cannot be said as a matter of law that a person upon discovering the darkness of the toilet room of a sleeping car should return to the body of the car, find the porter and wait until the room is lighted.

It is the duty of a railroad company not only to light the lamps in the toilet room of its sleeping cars, but also to use reasonable care to keep them lighted, and its neglect to do so a jury may determine to constitute negligence.

Semble, that the negligence of a railroad company may be inferred from the leaving open of the rear door of the last car of a train, when the rules of the company provide that it shall be kept closed between stations. *Piper v. The N. Y. C. & H. R. R. Co.*, 76 Hun, 44.

Where money is lost by a passenger upon a sleeping car, in the absence of proof that such corporation was liable as a common carrier, the corporation operating such car can be charged with liability only on the ground of negligence, in failing to maintain a continued watchfulness over the interior of its sleeping cars while the passengers therein are sleeping.

The burden of proof is upon the plaintiff to establish negligence on the part of the defendant. *Sessions v. N. Y., L. E. & W. R. R. Co.*, 78 Hun, 541.

A sleeping car company is bound to maintain a reasonable watch for thieves during sleeping hours, but the liability is for negligence and not

insurance; and in case of money it is limited to reasonable traveling expenses. *Williams v. Webb*, 27 Misc. 508; aff'g s. c., 22 id. 513.

Defendant was liable for the consequences of having to spend the night in a cold day coach, when plaintiff had purchased a berth but had found it occupied by another ticket holder. *Braun v. Webb*, 32 Misc. 243.

Defendant was negligent in permitting a valise to remain in a dimly lighted car aisle where people are liable to stumble over it. *Lerien v. Webb*, 30 Misc. 196.

A sleeping car company is liable for failure to maintain reasonable watch over the person and property of those asleep; and it was not negligence in a passenger to remove a ring from his finger and place it in a pocket book in the rack over the berth. *Pullman Palace Car Co. v. Adams*, 120 Ala. 581; s. c., 45 L. R. A. 767.

Defendant was liable for a theft of a valise which it had not used reasonable care to guard against; but recovery was confined to articles of convenience for travel which was held not to include a pistol. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368.

But where such articles are stolen by defendant's employés under whose protection they are, it is liable irrespective of any question of negligence. *Pullman's Palace Car Co. v. Martin*, 95 Ga. 314; s. c., 29 L. R. A. 498.

A sleeping car company must keep a lookout for property casually left by patrons and restore it to them upon ascertaining ownership. *Kates v. Pullman's Palace Car Co.*, 95 Ga. 810.

Defendant was not liable where theft was made through the car window, left open by plaintiff while he was in another car, the door being properly guarded in the meanwhile. *Pullman's Palace Car Co. v. Hall*, 106 Ga. 765.

Failure to provide a step for an upper berth or to have a porter respond to a bell provided for the purpose of summoning him was negligence. *Pullman's Palace Car Co. v. Fielding*, 62 Ill. App. 577.

Mere proof of loss in a sleeping car is insufficient to establish liability; some negligence must be established. *McMurray v. Pullman's Palace Car Co.*, 86 Ill. App. 619.

Sleeping car company held to have assumed the liability of a common carrier, where porter took plaintiff's case to carry it from the car to the reception room for her. *Vross v. Wagner Palace Car Co.*, 16 Ind. App. 271.

Reasonable care to prevent theft was for the jury, where the porter in sole charge had been on a long journey through the day and had twice during the night been absent for 20 minutes each time. *Pullman*

*Palace Car Co. v. Hunter*, (Ky.) 54 S. W. Rep. 845; s. c., 47 L. R. A. 286.

A steamboat is responsible for money deposited by travelers, when the deposit is a necessary one; so when plaintiff, a passenger on defendant's boat, deposited a package of money containing \$5,000, in the safe, the defendant is responsible for its loss, if he cannot show that loss was occasioned by some other cause than the negligence of his servant. *Dunn v. Branner*, 13 La. Ann. 452.

Where there was an arrangement between a railroad and a sleeping car company, which made the operation of the cars of both in a measure in common, the former was liable for the failure of the latter's porter to wake a passenger. *Aircy v. Pullman &c. Co.*, 50 La. Ann. 648.

Liability for loss by theft in the use of a sleeping car by passengers cannot be avoided by the carrier by posting notices disclaiming responsibility for personal property in berths. In an action for loss of property by theft it appeared that the property of two passengers was stolen on the same night; that the porter was found asleep at an early hour in the morning in a position not commanding a view of that part of the car where the passengers were, and that he had been on duty for thirty-six hours, which covered two nights. The question of negligence was for the jury. *Lewis v. N. Y. S. Co.*, 143 Mass. 273.

Porter carried plaintiff's baggage to his section, which was on the side opposite the platform, put it on the seat, opened the window, contrary to a rule of the company, and left the car; plaintiff also left the car though his wife remained in the car and passed up and down the aisle. In an action for loss of baggage by theft the questions of negligence and contributory negligence were properly left to the jury. *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315.

Where plaintiff's satchel was placed in his compartment near the door in the day time, and he remained in the smoker compartment for five hours, during several stops, he was guilty of negligence, contributing to its loss. *Whicher v. Boston &c. R. Co.*, 176 Mass. 275.

A palace car company is liable to a female passenger for the loss of her valise, containing articles of wearing apparel, although the same were not necessary to her on that particular journey. *Hampton v. Pullman &c. Co.*, 42 Mo. App. 134.

A sleeping car company is not liable to a passenger for the loss of his watch left in his berth while he is in the toilet room. *Chamberlain v. Pullman &c. Co.*, 55 Mo. App. 415.

Sleeping car companies are not liable as innkeepers, but only for the lack of ordinary care. *Falls River &c. Co. v. Pullman Palace Car Co.*, 4 Oh. N. P. 26; s. c., 6 Oh. Dec. 85.

Palace car company liable for overcoat placed in care of the porter. *Pullman &c. Co. v. Lowe*, 28 Neb. 239.

As to the safety of passengers themselves, a sleeping car porter or conductor acts in the capacity of servant of the railroad company. *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1.

Loss of valise in sleeping car although in exclusive custody of passenger, chargeable to company, when due to company's negligence in keeping the car doors open. *Pullman Co. v. Pollock*, 69 Tex. 120.

Palace car company liable for theft of a purse containing \$165 left by passenger in his berth while washing his hands. *Pullman &c. Co. v. Matthews*, 74 Tex. 654.

The liability of a sleeping car company is neither that of a common carrier or an innkeeper, but it is liable for negligence in connection with the property of its passenger. *Stevenson v. Pullman Palace Car Co.*, (Tex. Civ. App.) 32 S. W. Rep. 335; *Belden v. Pullman Palace Car Co.*, 43 id. 22.

Where a sleeping car company sells a negress a berth to a designated point, but she is compelled by the railroad company to leave the sleeper before reaching the point, it is bound to furnish the same accommodations in some other car. *Pullman Palace Car Co. v. Cain*, 15 Tex. Civ. App. 503.

Rules of company, requiring windows and doors to be closed while at a certain station, were not complied with on the part of those in charge, and in consequence plaintiff's valise, which he had left by an open window while he left his seat, was stolen. Defendant was held liable. *Pullman Palace Car Co. v. Arcents*, (Tex. Civ. App.) 66 S. W. Rep. 329.

Defendant was liable for injury to a sick person by being compelled to sit in a smoker, because of its failure to reserve a berth in a sleeper, as agreed by its ticket agent. *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223.

1. A carrier of passengers for hire is bound to observe the utmost caution, and is responsible to them for such injuries received in the course of their transportation as might have been avoided or guarded against by his exercise of extraordinary vigilance, aided by the highest skill.

2. Such caution and vigilance extend to all the appliances and means used by him in transporting them. He must, therefore, provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for their safe conveyance, and he is liable in damages if, by reason of the slightest negligence or fault in that regard, injury results to a passenger.

3. Passenger purchased from a railroad company a ticket over its line,

and, at the same time, from a palace car company, a ticket entitling him to a berth in one of its sleeping cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping car in which he was at the time riding. Held, that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that there were adequate for safe conveyance, the palace car company, its conductor and porter, were, in law, the servants and employés of the railroad company, and that the negligence of either of them, as to any matters involving the safety or security of passengers, was that of the railroad company. *Pennsylvania Company v. Roy*, 102 U. S. 451.

Cleveland R. Co. v. Walroth, 36 Ohio St. 461; Louisville &c. R. Co. v. Katzenberger, 16 Lea, (Tenn.) 380; Pullman &c. R. Co. v. Gardiner, 3 Penny. (Pa.) 78.

A female passenger is entitled to recover from palace car company for the indecent assault of one of its porters while on the car. *Campbell v. Pullman &c. R. Co.*, 42 Fed. Rep. 484.

No liability attaches to a sleeping car company for loss of passenger's money, except what is necessary for his wants and conveniences on the journey. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796.

A palace car company is not a common carrier, and if a ticket agent selling tickets for both palace and ordinary cars refuse a palace car ticket to a passenger, the action is against the railroad and not the palace car company. *Lemon v. Pullman Palace Car Co.*, 52 Fed. Rep. 262.

A sleeping car company is liable in damages for the proximate results of an unlawful expulsion from its car of a delicate woman. *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646.

The duty resting on a sleeping car company is to use ordinary care to equip and maintain its cars and man them with competent servants. *Bull v. Pullman Palace Car Co.*, (U. S. C. Ct. S. D. N. Y.) 1 Am. Neg. Rep. 200.

A sleeping car company, though not a common carrier, owes its patrons, by virtue of the nature of the business, the duty of reasonable care. *Hughes v. Pullman Palace Car Co.*, 74 Fed. Rep. 499.

Plaintiff can not complain of an open ventilator window where he neither notifies defendant of his delicate condition, requests it closed or attempts to close it himself, which he could easily do. *Edmunson v. Pullman Palace Car Co.*, 92 Fed. Rep. 824.

A sleeping car company, by selling a berth in connection with a ticket over a certain route, virtually represents that the car will pass over the lines named on the ticket, so as to enable the holder to recover for the consequences of being expelled for failure to pay additional fare, where



a different line is pursued without notice to him. *Pullman's Palace Car Co. v. King*, 99 Fed. 380.

Where defendant did not know of the danger and there was nothing to put it on its guard, it was not liable for the murder of passenger while asleep. *Connell v. Chesapeake &c. R. Co.*, 93 Va. 44; s. c., 32 L. R. A. 792.

## XXI. Ferry Companies.

**A ferryman occupying a position in the line of public travel, and holding himself out for general employment is a common carrier and liable as such for property carrier.** *Wilson v. Hamilton*, 4 Oh. St. 723, 738; *Angell on Carriers* secs. 82, 130; *Story on Bailm.* sec. 496; 2 *Kent's Com.* 599; 3 *Barr.* 342; 5 *Mo.* 30; 1 *McCord*, 444; 1 *Nott & McCord*, 19; 18 *Ala.* 96; 11 *Leigh*, 521; 12 *Ill.* 344; 10 *M. & W.* 161.

**If the owner takes upon himself the care of his property in transit, and it is lost by his carelessness, the carrier is not responsible.** *Wilson v. Hamilton*, 4 Oh. St. 723; *White v. Winnisimmet Co.*, 7 *Cush.* 155; *Willoughby v. Horridge*, 16 *Eng. L. & Eq.* 437; and it is sometimes held that the ferry company is not liable as a carrier for property that traveler retains in his custody. *Wyckoff v. Queens Co. Ferry Co.*, 52 *N. Y.* 34.

The owner of a young, timid and easily frightened horse is not guilty of negligence in taking it on a ferry-boat, where it was injured by the negligence of the ferry company. The defendant used a defective end chain and the frightened horse backed against it, when it broke; hence the injury. *Clark v. Union Ferry Co.*, 35 *N. Y.* 485, aff'g judg't for pl'ff.

It is negligence for a ferry company to order teams to leave a boat before the adjustment of the bridge is complete. In consequence of the crowd moving off the boat plaintiff was obliged to step upon the stringer separating the passage from the carriage-way. Plaintiff's witness testified that before the bridge was adjusted to the level of the boat, and while it was some eight or nine inches above it, defendant's employes dropped the chain and ordered the teams to pass off. A horse, attached to a heavily laden cart, in attempting to do so, struck his foot against the bridge and fell; the shaft of the cart struck plaintiff and broke his leg. *Hazman v. L. & I. Co.*, 50 *N. Y.* 53, aff'g judg't for pl'ff.

Distinguishing, *King v. Manchester R.*, 12 *Jur. (N. S.)* 525.

A ferry company is not a common carrier as to property *retained by the passenger in his custody*, but undertakes against defects and insufficiency of the boat and lack of skill of those in charge, and the owner of the horse must use ordinary care.

The barrier chain was not up, or not sufficient, and a horse was scared

and went overboard. Recovery against the defendant was sustained. Where loss was occasioned by apparent negligence of the ferryman in omitting safe and sufficient means of safety, the burden is on it to show that the accident was not occasioned by its fault. *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 34; aff'g judg't for pl'ff.

While plaintiff was engaged in carting brick from a dock and was backing up his cart to procure a load, "his horse suddenly became unmanageable and backed off the dock," and was lost in consequence of defendant's negligence in failing to keep a stringpiece on the dock. Case dismissed on the pleadings; error. *Kennedy v. Mayor*, 73 N. Y. 365, rev'g nonsuit.

A child of nine years of age fell through an opening in the defendant's bridge, whereby passengers landed from the ferry boat. Such bridge had been in use for six years and millions had passed safely over it. Defendant was not liable. *Loftus v. Ferry Co.*, 84 N. Y. 455; affirming 22 Hun. 33, which granted new trial after verdict for plaintiff.

Following *Dongan v. Champlain Trans. Co.*, 56 N. Y. 1; *Crocheron v. North Shore Staten Island Ferry Co.*, id. 656; and *Cleveland v. New Jersey Steamboat Co.*, 68 id. 306.

The signal was given to start a steamboat: the gangplank was pulled in and the boat moved a short distance from the pier. The mate was in the act of putting the gate in place when he was attracted by the shout of a man who rushed through the crowd of passengers to get off, and, in attempting to get ashore, fell into the water. The passengers rushed to the side of the boat, and in doing so the plaintiff, a passenger, was crowded into the water. Held, that the defendant was not bound to expect or guard against such an accident. *Cleveland v. N. J. S. S. Co.*, 125 N. Y. 299, rev'g judg't for pl'ff; s. c., 89 id. 627; 68 id. 306.

A woman going upon a ferry boat was injured by an alleged discrepancy in height between the boat and the bridge over which she entered, but inferred such discrepancy from the violence of her fall. This was not sufficient evidence of negligence. A ferry company may assume that passengers will take some care of themselves, and such carrier need only use such care and skill as will make the entrance upon its boats safe for persons of ordinary prudence. *Race v. Union Ferry Co.*, 138 N. Y. 644.

Ferry companies are not insurers of the absolute safety of passengers, either while coming on board the ferry boats, or while going ashore therefrom, nor are they bound to guard against possible accidents, which could not reasonably be foreseen. Their duty is to furnish accommo-

dations for the receiving and landing of passengers, which are reasonably sufficient for that purpose, and for the protection of persons using the means provided, in a reasonable way. (*Blackman v. London &c. R. Co.*, 11 W. B. 769; *Rigg v. Manchester &c. R. Co.*, 12 Jur. [N. S.] 525; *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Crafter v. Metropolitan R. Co.*, L. R., 1 C. P. 300; *Dougan v. Champlain Tr. Co.*, 56 N. Y. 1; *Crocheron v. North Shore &c. Ferry Co.*, id. 656; reversing 1 N. Y. Sup. Ct. [T. & C.] 446; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306). It is not enough to make out a case of negligence, to suggest that additional precautions would have prevented the accident. *Loftus v. Union Ferry Co.*, 22 Hun, 33, granting new trial after verdict for plaintiff; s. c. aff'd, 84 N. Y. 455.

The defendant's boat came with such force against bridge of slip that the plaintiff was thrown down and his leg crushed between the boat and the bridge. He was standing in front of the forward chain with other passengers. Question was for jury. *Gannon v. Union Ferry Co.*, 29 Hun, 631; reversing nonsuit.

The same strict rule of care as to the safety of passengers on the trains of a railroad applies in the maintenance of a ferry in connection therewith. Where plaintiff was injured by the breaking of a portion of the machinery of a ferry bridge, while standing in the passageway of the bridge used by passengers, it raised a presumption of negligence against defendant. *Bartnik v. Erie R. Co.*, 36 App. Div. 246.

By permitting passengers to habitually use a roadway designed for vehicles, a ferry company undertakes the duty of keeping it in a reasonably safe condition for such use. Plaintiff recovered for injury by a projecting splinter. *Wolf v. Brooklyn Ferry Co.*, 51 App. Div. 67.

Where appliances are of the best known kind, the liability may not attach. *Duke v. Ferry Co.*, 9 Misc. 268.

A passenger on a ferry boat may recover for injuries received from the negligence of a stranger. *Louisville &c. Ferry Co. v. Nolan*, 135 Ind. 60.

Ferry company not liable for loss of horse when owner of the same failed to use ordinary care and left him unattended, when the sound of the bell on the boat frightened him, and he jumped overboard. *White v. Winnisimmet Co.*, 61 Mass. 155.

Leaving the cabin of a ferry boat, as it approaches the wharf, and standing between the cabin and the end of the boat, was not *per se* negligent. *Peverly v. Boston*, 136 Mass. 366.

*Wheelock v. Boston &c. R. Co.*, 105 Mass. 203; *Barden v. Boston &c. R. Co.*, 121 id. 426; *Northern v. Grand Trunk R. Co.*, 125 id. 99.

An educational corporation running a ferry boat cannot escape from

liability for negligence on ground of *ultra vires*. *Nims v. Mt. Hermon*, 160 Mass. 177.

Ferry company not bound to prevent, by railings, runaway teams from passing over a boat when not in use. *Evans v. Goodrich*, 46 Minn. 388.

No negligence attaches to ferry company by reason of slippery condition of boat due to existing snowstorm, when no further act of negligence is alleged. *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122.

Ferry company must have boat and landing in a state of repair. *Cohen v. Hume*, 1 McCord. (S. C.) 439.

*Mills v. Johnson*, 1 McCord. (S. C.) 157.

Stepping over a guard chain of a ferry boat, according to custom, although contrary to rules, if not restrained by the management was not *per se* negligent. *The Manhasset*, 19 Fed. Rep. 430.

Ferry company not liable for injuries caused by guard chain when passenger attempted to leave the boat by the horse gangway instead of the one adapted for passengers. *Graham v. Penn. R. Co.*, 39 Fed. Rep. 596.

Town operating ferry boat liable for injuries caused by failure to warn passengers against danger, where all parts of boat do not come close to wharf. *Drake v. Dartmouth*, 25 Nova Scotia, 177.

## XXII. Medical Treatment of Passengers.

Does a steamship company owe duty to its passengers of furnishing a surgeon?

Where by law or by choice the company has become bound to furnish such officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience. (*Chapman v. Erie R. Co.*, 55 N. Y. 519; *McDonald v. Hospital*, 120 Mass. 432; *Secord v. St. Paul R. Co.*, 18 Fed. Rep. 221.)

Accordingly held, that in the absence of evidence of any carelessness or negligence on the part of the steamship company, in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon. *Laubheim v. DeKoninglyke*, 107 N. Y. 228, aff'g judgt for def't.\*

The "passenger's act of 1855," required every *English* ship to carry a duly qualified medical practitioner, and its owner or charterer to provide, for the use of the passengers, a supply of proper and necessary medicines for their medical treatment during the voyage, properly

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\* NOTE The injury complained of in this case occurred prior to the passage of the act of congress of August 3, 1882, imposing upon steamboat companies the duty to provide physicians or surgeons.

packed and placed under the charge of a medical practitioner "to be used at his discretion."

In an action against a corporation of Great Britain for injuries alleged to have been sustained by the plaintiff, as passenger on one of the steamers, from taking calomel furnished by the steamer's physician in response for a request for quinine, it appeared that the defendant had advertised the statement that an experienced surgeon was carried on board each ship and all medicines were supplied *gratis*. The defendant assumed no duty or liability beyond that imposed by the statute and was not liable for the errors and mistakes of the physician, if so duly furnished.

These views find support in *Laubheim v. DeK. N. S. Co.*, 107 N. Y. 229, and in *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272. Evidence of confusion, disorder, etc., in the surgery after the steamer went to sea and after the medicines were put in the charge of the physician, properly packed and labeled, did not justify a finding of negligence on the part of the defendant. *Allen v. State S. S. Co.*, 132 N. Y. 91, rev'g judgt for pl'ff.

Distinguishing *Van Wyck v. Allen*, 69 N. Y. 62; *Thomas v. Winchester*, 6 id. 397.

A railroad company has discharged its duty to a passenger injured in a collision if it provides a surgeon of ordinary skill, and is not liable for the negligence of such surgeon. *Secord v. St. Paul &c. R. Co.*, 18 Fed. Rep. 221.

*O'Brien v. Cunard S. S. Co.*, 154 Mass. 272.

### XXIII. Baggage.\*

The carrier is bound to carry, under the same rules, that govern the carriage of goods, and without extra compensation beyond the passage money, baggage, consisting of such clothing, money and articles of usual personal adornment, as may be reasonably proper for the purpose of the *whole* journey, undertaken, and may, to the same extent, as in the carriage of goods, limit and extend its liability concerning same.

A contract by a common carrier of passengers, to carry a passenger from one place over his line or route to another, obliges the carrier not only to carry the passenger, but a reasonable amount of personal baggage, although nothing is received or paid for this carriage of the baggage in addition to that paid for the carriage of the passenger. *Angell on Carriers*, sections 107, 108, 109; *Hawkins v. Hoffman*, 6 Hill 586; *Powell v. Myers*, 26 Wend. 591; *Orange Co. Bank v. Brown*, 9 id. 85;

\*NOTE.—This topic would properly be treated under the head of "Common Carrier of Goods," which see for more extended citation of authorities.

Camden & Amboy R. R. Co. v. Burke, 13 id. 611; Hollister v. Nowlen, 19 id. 239; Cole v. Goodwin, id. 251; *Merrill v. Grinnell*, 30 N. Y. 544.

A common carrier is an *insurer* of safe transportation of baggage to the same extent as if delivered to it for freightage. *Parsons' Mercantile Law*, 226, 227; 2 Kent's Com. 602; Hollister v. Nowlen, 19 Wend. 234; Cole v. Goodwin, id. 251.

*Merrill v. Grinnell*, 30 N. Y. 594; *Hannibal R. Co. v. Swift*, 12 Wall. 262; *Powell v. Meyers*, 26 Wend. 591; *Bennett v. Dutton*, 10 N. H. 481; *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326.

Common carrier is liable only for gross negligence, where he carries baggage without reward. *Rice v. Illinois Central R. Co.*, 22 Ill. App. 643.

#### (a). WHERE BAGGAGE MAY BE CARRIED.

A carrier by water furnishing staterooms to passengers owes the duties of an innkeeper to them and is an insurer as to the safety of their goods. *Adams v. New Jersey S. B. Co.*, 151 N. Y. 163; s. c., 34 L. R. A. 682; aff'g s. c., 9 Misc. 25.

Citing *Crozier v. Boston &c. Steamboat Co.*, 43 How. Pr. 466; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. 229.

A carrier, whose constant employment was the transportation of property and passengers upon its railroad, for hire, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, coal, over its railroad, the plaintiff being bound to load and unload the cars, and to furnish brakeman, under the control of defendant's conductor. Defendant was liable as a *common carrier* for injury to cars of plaintiff and his property therein. *Mallory v. Tioga R. Co.*, 39 Barb. 488.

**From opinion.**—"If a servant of the owner happen to go with the goods, but there is no intention to let him meddle with the care of them, the carrier will be answerable for loss. Marsh Ins. B. 1, ch. 7, sec. 5; Abbott on Ship., part 3, ch. 2, sec. 3; Story on Bail., sec. 533. So if a man travel in a stage coach, and take his portmanteau with him, although he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. Per Chamber, J., in *Robinson v. Dummore*, 2 Bos. & Pull. 418. It was said by Bronson, J., in *Hollister v. Nowlen* (19 Wend. 237) that 'when there is no fraud the fact that the owner accompanies the property cannot affect the principle on which the carrier is charged in case of loss.' He likened the liability of a carrier to that of an innkeeper, and cited the remark in *Calve's Case* (8 Co. 63) that 'it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged and that he left the door open; but he ought to keep the goods and chattels of his guests therein safely.'

See *Hannibal R. v. Swift*, 12 Wall. 262.

A passenger may take his light baggage, like a valise, into the state-room of a steamboat and the rule of the company prohibiting the same is not reasonable. *Hacklin v. N. J. Steamboat Co.*, 7 Abb. Pr. N S. 241; 9 Am. L. Reg. 239.

*S. P. Midgett v. Bay State Steamboat Co.*, 1 Daly, 151; *Gore v. Norwich &c. Co.*, 2 id. 254; *Contine v. L. & S. W. R. Co.*, L. R. 1 C. B. 54; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; but see this doctrine criticized in *The R. E. Lee*, 2 Abb. U. S. C. I. R. & Dist. Ct. Rep.

Plaintiff was not negligent in leaving his locked hand bag in a state room, the door of which he closed, while he went for the key to the room. *Lincoln v. New York &c. S. S. Co.*, 30 Misc. Rep. 752.

In *McKee v. Owen*, 16 Mich. 115, the court was divided as to whether steamship proprietors furnishing staterooms were liable for loss of baggage to the extent of innkeepers.

Where articles in a valise were lost, which might have been carried, instead, in passenger's trunk, the court would not rule as a matter of law that they could not be recovered for. *Hampton v. Pullman &c. R. Co.*, 42 Mo. App. 134.

*Carpenter v. N. Y., N. H. & H. R. Co.*, 124 N. Y. 53.

**From opinion.**—"Money necessary for the payment of the expense of a journey undertaken, which is carried in the trunk of passenger is part of his baggage, and if lost while in the custody of a carrier for transportation it is liable. *Merrill v. Grinnell*, 30 N. Y. 594; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 id. 167; 2 Red. R. R. 59. But carriers do not undertake to carry and safely deliver the effects of travelers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day and placed under his pillow at night is in the custody of the corporation which carries and furnishes travelers with berths in sleeping coaches. *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 367; 2 Rorer R. R. 887.

The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given."

The owner of a vessel is not an innkeeper and is not liable in the absence of some particular breach of duty, where baggage is not delivered into its exclusive custody. *The Humboldt*, 97 Fed. Rep. 656.

See, also, "Bailments—Innkeepers," *ante*, p. 135.

If goods be placed in a vehicle without knowledge of the carrier he is not liable. *Lovett v. Hobbs*, 2 Show. 127.

*Neigh v. Smith*, 1 Carr. & P. 649; *Packard v. Getman*, 6 Cow. 757.

#### (b). ARTICLES OF UNUSUAL VALUE IN POSSESSION OF PASSENGER.

Under the ordinary contract for carriage, a carrier of passengers makes no contract and enters into no duty, as to articles of property of

great value, forming no part of a passenger's ordinary baggage or personal equipment. *Weeks v. N. Y., N. H. & H. R. R. Co.*, 72 N. Y. 50, aff'g 9 Hun, 669, setting aside verdict for plaintiff.

See *First National Bank v. R. Co.*, 20 Ohio St. 259; through negligence of defendant's servant bridge gave way and money on his person was burned; no recovery.

A passenger on a steamboat retired to his berth and placed under his pillow a gold watch with \$10, a gold pen and pencil, railroad tickets worth \$1, and a silver watch, and all were stolen. It was error to charge that, if the jury found it negligent to have the *money* in the berth, the plaintiff could not recover, as it implied that he could not even recover for the *articles* stolen. So, it was error to charge, that the plaintiff had a right to carry these articles with him on the trip, but not to retain them in his berth, as the jury might have inferred, that the plaintiff had no cause of action because he took such articles in his berth. *Dunn v. N. H. Steamboat Co.*, 58 Hun, 461, reversing order denying new trial, after verdict for defendant.

Where \$4,000 in gold was carried in satchel no recovery for that sum was allowed. *Doyle v. Kiser*, 6 Ind. 242.

*Pfister v. R. Co.*, 70 Cal. 169; *Steamboat Palace v. Vanderpool*, 16 B. Mon. 302.

Carrier held not liable for baggage while in care of passenger. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

#### (c). WHERE THE PASSENGER AND BAGGAGE, PROPERLY CHECKED, GO BY DIFFERENT TRAINS.

Where baggage in charge of the wife went on a different train from her husband and was lost, recovery was had. *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116.

See *Logan v. R. Co.*, 11 Rob. L. A. 24.

A railroad company may reasonably require that baggage be checked only to the point of destination named in the ticket, though a passenger is permitted to stop over, and is not liable for the consequences of its refusal to unload it at an intermediate point. *Howell v. Grand Trunk R. Co.*, 92 Hun, 423.

Defendant was not liable for mere negligence in the loss of trunks of a passenger of another line carried on its road under the mistaken but *bona fide* assumption that they belonged to a passenger of its own. *Beers v. Boston &c. R. Co.*, 67 Conn. 417; s. c., 32 L. R. A. 535.

See, also, *Wald v. Pittsburg &c. R. Co.*, 162 Ill. 545; s. c., 35 L. R. A. 356; *Edson v. Pennsylvania R. Co.*, 70 Ill. App. 654.



In the absence of other direction, a carrier impliedly undertakes to ship baggage on the same train as the passenger and is liable for an inexcusable failure to do so, though the loss itself happened through an act of God. *Wald v. Pittsburg &c. R. Co.*, 162 Ill. 545; s. c., 35 L. R. A. 356.

A carrier is not liable for baggage ordered to be forwarded by the passenger subsequently to his passage, unless negligence be shown. *Wilson v. Grand Trunk R. Co.*, 56 Me. 60.

Where a passenger put his baggage, consisting of merchandise, on train, unchecked, intending himself to go but was left, and went by the next train, he did not recover in the absence of gross negligence. *Collins v. Boston &c. R. Co.*, 10 Cush. 506.

Where a passenger put his baggage on a steamboat, unchecked, and without delivery to any one, and was left by accident, the carrier was not liable. *Wright v. Caldwell*, 3 Mich. 51.

A carrier should use suitable care of property left by mistake in the cars. *Bonner v. DeMondosa*, (Tex. App.) 4 Wills. 392; s. c., 16 S. W. 976.

A carrier does not impliedly undertake to ship baggage on the same train as the passenger, but only within a reasonable time after it is received and checked. *St. Louis &c. R. Co. v. Ray*, 13 Tex. Civ. App. 628.

#### (d). NATURE AND EXTENT OF LIABILITY.

A carrier is liable for the negligent loss or injury to baggage while being delivered by its porters, although gratuitously to a cab engaged by the plaintiff, and for baggage delivered to such porters for shipment. *Wharton on Negligence*, sec. 612, note.

Baggage delivered to carrier the night before the train was to leave, was lost, and carrier was held liable. *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293; s. c., 2 West. R. 299.

See same heading under "Common Carrier of Goods."

Where plaintiff purchased a ticket only for the purpose of having his trunk sent by rail, defendant was not even a warehouseman, but only a gratuitous bailee liable only for gross negligence. *Marshall v. Pontiac &c. R. Co.*, 126 Mich. 45.

Though one intends to become a passenger, his valise, left with the company before he purchases his ticket, not for immediate transportation but as an accommodation, is left with it in the capacity of a warehouseman. *Murray v. International S. S. Co.*, 170 Mass. 166.

The question of delivery to the carrier was for the jury, where there was a doubt as to its having been put in the usual and proper place. *McKibbin v. Great Northern R. Co.*, 78 Minn. 232.

Baggage was left with carrier to be shipped at a certain time, unless directions to the contrary were received. Liability of carrier arises when the time set has arrived, and no orders have been received. *Illinois Central R. Co. v. Troustine*, 64 Miss. 834.

A rule refusing to receive baggage into the baggage room until after ticket is purchased is unreasonable. *Coffee v. Louisville &c. R. Co.*, 76 Miss. 569; s. c., 45 L. R. A. 112.

The duty as to baggage is incident to the duty as carrier of the passenger. *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287.

Where defendant had taken charge of the baggage it was immaterial that it had been unloaded on a union platform. *Texas & R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144.

Deck passengers cannot recover for loss of baggage kept in their own possession. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

Where trunk was taken to the station at night 12 hours before train time with knowledge of defendant's rule not to check trunks until thirty minutes before such time, it was left to the jury to say whether the delivery was within a reasonable time. *Goldberg v. Ahnapee &c. R. Co.*, 105 Wis. 1; s. c., 41 L. R. A. 221.

#### (e). WHAT IS BAGGAGE.

A proper sum of money for the whole of contemplated journey is a proper part of baggage, and also for sickness and accident; it may be such sum as a reasonably prudent man would think necessary. In Massachusetts the question is definitely settled by the case of *Jordan v. The Fall River Railroad Company* (5 Cush. 69). The sum of \$325, placed in the trunk of a traveler, which was lost upon a very short journey, was recovered. The judgment was sustained by the court. Similar decisions have been made in Ohio, Tennessee, Illinois and Indiana, and in the Court of Common Pleas of the city of New York (9 Humphrey 61; 11 id. 419; 10 Ohio 145; *Davis v. Michigan Central Railroad Co.*, 22 Ill. 278; *Doyle v. Keyser*, 6 Ind. 242. *Duffy v. Thompson*, 4 E. D. Smith 178.) \* \* \*

A right of action against a common carrier to recover the value of property entrusted to him, is assignable; and the assignee may sue in his own name. *Merrill v. Grinnell*, 30 N. Y. 594.

**From opinion.**—"Baggage embraces such articles as it is usual for persons to carry with them whether from necessity or for convenience or amusement. Tools used by the passenger in his trade (*Davis v. Cayuga & Susquehanna R. R. Co.*, 10 How Pr. 330) gems (Same, and *Van Horne v. Kermit*, 4 E. D. Smith 453); a watch and such jewelry as is usually worn about the person (*McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 182) money for traveling expenses (*Duffy v. Thompson*, 4 E. D. Smith 178; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Grant*

v. Newton, 1 E. D. Smith 95; Angell on Carriers sec. 115; Jordan v. Fall River R. R. Co., 5 Cush. 69; Parsons' Mercantile Law, 225; Weed v. Saratoga R. R. Co., 19 Wend. 534). \* \* \* \* \*

In *Orange County Bank v. Brown*, 9 Wend. 85, it was said by Justice Nelson that money is not a part of a passenger's baggage, beyond such sum as is reasonably necessary for his expenses. Even this doctrine was repudiated by Bronson, J., in *Hawkins v. Hoffman*, 6 Hill 586.

The Common Pleas of New York, in *Duffy v. Thompson* and *Grant v. Newton*, cited, *supra*, has held, in conformity with the dicta in the 9 Wend. 85 and the 19 Wend. 534, that money for necessary expenses may be recovered for as part of a passenger's baggage."

Baggage may include a sum of money which is reasonable and proper for the purposes of the journey. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163; s. c., 34 L. R. A. 682.

Where a commercial traveler's sample trunk, checked as excess baggage, is of such a character as to be capable of giving notice that its contents was merchandise and not baggage, it was for the jury to say whether plaintiff had had notice thereof and carried it as freight, though the salesman, in getting it checked, gave no information as to what it contained. Failure of a company's own servants, to exact the release required by its rules in case of trunks containing merchandise was no defense. *Trimble v. New York &c. R. Co.*, 162 N. Y. 84; aff'g s. c., 39 App. Div. 403; s. c., 48 L. R. A. 115.

The sum of \$285 contained in traveler's trunk was recovered for, and the reasonableness of the amount was rightly left to the jury. *Weed v. Saratoga &c. R. Co.*, 19 Wend. 534.

*Dictum*, in *Bank v. Brown*, 9 Wend. 85; *dictum*, in *Hawkins v. Hoffman*, 6 Hill, (N. Y.) 586; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621; *Johnson v. Stone*, 11 id. 419. But see *Davis v. Michigan Southern &c. R. Co.*, 22 Ill. 278; *Duffy v. Mason*, 4 E. D. Smith (N. Y.) 178; *Grant v. Newton*, 1 id. 195; *Jones v. Vorhees*, 10 Ohio 180; *Dunlap v. International &c. R. Co.*, 98 Mass. 371.

But, as to carrying money in trunk, see *Weed v. R. Co.*, 19 Wend. 534; *Hickox v. R. Co.*, 31 Conn. 281.

Carrier is not chargeable with the knowledge of an agent that a valise contains only merchandise, where it was acquired in a purely personal transaction with a passenger. *Central &c. R. Co. v. Joseph*, 125 Ala. 313.

By receiving trunks knowing them to contain more than ordinary baggage, a carrier assumes responsibility therefor. *Kansas City &c. R. Co. v. McGahey*, 63 Ark. 314; s. c., 36 L. R. A. 781; *Lake Shore &c. R. Co. v. Hochstim*, 67 Ill. App. 514.

By transporting luggage, which an expressman knows is that of a rail-

road passenger, he takes the risk of the contents being suited to her condition. *Hebard v. Riegel*, 67 Ill. App. 584.

In the absence of a custom permitting officers to perform such service, defendant was not liable for the loss of telegram received by them under a promise to deliver it to a passenger. *Davies v. Eastern Steamboat Co.*, 94 Me. 379.

Delivery of six trunks of large and uniform size as those of a ladies' tailor and the baggage master's remark in receiving them that he knew the owner as the dressman who had imported dresses, were evidence for the jury to affect the railroad company with notice of their contents when checked as baggage. *Amory v. Wabash R. Co.*, (Mich.) 90 N. W. Rep. 22.

Carriers of passengers insure safe delivery of such baggage as is by custom ordinarily carried by travelers. *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392.

*Shaw v. Northern Pac. R. Co.*, 41 N. W. (Minn.) 548.

Where carrier, with knowledge of its character, receives and checks merchandise it is liable for it as baggage. *Toledo &c. R. Co. v. Dages*, 57 Oh. St. 38.

Verdict for defendant was set aside, where the porter accepted plaintiff's valise and deposited it in the station as baggage with knowledge that its owner was a traveling merchant. *Snaman v. Missouri &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1003.

Baggage includes jewelry and money to pay expenses of the journey. *Mexican &c. R. Co. v. Ware*, (Tex. Civ. App.) 60 S. W. Rep. 343.

Baggage is not confined to wearing apparel, but extends to other articles of convenience for the journey. *Runyan v. Central R. Co.*, 61 N. J. L. 537; s. c., 43 L. R. A. 284

The following have been held to be baggage:

Tools used by the passenger in his trade. *Davis v. Cayuga &c. R. Co.*, 10 How Pr. 330.

See *Brock v. Gale*, 14 Fla. 423; *Porter v. Hildebrand*, 14 Pa. St. 129.

Gems. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

A revolver. *Davis v. Michigan Southern &c. R. Co.*, 22 Ill. 278.

*Woods v. Devin*, 13 Ill. 746.

Clothing, traveling expenses, a few books, a lady's jewelry for dressing, an opera glass. *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379.

Salesman's catalogue, used by, and necessary to, him, in his business. *Staub v. Kendrick*, 121 Ind. 226.

*Gleason v. Goodrich &c. Co.*, 32 Wis. 85.

Articles of necessary convenience. *Jordan v. Fall River R. Co.*, 5 Cush. 69.

Macklin v. N. J. S. Co., 7 Abb. Pr. (N. S.) 238.

A watch. *Jones v. Vorhees*, 10 Oh. 145.

McCormick v. Hudson R. R. Co., 4 E. D. Smith (N. Y.) 181. See *Mad River &c. R. Co. v. Fulton*, 20 Oh. St. 318; *Dunn v. N. H. &c. Co.*, 58 Hun, 461; *American Contract Co. v. Cross*, 8 Bush. (Ky.) 472.

Jewelry of wife and for her use. *McGill v. Rowand*, 3 Pa. St. 451.

Jewelry for a lady's use and a part of her wardrobe.

Wharton on Negligence, sec. 607, and cases cited.

Manuscript music. *Texas &c. R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144.

Surgical instruments, in the case of a surgeon in the army traveling with troops. *Hannibal R. Co. v. Swift*, 12 Wall. 262.

Cloth not yet made into garments, but procured for purpose of manufacture into wearing apparel. *Mauritz v. N. Y. &c. R. Co.*, 23 Fed. Rep. 765.

*Dexter v. Sy. &c. R. R. Co.*, 42 N. Y. 326. (But this does not cover goods purchased for one not a member of passenger's family.) *Wilson v. Railroad Co.*, 56 Me. 60.

Manuscripts. *Hopkins v. Westcott*, 6 Blatch. C. Ct. 64.

Bedding of emigrant in his trunk. *Quimit v. Henshaw*, 35 Vt. 605.

#### (f.) WHAT IS NOT BAGGAGE.

Defendant was not liable for loss of *merchandise* received by it under guise of baggage, unless the transportation was knowingly undertaken, and not then, if the passenger knowingly violated the company's rules. The inference that baggagemaster knew contents of trunks was not justified. *Sloman v. Great Western R. Co.*, 6 Hun, 546, rev'g judg't for pl'ff; s. c., rev'd, 67 N. Y. 208 on the ground that it was properly submitted to the jury.

**From opinion.**—"Railroad companies are not liable for the loss of merchandise delivered to them, under the guise of baggage, for transportation along with a passenger. *Belfast &c. R. R. Co. v. Keys*, 9 H. of L. Cases 556; *Cahill v. London & N. W. R. R. Co.*, 13 C. B. (N. S.) 818; *Hudston v. Midland R. R.*, 4 Q. B. (L. R.) 366; *Smith v. B. & M. R. R.*, 44 N. H. 325; *Collins v. Boston & M. R. R.*, 10 Cush. 506; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill 586; *Dexter v. Syracuse R. R. Co.*, 42 N. Y. 326; *Stimson v. Conn. River R. R.*, 98 Mass. 83. They are liable, if they knowingly undertake to transport merchandise, in trunks or boxes which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose, violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulations. Cases, *supra*; *Gt. Northern*

R. R. v. Shepherd, 8 Exch. 39; Buther v. Hudson River R. R., 3 E. D. Smith 571; Brooke v. Pickwick, 4 Bing. 218; Stoneman v. Erie Railway, 52 N. Y. 429."

*Paintings* were shipped as baggage, without advising the defendant's agent of the nature of the same. The United States Statutes, that notice in writing of such paintings, when shipped as baggage, shall be given the master, &c., and that they be entered on the bill of lading thereof, or carrier should not be liable, was held to be a bar to the loss of the same. *Wheeler v. Oceanic S. Nav. Co.*, 52 Hun, 75, affirming nonsuit; s. c., rev'd, 125 N. Y. 155 on ground that defendant was still liable as bailee for hire for negligence.

Distinguishing *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 id. 167, and not following *Golden v. Romer*, 20 Hun, 438.

*Samples* carried by a commercial traveler do not constitute baggage, nor is a carrier liable for the loss thereof, although the baggagemaster was informed of the contents of the trunk, in the absence of evidence, that the baggagemaster had authority or had been accustomed to exercise the authority to contract for the carriage thereof. A contract made by the traveler did not inure to another person, who owned the goods. *Talcott v. Wabash R. Co.*, 66 Hun, 456, rev'g judgt for the pl'ff.

Distinguishing *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429; *Sloman v. Great Western R. Co.*, 67 id. 211, as compensation, aside from the passage tickets, was received in these cases.

Defendant was not liable for plaintiff's trunk, transported free, under the false representation that he was still an employé of defendant, where it was stolen from station platform, where it was left by his direction. *Burkett v. New York & C. R. Co.*, 24 Misc. 76.

Recovery is limited to personal baggage and does not extend to costly merchandise. *Simpson v. New York & C. R. Co.*, 16 Misc. 613.

Knowledge that it was against the rule of the company to receive jeweler's sample cases, prevented recovery and the receipt by the agent in violation of the rule did not constitute a waiver. *Weber Co. v. Chicago & C. R. Co.*, 113 Iowa, 188.

Loss of samples of merchandise carried by traveler as personal baggage without the knowledge of the carrier, is not chargeable to him. *South Kans. R. Co. v. Clark*, 52 Kans. 398; *Missouri & C. R. Co. v. Liveright*, 7 Kan. App. 772.

A railroad company may refuse to carry merchandise as personal luggage. *Collins v. R. Co.*, 10 Cush. 606.

The *Ionic*, 6 Blatchf. (U. S.) 538; *Dibble v. Brown*, 12 Ga. 217; *Smith v. R. Co.*, 44 N. H. 325; *Stimson v. R. Co.*, 98 Mass. 83; *Hannibal R. v. Swift*, 12 Wall. 262.

Where trunks contained *merchandise*, carrier was liable only for gross negligence. *Clark v. R. Co.*, 139 Mass. 423.

*Haines v. Chicago & c. R. Co.*, 29 Minn. 160; *Hamburg & c. Packet Co. v. Gattman*, 127 Ill. 598; *Blumantle v. R. Co.*, 127 Mass. 322; *Stimson v. Conn. R. R. Co.*, 98 Mass. 83; *Cosmelly v. Warren*, 108 Mass. 146; *Southern Kans. R. Co. v. Clark*, 52 Kans. 398; *Cahill v. London & c. R. Co.*, 13 C. B. (U. S.) 818; *Belfast & c. R. Co. v. Keys*, 9 H. L. Cas. 556; *Collins v. Boston & c. R. Co.*, 10 Cush. 506; *Chamberlain v. West Trans. Co.*, 45 Barb. 223.

A passenger, by the terms of his ticket, entitled to "personal passage" cannot take groceries into the car with him. The company cannot take away his packages. Its remedy is to eject him with his packages. *Bullock v. Delaware & c. R. Co.*, 60 N. J. L. 24; s. c., 37 L. R. A. 417.

In an action on the contract for failure to carry by one excluded by force from defendant's train because he was carrying packages of merchandise, it was held that, if the defendant company had, previous to the denial of the admission of the plaintiff to their cars, for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, it could resume its rights under the law only after reasonable notice of its rescission of the regulation so made. It could not suddenly enforce the right resumed without reasonable notice as against passengers who were in good faith traveling in reliance upon the previous regulation, and ignorant of, and unprepared for any change in it. *Runyan v. Central R. & c.*, 61 N. J. L. 542.

As to the proof required to establish such custom, see *Runyan v. Central R. & c.*, 65 N. J. L. 228; *id.*, 64 N. J. L. 67.

Where merchandise is shipped under the guise of baggage, plaintiff cannot recover, in the absence of gross negligence amounting to wilfulness. *Toledo & c. R. Co. v. Bowler & c. Co.*, 63 Oh. St. 274.

Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practiced or attempted upon its employes, it assumes with reference to the property the liability of a common carrier of merchandise. *Hannibal R. Co. v. Swift*, 12 Wall. Rep. 262, aff'g judg't for pl'ff.

**From opinion.**—"A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it was not pretended that any was attempted. Where a railroad company received for transportation in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is prac-

ticed or attempted upon its employes, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience: such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage. \* \* \* On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character, in the case of a surgeon in the army traveling with troops, may be properly regarded as part of his baggage. He may be required to use these instruments at any time, and must, accordingly have them near his person where they can be had upon a moment's notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff."

If agent checked with knowledge of contents, liability of common carrier attaches. *Jacobs v. Tutt*, 33 Fed. Rep. 412.

*Central Trust Co. v. Wabash & c. R. Co.*, 39 Fed. Rep. 417; *Winter v. Pac. R. Co.*, 41 Mo. 503; *Chicago & c. R. Co. v. Conklin*, 3 Pac. 762; *Oakes v. Northern Pac. R. Co.*, 26 Pac. Rep. (Ore.) 230; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30.

A traveling salesman, who would not certify that his trunk contained only baggage, as the rules provided, could not recover for failure to transport the same. *Norfolk & c. R. Co. v. Irvine*, 84 Va. 553.

The following articles were held not to be baggage:

Books purchased for another. *Horwitz v. Hamburg-American Packet Co.*, 27 Misc. 814.

Traveling salesman's samples are not baggage within a statute pre-



scribing rates for excess baggage. *Kansas City &c. R. Co. v. State*, 65 Ark. 363; s. c., 41 L. R. A. 333.

Feminine jewelry carried for transportation by a man. *Metz v. California &c. R. Co.*, 85 Cal. 329.

*Chicago &c. R. Co. v. Boyce*, 73 Ill. 510.

Agreement to transport bedding will not render carrier liable for wearing apparel said to have been wrapped up in the bedding. *Savannah &c. R. Co. v. Collins*, 77 Ga. 316.

Articles carried for sale. *Spooner v. Hannibal &c. R. Co.*, 23 Mo. App. 403.

A bicycle. *State v. Missouri P. R. Co.*, 71 Mo. App. 385.

Jewelry carried as personal baggage and not known to company's agent. *Humphreys v. Perry*, 148 U. S. 627.

Knowledge of the carrier that a trunk contains jewelry renders him liable for its loss. *Central Trust Co. v. Wabash &c. R. Co.*, 35 Fed. Rep. 147.

Deeds and documents, to be used by passenger, an attorney, on a trial to which he was bent, not luggage. *Phelps v. N. W. R. Co.*, 19 C. B. (N. S.) 321.

A "spring horse," weighing seventy-eight pounds, and measuring forty-four inches in length, is not personal luggage. *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366.

Articles intended for household use. *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

*Connolly v. Warren*, 106 Mass. 146.

Nor bullion, money or plate concealed in baggage (beyond that necessary for traveler's expenses), without notice to the carrier. Wharton on Neg. sec. 608.

Citing *Jordan v. R. R.*, 5 Crsh. 69; *Bell v. Drew*, 4 E. D. Smith, 59; *Phelps v. R. R.*, 19 C. B. N. S. 321; *Bomer v. Moxwell*, 9 Humph. 621; *Orange Co. Bk. v. Brown*, 9 Wend. 85; *Weed v. R. R.*, 19 Wend. 534; *Davis v. Mich. R. R.*, 22 Ill. 278; *Jones v. Preston*, 1 Tex. L. J. 66.

A package of nails and a letter file. *Runyan v. Central R. Co.*, 61 N. J. L. 542.

#### (g). WHEN LIABLE AS CARRIER AFTER ARRIVAL.

A passenger, with the consent of the agents of a carrier, checked his baggage to a station, intermediate to that of his departure and the one to which he purchased his ticket, upon the understanding that the baggage would be all right until he claimed it on the following morning. The baggage was destroyed by fire at such intermediate station during the night. A finding for the plaintiff was sustained, that the defendant

was liable as a carrier and not as a warehouseman. *Burgerin v. N. Y. C. & H. R. R. Co.*, 69 Hun, 479, aff'g judg't for pl'ff.

Citing *Roth v. Buffalo & State Line R. Co.*, 39 N. Y. 548; *Burnell v. N. Y. C. R. Co.*, 45 id. 184; *Hedges v. H. R. R. Co.*, 49 id. 223.

Carrier is liable, in damages, to passenger for trunk destroyed by fire, without fault of the owner, after reaching its place of destination and still in possession of the carrier. *Carey v. Cleveland &c. R. Co.*, 29 Barb. (N. Y.) 35.

If not called for within a reasonable time, carrier's liability for baggage is that of a warehouseman only. *Kansas &c. R. Co. v. McGahey*, 63 Ark. 344; s. c., 36 L. R. A. 78; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 521; *Kansas &c. R. Co. v. Patten*, 3 Kan. App. 338.

Where depot was closed soon after arrival of train, and a passenger could not, without extraordinary measures, have secured his baggage, company is liable, as common carrier, for loss of the same by burning of depot. *Dittman v. Keokuk R. Co.*, 59 N. W. (Iowa) 257.

*Toledo &c. R. Co. v. Tapp*, 33 N. E. (Ind.) 462.

#### (h). WHEN LIABLE AS A WAREHOUSEMAN.

The baggage may be left so long unclaimed as to make the carrier a gratuitous bailee and hence liable for only gross negligence. *Roth v. R. Co.*, 34 N. Y. 548.

*Van Horn v. Kermit*, 4 E. D. Smith 453; *Jones v. N. &c. T. Co.*, 50 Barb. 193; *Rock Island &c. R. Co. v. Fairclough*, 52 Ill. 106; *Louisville &c. R. Co. v. Mahan*, 8 Bush. 184; *Minor v. R. Co.*, 19 Wis. 40.

When the baggage was left overnight and was meanwhile lost by fire carrier was only liable as a warehouseman. *Roth v. R. Co.*, 34 N. Y. 548.

*Louisville &c. R. Co. v. Mahan*, 8 Bush. 184.

What is a reasonable length of time for a passenger to claim his baggage and in default thereof to charge the carrier only as a bailee for hire is a question of law for the court. *Hedges v. H. R. R. Co.*, 49 N. Y. 223.

But see *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Jefferson R. Co. v. Cleveland*, 2 Bush. 473; *Quimit v. Henshaw*, 35 Vt. 602.

Where a trunk is checked from one city to another, the liability to the owner of the trunk by the company as a common carrier continues from the time the trunk is checked until its arrival at its destination, and for such time thereafter as will afford the owner thereof a reasonable opportunity to remove the same.

What constitutes a reasonable time depends upon the circumstances of each case, and if the facts are disputed it is a question of law for the court to determine.

After the liability of a railroad company as a common carrier ceases, its strict responsibility as a carrier changes to a modified liability, such as that of warehouseman, and it can be charged with responsibility for the loss of the trunk only on the ground of negligence. *Mortland v. Philadelphia & Reading Railroad Company*, 81 Hun. 473.

**From opinion.**—"The trial court, rightly, as we think, dismissed the complaint after the plaintiff had rested her case. Defendant's liability to the plaintiff as common carrier was in force from the time the trunk was checked at Wilmington until its arrival at Mahoney City, and for such a time thereafter as should afford plaintiff reasonable opportunity to remove it. *Roth v. Buffalo & S. L. R. R. Co.*, 34 N. Y. 548; *Fanner v. Buffalo & S. L. R. R. Co.*, 44 id. 505; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184; *Mattison v. N. Y. C. R. R. Co.*, 57 id. 552.

As to what constitutes a reasonable time cannot be measured by any arbitrary and inflexible rule, but depends upon the circumstances of each case. When, however, the facts are undisputed, what is a reasonable time is a question of law for the court. *Hedges v. H. R. R. R. Co.*, 49 N. Y. 223.

In this case the facts were not in dispute. Only one witness was sworn, and he was the baggage manager of the theatrical company. His testimony required the court to hold that before the trunk was taken from the possession of the defendant the plaintiff had had a reasonable time within which to remove it, because the person who was authorized to act for her, and for that purpose had possession of the check, removed from the same car other baggage, and could have removed this had he desired to do so. For his own convenience, or for that of his principal, or both, he elected not to take it away, but to leave it in the custody of the defendant.

The baggagemaster of the defendant suggested that he leave it in the car, and told him where the car would be located, and that the defendant had a night watchman.

Plaintiff's representative acquiesced in the suggestion, delivered the check, with others, to the baggagemaster, and the car was closed. Thus was terminated defendant's relation to the plaintiff as common carrier of her trunk.

*Deninny v. N. Y. & N. H. R. Co.*, 49 N. Y. 546, is not an authority for the plaintiff. The decision in that case was predicated on a finding of fact that "The plaintiff caused the demand to be made for said trunk and contents within a reasonable time, and made reasonable efforts, and within a reasonable time, to demand and procure the trunk and contents; and, that the defendant refused and neglected to deliver the contents of said trunk."

We have not overlooked the case of *Burgevin v. N. Y. C. & H. R. R. R. Co.*, 69 Hun. 479. The proposition of law which the court asserts to be controlling in such a case as this accords with the views we have expressed, but under the peculiar circumstances of that case it was held that plaintiff called for his trunk within a reasonable time after its arrival at the station.

It does not follow, of course, that because defendant's responsibility as a carrier ceased, the company could thereafter leave it uncared for. It still owed a duty to the plaintiff in respect to the trunk. The strict responsibility of a carrier had been changed to a modified liability such as that of a warehouseman. As a warehouseman, the defendant could be charged with responsibility for the loss of the trunk only on the ground that it was negligent and failed to dis-

charge in full the duty it owed to the plaintiff as such. But upon the question of negligence the record is silent. Hence no question was presented for the consideration of the jury.

The judgment should be affirmed."

Liability even as a warehouseman was not established, where, to the passenger's knowledge, the baggage-master checked merchandise without taking bond of release, in violation of the company's rules, though at the request of a co-employé. *Weber Co. v. Chicago &c. R. Co.*, 113 Iowa, 188.

Defendant as warehouseman is not bound to keep an absolutely burglar proof storeroom but only one reasonably well secured. *Kansas City &c. R. Co. v. Patten*, 3 Kan. App. 338.

Liability of carrier with respect to personal baggage that has reached its destination, but has not been called for within a reasonable time over night, is that of bailee for hire. *Nealand v. Boston &c. R. Co.*, 161 Mass. 67.

*Vineberg v. R. Co.*, 13 Ont. App. 91; *R. Co. v. Boyce*, 72 Ill. 510; *R. Co. v. Fairclough*, 52 id. 106; *Bartholomew v. R. Co.*, 53 id. 227; *R. Co. v. Hardway*, 17 Ill. App. 321; *Hoeger v. R. Co.*, 63 Wis. 100; *Quimit v. Henshaw*, 35 Vt. 605; *R. Co. v. Mahan*, 8 Bush, (Ky.) 184; *Mote v. R. Co.*, 27 Iowa, 22; see, also, *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479; *Rome &c. R. Co. v. Wimberly*, 75 Ga. 316.

The liability of a railroad company for the burning of a passenger's trunk left in the baggage room over night, after he had arrived at his destination, was that of warehouseman. *Nealand v. Boston &c. R. Co.*, 161 Mass. 67.

A statute limiting liability as carrier, held not to apply to liability as warehouseman. *Wiegand v. Central R. &c. Co.*, 75 Fed. Rep. 370.

#### (i). WHO MAY RECOVER FOR LOSS OF.

The baggage was for the use of the plaintiff, his wife and child. The wife and child went on the train with the baggage and the plaintiff on another train. This did not effect recovery. *Curtis v. Delaware, L. &c. R. Co.*, 74 N. Y. 116.

From opinion.—"The baggage being, to some extent, at least, for the benefit of the members of the plaintiff's family, who were on the train, and had paid their fare, the case is distinguishable from one where the plaintiff's servant, or some other person, who has no interest in the baggage, takes his place, or even where the plaintiff himself follows the baggage on a later train. See *Wilson v. Grand Trunk Co.*, 56 Me. 60; *Becher v. Great Eastern Co.*, 5 L. R. (Q. B.) 241; *Stimson v. Comm. River Co.*, 98 Mass. 83; *Belfast and Ballymena Co. v. Keys*, 9 Il. of L. Cases, 556. Held, also, that the plaintiff could recover for the paraphernalia of his wife which he had given her. As the evidence did not show any gift of same to wife, the right of the husband was paramount and should be up-

held. Where there is a gift, the wife may bring an action, but otherwise the husband must sue. *Rawson v. Penn. R. Co.*, 2 Abb. (N. S.) 220; s. c. on appeal, 48 N. Y. 212; *Rodgers v. Long Island R. R. Co.*, 1 N. Y. S. C. Rep. (T. & C.) 396."

Where a trunk was checked as excess baggage for extra compensation with notice that it was the sample trunk of a commercial traveler, without exacting release of liability, in violation of a rule of the company unknown to the passenger, it was not necessary, to enable his employer to recover, that the latter's ownership should have been disclosed. *Trimble v. New York &c. R. Co.*, 162 N. Y. 81; s. c., 48 L. R. A. 115; aff'g, 39 App. Div. 403.

Where merchandise of an employer was included in baggage without a carrier's knowledge, the latter was only a gratuitous bailee, liable only in case of gross or willful negligence. *Cattaraugus Cutlery Co. v. Buffalo &c. R. Co.*, 24 App. Div. 267.

Where plaintiff made no effort to secure the removal of his trunk or to request that the station remain open to give an opportunity to have it removed, but went away and made no inquiry till the following morning, defendant's duty as carrier ceased upon the closing of the station, for the night, though only ten minutes after the train left; thereafter it was only liable as warehouseman. *Graves v. Fitchburg R. Co.*, 29 App. Div. 591.

Railroad company was only chargeable as warehouseman, where one left his baggage on the platform until morning, though he arrived after eleven o'clock at night and there was no one there to remove it for him. *Kansas City &c. R. Co. v. McGahey*, 63 Ark. 341; s. c., 36 L. R. A. 781.

Where a passenger was informed when her trunk would arrive, defendant was not liable, where she failed to call for it for a week, during which time it was stored in a reasonably safe place. *Indiana &c. R. Co. v. Zilly*, 20 Ind. App. 569.

Carrier held not liable for loss of firm goods checked as baggage of a member of the firm. *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287.

Citing *Weed v. Saratoga &c. R. Co.*, 19 Wend. 534; *Stinson v. Connecticut River R. Co.*, 98 Mass. 83; *Dunlap v. International Steamboat Co.*, id. 371; *Alling v. Boston &c. R. Co.*, 126 id. 121; *Becker v. Great Eastern R. Co.*, L. R., 5 Q. B. 241.

#### (j). FAILURE TO DELIVER ON DEMAND.

The failure of a carrier to deliver baggage to a passenger, when duly demanded, is *prima facie* evidence of negligence, even though the baggage is checked through and delivered to the connecting line; and if passenger does not call for it within a reasonable time, the carrier must use the care of a warehouseman, and, if it contracted to carry the baggage

through, it is liable for default of connecting carrier. *Carey v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *The Norway Plain Co. v. B. & M. R. R.* 1 Gray 211, and cases cited.

The carrier should keep the baggage until called for or disposed of according to law, and use ordinary care therefor. *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184, aff'g judg't for pl'ff.

As the baggage was not delivered when demanded, and no satisfactory explanation given of its non-delivery, without regard to the question whether the defendant became liable as a common carrier, it incurred the responsibility of a warehouseman, or that of an analagous character, and was liable for negligence. *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116.

*Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; Story on Contracts, secs. 446, 447, 448; 2 Parsons on Contracts, 140; Angell on Carriers, 267; Hathorn v. Ely, 28 N. Y. 78; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184, 186.

The plaintiff purchased a ticket of G. T. R. Co. and checked baggage from Montreal to New York. The defendant received and deposited the baggage in its room at New York, but it could not thereafter be found nor accounted for. The defendant was *prima facie* liable. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; reversing 5 J. & S. 516, and directing judg't for pl'ff.

#### (k). EXTRA COMPENSATION.

The defendant's agent refused to check baggage without a ticket, and while the plaintiff went for a ticket the trunks were put aboard and an extra charge for baggage was demanded and refused. The plaintiff demanded the trunks and he was refused, because they were covered by other trunks and train would be delayed while recovering them; they were taken by the train and burned. An action for *conversion* was sustained. Defendant did not occupy the position of common carrier of the plaintiff, and could not avail itself of any of the rules which have been established as to the liabilities of common carriers of passengers. Whether or not the qualification of the refusal to deliver, because train would be delayed, was reasonable in this case, was a question of fact for the consideration of the jury under proper instructions from the judge. *Mount v. Derick*, 5 Hill 455; *Watt v. Potter*, 2 Mason, 80; *Alexander v. Southey*, 5 Barn. & Ald. 211; *Delano v. Curtis*, 7 Allen 470; see *McEntee v. N. J. S. Co.*, 45 N. Y. 34; *Mc'ormick v. P. C. R. Co.*, 49 N. Y. 303, rev'g judg't for pl'ff.

Criticising and limiting *Jones v. N. & C. Co.*, 50 Barb. 193.

By checking a trunk with knowledge that it contains merchandise for which extra charge is made, the defendant becomes liable for its safety

as a carrier of freight, not baggage. *Trimble v. New York &c. R. Co.*, 162 N. Y. 84; s. c., 48 L. R. A. 115; aff'g s. c., 39 App. Div. 403.

The plaintiff, in a former action for loss of baggage, was not entitled to recover for merchandise checked in a separate box and paid for as "merchandise" as it was not baggage. *Dexter v. Syracuse R. R. Co.*, 42 N. Y. 326. Held, entitled to recover for same in second action. *Millard v. M., K. & T. R. Co.*, 20 Hun, 191. aff'g judg't for pl'ff; s. c. aff'd, 86 N. Y. 441.

Where no provision is made in the contract for *overweight*, and passenger was charged, and paid for, extra weight, such an arrangement was an independent agreement, and liability for loss could not be avoided by reason of limitations in the written contract. *Glorinsky v. Cunard Steamship Co.*, 4 Misc. (N. Y.) 388; s. c. aff'd, 6 Misc. 388.

## CONTRACTS.

A pledgor, through false representations, pledged property to another; the latter got no title and the pledgor was not negligent in not ascertaining the truth of the representation. *Mead v. Bunn*, 32 N. Y. 275.

Where a party signs a paper, and is misled as to the character and extent of an obligation, it is no defense as to one not a party to the fraud. *Western N. Y. L. Ins. Co. v. Clinton*, 66 N. Y. 331.

Citing *McWilliams v. Mason*, 31 N. Y. 294; *Casoni v. Jerome*, 58, id. 315, 321.

Where a party who has *actually executed* an instrument is chargeable with negligence in attaching his signature, he is liable to an innocent third party who has acted to his prejudice upon the faith of the instrument, although the signature was procured by fraud. *Page v. Krekey*, 137 N. Y. 307, rev'g judg't for pl'ff.

(In this case the defendant signed a letter directed to the plaintiff, guaranteeing that one "T." was a good tanner, honorable and straightforward, and that if the plaintiff would send him hides to be tanned that "T." would not convert or misappropriate them, and that the defendant would guarantee that they should, if not purchased by "T." be delivered to a certain firm. The defendant was intoxicated when he signed the paper, was unable to read it, was ignorant of its contents and signed it upon the false representation that it was an application for a license. In reliance upon this the plaintiff shipped "T." certain hides for which "T." did not properly account. The question was submitted to the jury whether the defendant, in signing the paper, *observed proper care and caution*, or was chargeable with neglect, and the plaintiff recovered. It was held that, if the defendant actually signed the paper, though induced to do so by fraud, if he was chargeable with negligence, he was liable to an innocent party, who acted to his prejudice upon the faith of the instrument upon the equitable rule that, where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. *McWilliams v. Mason*, 31 N. Y. 294; *Western & Co. v. Clinton*, 66 id. 326; *Powers v. Clarke*, 127 id. 417; *Casoni v. Jerome*, 58 id. 315; *Baylies on Sureties and Guarantors*, 214; *Burge on Suretyship*, 218. If the instrument had been negotiable paper, the defendant's liability to the plaintiff would depend upon the question of negligence, and there was no sound reason for the application of the different rule in this case. *Chapman v. Rose*, 56 N. Y. 137; *Whitney v. Snyder*, 2 Lans. 477; *National Exchange Bank v. Veneman*, 43 Hun. 241; *Fenton v. Robinson*, 4 id. 252. The judgment



was reversed upon the ground that the court erred in excluding evidence offered to fortify the defendant's testimony that he could not read.)

A party cannot evade a provision of a contract he failed to notice at the time of execution. *Consolidated &c. Storage Co. v. Atlantic Trust Co.*, 24 App. Div. 172.

Widow, inexperienced in business, bought fluctuating securities from bank, represented by its president, pretending to act in her interest in securing an investment, as first class. Contract set aside. *Carr v. National Bank &c. Co.*, 43 App. Div. 10; aff'g s. c., 23 Misc. 368.

So where the judgment debtor's agent, by fraud, obtained the judgment creditor's power of attorney to cancel a judgment, taking advantage of the latter's mental and physical helplessness. *Ballard v. Chicago &c. R. Co.*, 70 Mo. App. 108.

If false representations as to the value of articles could have been discovered by reasonable care, vendor cannot have damages therefor. *Kennedy v. Crandall*, 3 Lansing, 1.

*Smith v. Countryman*, 30 N. Y. 681.

A married woman gave notes and chattel mortgage on her separate property to secure payment of goods, whereof bill of sale was made in her name without her authority. She claimed that she did not read papers. She was negligent and liable. *Flower v. Trull*, 1 Hun, 409.

In the absence of actual fraud, a party cannot complain of terms of an instrument he executed without reading. *Terry v. Mutual Life Ins. Co.*, 116 Ala. 242.

See, also, *Lewis v. Dunlap*, 5 Pa. Super. Ct. 625; *Ruby v. Enig*, 12 York Leg. Reg. 174; *Sloan v. Courtenay*, 54 S. C. 314; *Clack v. Wood*, 14 Tex. Civ. App. 400.

Monomania on subject matter of contract vitiates it. *Dommick v. Randolph*, 124 Ala. 557.

Contract of sale prepared by a proposed lessee was signed by a woman, aged, illiterate and infirm, in belief that it was a lease as agreed. She did not have it read to her, but trusted the lessee to prepare it in accordance with oral agreement. Instrument set aside. *Moore v. Copp*, 119 Cal. 429.

When the facts are within the knowledge of both parties and there is no fiduciary relation, expressions of opinion as to title do not amount to fraud or deceit. *Choate v. Hyde*, 129 Cal. 580.

A mortgagor was not allowed to complain of erasures and changes in a chattel mortgage he executed without reading. *Dingle v. Trask*, 7 Colo. App. 16.

A contract executed by one while intoxicated was set aside. *Hale v. Stery*, 7 Colo. App. 165.

See, also, *Rogers v. Warren*, 75 Mo. App. 271; *Boner v. Meyer*, 11 York Leg. Reg. 58; *Wells v. Houston*, 23 Tex. Civ. App. 629; *Hauter v. Tolbard*, 47 W. Va. 258.

Weakness of mind not amounting to imbecility will not vitiate a contract in absence of fraud. *Nance v. Stockburger*, 111 Ga. 821.

See, also, *Shea v. Murphy*, 164 Ill. 614.

Reformation was refused as to a note so executed as to be an individual and not a corporate note, when individual liability was in fact demanded and promised. *Hackmack v. Wiebrock*, 71 Ill. App. 71; s. c. aff'd, 172 Ill. 98.

An instrument under seal is valid unless it appears that fraud has induced the signing of an instrument not intended. *Resser v. Corwin*, 72 Ill. App. 625.

See, also, *North v. Stevenson*, 71 Mo. App. 429, (a receipt).

Negligence of a vendee in failing to examine the records, did not bar relief for the actual fraudulent misstatements of the vendor as to location of land. *Rohrof v. Schultz*, 154 Ind. 183.

Plaintiff was unable to read without glasses. Defendant's agent filled in one amount, and read another when asked to read document. Plaintiff was not negligent. *Sawin v. Union &c. Asso.*, 95 Iowa, 477.

A party intending to guarantee only future indebtedness, refused to sign an instrument covering existing debts. The other party directed him where to make erasures that would eliminate this feature. There were, however, other provisions regarding it which a careful reading would have discovered. Failure to read it was negligence. *Reid &c. Co. v. Bradley*, 105 Iowa, 220.

But an illiterate man is not necessarily negligent in trusting another to reduce his oral agreement to writing. *Williams v. Hamilton*, 104 Iowa, 423.

See, also, *Nicol v. Young*, 68 Mo. App. 448.

Agreement to be liable for all cattle that escape from a certain pasture, construed to apply to an escape through negligence and not by an extraordinary storm. *Well v. Sutphin*, (Kan.) 68 Pac. Rep. 648; s. c., 64 Kan. 873.

Although a mistake of fact is caused by the negligence of one party, he may avail himself of it if the other can be relieved of any prejudice caused thereby. Storage company was permitted to stop a check paid for sack overlooked in a negligent search but afterwards found. *State &c. Bank v. Buhl*, (Mich.) 88 N. W. Rep. 471.

See, also, *Walker v. Conant*, 65 Mich. 195; *Pingree v. Gas Co.*, 107 id. 156; *Eberle v. Heaton*, 124 id. 205; *Hewitt v. Attick's Sons*, 15 Lane. L. Rev. 240; *Alexander v. Brogley*, 62 N. J. L. 584; *Engman v. Taylor*, 46 W. Va., 669.

Reliance on expressions of opinion, easily verified, is not ground for relief. *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 317.

Where one signs a document, he is conclusively presumed to have read its contents, in the absence of fraud. *Firey v. Pennsylvania R. Co.*, (N. J. L.) 52 Atl. Rep. 472.

Mistake induced by fraud, was waived by permitting the performance of contract after discovery of the fraud. *Dellinger v. Gillespie*, 118 N. C. 737.

See, also, *Avondale Marble Co. v. Wiggins*, 12 Pa. Super. Ct. 577; *Rouzie v. Daingertfield*, 97 Va. 708; *Landreth Co. v. Schevenal*, 102 Tenn. 486; *Whitcomb v. Hardy*, 73 Minn. 285.

An executed contract cannot be avoided because its legal effect was misunderstood, though the mistake was mutual and might have been an excuse for non-performance. *Mitchell v. Holman*, 30 Or. 280.

Parties stipulated for the mining of coal, whereby the second party agreed to pay the first party a stipulated price per ton for the coal taken out. The second party mined under the land so negligently and left such insufficient support that the rock, earth and coal fell down into and ruined the mine, and the whole bed of coal was lost to the plaintiff. Held, that although there was no express stipulation in the contract against such a negligent destruction of the mine, it was to be implied, and that the plaintiff had a right of action upon this implied promise. *Sander-son v. Scranton*, 105 Pa. St. 472.

See "Bills, Notes, etc., Negligence in Executing," p. 166.

Or at least was not induced by the act of the other party. *Coates & Sons v. Early*, 46 S. C. 220.

See *Dewey v. Whitney*, 93 Fed. Rep. 533; aff'g s. c., 83 Fed. Rep. 325.

The fact that certain liens were overlooked in a contract of exchange subject to specified encumbrances, held not of itself ground of rescission. *McGregor v. Johnson*, (Tex. Civ. App.) 34 S. W. Rep. 407.

Contract was binding, though plaintiff made a mistake in figuring his estimates. *Brown v. Lery*, (Tex. Civ. App.) 69 S. W. Rep. 255; *Moffett & Co. v. Rochester*, 91 Fed. Rep. 28; rev'g s. c., 82 id. 256.

Where an ignorant and unlettered man seeks to get rid of a note and mortgage, on the ground that they were procured by fraud, and he did not understand them, he cannot have a different contract by parol, if it appears that the papers he signed were read and truly explained to him. *Selden v. Myers*, 20 How. (U. S.) 506.

See *Ellis v. McCormick*, 1 Hilt. 313; *Trambly v. Ricard*, 130 Mass. 261.

One will not be relieved of a mistake in making a contract, where it was due to negligence. *Pope v. Hoopes*, 90 Fed. Rep. 451.

Misrepresentations were no defense, where they were such that no intelligent man would have relied on them and their falsity was known before the contract was executed. *Beckley v. Riverside Land Co.*, (Va.) 23 S. E. Rep. 778.

## CONTRACTORS.

Where a person, exercising an independent employment, enters into a contract with another as an independent contractor, and not as a mere servant of the latter for the bestowal of his personal services according to the will of the latter, the doctrine of *respondet superior* does not apply, and the contractor is alone liable for injuries arising from the negligence of himself or his servants, unless,

- (1) The act to be done is unlawful, or,
- (2) Is intrinsically dangerous, or the injury resulted necessarily from the nature of the work, and not from the lack of care or skill on the part of those executing it, or,
- (3) Unless there be a personal and immediate duty on the part of the contractee to prevent or use due care to prevent the act or condition from which the injury arose.

(In addition to these exceptions to the general rule confining the remedy to recovery against the contractor, it has been urged, and, indeed, held, that the contractee must exercise care in selecting the contractor. See discussion in March-April, 1895, Am. L. Rev. 229, citing *Norwalk &c. Co. v. Borough of Norwalk*, 63 Conn. 395, and *Berg v. Parsons*, 84 Hun, 60.

Such a doctrine, at present, furnishes no recognized exception to the rule, yet it must form a fundamental modification of it. It could not, in any just, legal sense, be considered that a boy or ignorant and inexperienced man could be engaged to do a dangerous work, so as to divest the contractee of liability. Hence, the question of negligence is involved in the engagement of the contractor. But the difficult inquiry relates to the degree of care that a contractee should employ. This would be somewhat proportioned to the danger of the undertaking; but, in general, if it were lawful to do the work at all, through the employment of a skillful contractor, so as to relieve the contractee, the latter should have the right, without subjecting himself to liability, to employ any person following for his vocation the particular employment involved, and holding himself out as competent therein. In such case, however, the conditions surrounding the proposed contractor might be such, or notice of his unfitness might be so particularly brought home to the contractee that the latter would be bound to use reasonable care to determine his competency, and if the research were made in good faith and with reasonable prudence, and resulted favorably to the contractor, the engagement of him should be justified.)

The contractor of a person, licensed to build a sewer, is liable for the failure to guard it with lights: although the license from the city provided, that the *licensee* should provide proper guards to be placed at the excavation and be answerable for any damage to persons injured, this did not enure to third person injured. Horses were driven into an open sewer. Licensee was not liable. *Blake v. Ferris*, 5 N. Y. 48, rev'g judg't for pl'ff.

See *Storrs v. City of Utica*, 17 N. Y. 107, *post*,

The city was held liable, where a person fell into an excavation in the street, against which the contractor had not stipulated to protect the public by barriers, and recovery over against the contractor was not permitted. *City of Buffalo v. Holloway*, 7 N. Y. 493, aff'g judg't sustaining demurrer.

This case would seem to hold the doctrine that the contractor would not be liable for omission to warn persons on street of an excavation by lights, guards or barriers, unless he contracted to do so, and that such duty rested solely on the city. It was assumed that the excavation was necessary.

The defendant was not liable for the negligence of a workman of a contractor, engaged by the defendant to do work. The fact that the work was to be conformed to directions to be given by the defendant was immaterial. Such arrangement applies only to the results of the work, and does not give control over the contractor or his workman. *Pack v. Mayor &c.*, 8 N. Y. 222, rev'g judg't for pl'ff.

The defendant was not liable for negligence of servants of the contractor to grade a street, where blasting was necessary, although to be done under the direction and to the satisfaction of the defendant's officers.

A horse was injured by a stone from a blast negligently sent off. *Kelly v. The Mayor &c. of New York*, 11 N. Y. 432, rev'g judg't for pl'ff.

A contractor was liable for the wrongful act of a sub-contractor, engaged to build houses; boards were placed over excavation on sidewalk and plaintiff fell through. *Creed v. Hartman*, 29 N. Y. 591, aff'g judg't for pl'ff.

The excavation was deemed a nuisance, and the action was not one of negligence, following *Congreve v. Smith*, 18 N. Y. 79.

Defendant, as contractor for repairs upon the canal, and legally bound to keep the same free from all obstructions to navigation, was liable for damages occasioned by negligently permitting obstructions to the navigation of the canal to continue.

Such cause of action is assignable, and the assignee can recover for the same in his own name. *Fulton Fire Insurance Co. v. Baldwin*, 37 N. Y. 648, overruling demurrer to complaint.

*McKee v. Judd*, 2 Kern. 622; *Waldron v. Willard*, 17 N. Y. 466; *Merrill v. Grinnell and others*, 30 id. 594.

"L." agreed to build an arch culvert for the defendant, for which the defendant should furnish the centers, but "L." being short of centers requested the defendant's foreman of carpenters to take down one from those already in use, during which removal, an employé under the carpenter was, by the negligence of "L." and the carpenter, killed. Defendant was not liable, as failure to perform contract was not the proximate cause of the injury. *Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 608, rev'g judg't for pl'ff.

The defendant contracted with the state to keep a section of the canal in repair. The plaintiff's horse fell through a bridge. Chapter 577, Laws of 1867, sections 3 and 4, imposing duties on officers, as to manner of making repairs, did not excuse the defendant from keeping the section in repair, nor did the fact, that he did all that was ordered to be done. The repairs were at his peril and, under the contract, he was liable for all injuries. *French v. Donaldson*, 51 N. Y. 496, affirming 5 Lansing, 293, and judg't for pl'ff.

Citing *Conroy v. Gale*, 5 Lansing, 344; affirmed 47 N. Y. 665.

"A," contractor to tow boats, hired a steamer to do it, under the management of its master. "A." was liable perhaps on the contract, but not on action based on the negligent management of the steamer, whereby a boat in tow was sunk. *Bissell v. Torrey*, 60 N. Y. 635, aff'g nonsuit.

A railroad corporation, which has let by contract the entire work of constructing its road, and had no control over those employed in the work, was not liable for injuries to a third person, occasioned by negligent acts in doing the work of those employed, such as blasting in such a manner as to throw rocks upon the land of another.

A party is not chargeable with the negligent acts of another, in doing work on his lands, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him.

There is no distinction in this respect between an owner of real and of personal property, and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property. *McCafferty v. S. D. & P. M. R. Co.*, 61 N. Y. 178, aff'g judg't for def't.

Distinguishing *Storrs v. City of Utica*, 17 N. Y. 104; *Water Co. v. Ware*, 16 Wall. 566; *Hay v. Cohoes Co.*, 2 Comst. 159. See dissenting opinion by Dwight, C.

Where a contractor sub-lets a part of the work, the sub-contractor is alone liable for his own negligence. *Overton v. Freeman*, 11 C. B. 73 Eng. C. L. 687; *Burgess v. Grav*, 1 C. B. 50 Eng. C. L. 577; *Rapson v. Cubitt*, 9 M. & W. 710. But where the injury arises from the separate negligence of each, and the damage done by each cannot be distinguished, each is liable for the whole. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 195; *Partenheimer v. Van Order*, 20 Barb. 479; *Colgrove v. R. Co.*, 5 Duer. 382; 20 N. Y. 49.

Water ran into a house from an omitted waste pipe, which the sub-contractor should have put in, and a defective area was made by the

contractor. Both were liable. *Slater v. Mersereau*, 64 N. Y. 138, affirming 5 Daly, 445 and judg't for pl'ff.

See *Webster v. R. Co.*, 38 N. Y. 260.

The owner of land is not liable for the negligence thereon of a contractor or his servants. The negligent act of one person cannot be imputed to another, unless the relation of master and servant exists. *Reedie v. The London & Northwestern Railway Co.*, 4 Exch. 244; *Hobbit v. Same*, id. 253; *Pack v. The Mayor &c.*, 8 N. Y. 222; *Kelly v. The Mayor*, 11 id. 432; *Blake v. Ferris*, 1 Sold. 48.

The owner of machinery not dangerous in its nature loaned it to another, whereupon it became defective, and did injury. The owner was not liable. The defendant's derrick was loaned to one contracting with it to unload iron, and contractor's servant was injured by the contractor's negligent use of it. The presumption was that the contractor was to keep derrick in repair; and if defendant was to repair on notice, it would not be liable, at least, until notice was given. *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, reversing 4 Hun. 769 and judg't for pl'ff.

Distinguishing *Coughtry v. Globe &c. Co.*, 56 N. Y. 124.

The defendants hired "S." and "D." by a written contract, to take logs down the river and put them in the booms of the respective owners. The logs mingled with others and formed a jam and carried away the plaintiff's bridge. "S." and "D." were not servants of such owners, but independent contractors, and the owners were not liable. The undertaking was not *per se* dangerous to third parties, nor unlawful, as the legislature recognized the propriety of it. (Cases cited.) *Town of Pierpont v. Loveless*, 72 N. Y. 211, rev'g judg't for pl'ff.

Through the neglect of the contractor, in repairing upper stories of a building, some property of plaintiff in first story was injured. The contractors and not the owners were held liable, although owner employed superintendent to overlook work and give instructions to contractor. *Morton v. Thurber*, 85 N. Y. 550, aff'g judg't for def't.

The defendant contracted with the county for the services of convicts, rendered in the county building, under its control and with its appliances. The plaintiff was employed to repair the building and fell down the elevator shaft. The shaft and convicts were under control of prison authorities. Defendant was not liable. *Cunningham v. B. S. S. & L. Co.*, 93 N. Y. 481, affirming 25 Hun. 210, and nonsuit.

A contractor and the defendant stipulated that the former should pay all damages done in construction; contractor and not defendant was liable to the plaintiff injured by his horse, which was frightened by blasting.



If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given such notice; but the duty to give it did not devolve upon the village. *Herrington v. Village of Lansingburgh*, 110 N. Y. 145, aff'g 35 Hun. 598, and nonsuit.

*Pack v. Mayor &c.*, 8 N. Y. 222; *Kelly v. Mayor*, 11 id. 432, and *McCafferty v. Spuyten Duyvil &c. Co.*, 61 id. 178.

Contractors, under the aqueduct commissioners of the city of New York, were held not liable for negligence of the brakeman of a dump car, on which the commissioner's inspector was injured, while riding into the tunnel, as they owed him no duty to furnish a car, and it was not material that he had ridden before. A different question would have arisen, if plaintiff had been injured by defendant's servants in the course of his duty, and while walking into tunnel. *Morris v. Brown*, 111 N. Y. 318, rev'g judg't for pl'ff, distinguishing *Byrne v. N. Y. Central R. Co.*, 104 id. 362; *Weinhald v. Acker*, 17 J. & S. 182; *Wendell v. Bonter*, 12 N. Y. 494; *Ackert v. Lansing*, 59 id. 646; *Beek v. Carter*, 68 id. 283.

The defendant, a contractor, to build one railway, left a car on the crossing of a track of another railway which crossed the first at grade. The engineer of a special train of the second railway ran into said car and jumped and was hurt. Defendant was liable. *Albert v. Sweet*, 116 N. Y. 364, aff'g judg't for pl'ff.

A municipal corporation is not liable for the injury of a third person, occasioned by the negligence of the servants of a contractor, where the municipality has no control over the manner of performing the work, but the contractor is liable in such case.

After the contractor had completed the sewer he was directed to raise the grade of a street, and the injury happened while doing this. Held, that the work was within the terms of the contract for the sewer, and that the municipality was not liable: also that this would have been the case if the work had not been done in connection with the former contract, as the city had nothing to do with the manner of its performance and had no control over the workman. *Charlock v. Freel*, 125 N. Y. 357, aff'g 50 Hun. 395, and judg't for pl'ff.

**From opinion.**—"In *Vogel v. Mayor &c.*, 92 N. Y. 18, Earl, J., said, referring to the cases of *Kelly v. Mayor &c.*, 11 id. 432, and *Pack v. Mayor &c.*, 8 id. 222: 'The doctrine was again announced that, to make the city liable, it must have the power to direct and control the manner of performing the *very work* in which the carelessness occurred.'

The owner of a building employed a competent contractor to alter a building, in doing which a wall fell and did injury to a third person. Although the wall was weakened by age and decay the work was not

intrinsically dangerous, and the owner was not liable and the contractor was. *Engel v. Eureka Club*, 137 N. Y. 100, aff'g nonsuit.

**From opinion.**—"But the exigencies of affairs frequently require that persons exercising independent employments should be entrusted by owners of property with its improvement, and in various relations and under varying conditions they are employed, not as servants, but as independent contractors to execute contracts, which the person, who secures their services, is unable to execute himself, or the execution of which he prefers to commit to another. The duty which the contractor owes, is defined by the contract or implied therefrom. In such cases the maxim *qui facit per alium, facit per se*, has no appropriate application, and there is no reason founded upon public policy, or the relations between the parties to the contract, which should subject one party to the contract to liability to third persons, for the negligence of the other. The principle that no liability on the part of the innocent party in such cases exists, has become settled doctrine of our law. It leaves an adequate remedy to the party injured, against the real author of the wrong. There are well understood exceptions to this rule of exemption. *Cases of statutory duty imposed upon individuals or corporations: or contracts which are unlawful, or which provide for the doing of acts which, when performed, will create a nuisance, are exceptions.* In cases of the first mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed, from responsibility, and in those of the second class, exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. *Storrs v. City of Utica*, 17 N. Y. 104; *Lowell v. L. & B. R. R. Co.*, 23 Pick. 24; *Hole v. S. S. R. Co.*, 6 H. & N. 488; *Butler v. Hunter*, 7 id. 826. There are cases of still another class, where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is '*intrinsically dangerous*,' in which case, it is held that the party who lets the contract to do the act, cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful. 2 Dillon on Mun. Corp. sec. 1029, and cases cited. But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care. *McCafferty v. L. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Connors v. Hennessy*, 112 Mass. 96; *Butler v. Hunter*, *supra*."

"H.," the owner of a lot, contracted with defendants to build a house upon said lot and latter were "to be answerable for any damages \* \* \* to the property \* \* \* of any neighbor." \* \* \* Defendants contracted with "D." to do the necessary excavation, and to assume "all responsibility for any loss or damage to persons or property." In blasting rock upon said lot, plaintiff's house was injured. The evidence tended to show that the damage was caused by the negligent manner in which "D." did the blasting. The court charged the jury that the defendants were liable. Error: the defendants were not liable for negligence of "D.:" that if there were no negligence and the injury was the inevitable result of the blasting, no one was liable (*Booth v. Rome & C. R.*

Co., 140 N. Y. 267), and if defendants' contract with "H." was a contract of indemnity, it imposed no liability, as "H." was not liable; that the clause referred to could not be considered as inserted for plaintiff's benefit, but if so, as she was not a party to the contract or in privity therewith, she could not enforce it. *French v. Vix*, 143 N. Y. 90, affirming order granting new trial to defendants.

See *Vroman v. Turner*, 69 N. Y. 280.

Inspection of boat by her owner and his direction to captain to collect bill for contract price under charter party before allowing freight to be unloaded, held not to show control by owner of such vessel, chartered with her crew, so as to make owner liable for negligence of crew in unloading. *Anderson v. Boyer*, 156 N. Y. 93; rev'g s. c., 13 App. Div. 258.

An owner of a city lot, held not liable to adjoining lot owner for negligence of independent contractor in blasting rocks. *Berg v. Parsons*, 156 N. Y. 109; s. c., 41 L. R. A. 391; rev'g s. c., 90 Hun. 267.

**From opinion.**—"There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of these exceptional cases does the question of negligence arise."

A municipal corporation held not liable for construction of an authorized public improvement under an authorized contract reserving only power of inspection and supervision. *Uppington v. New York*, 165 N. Y. 222, aff'g s. c., 44 App. Div. 630; see also s. c., 41 App. Div. 370.

**From opinion.**—"When a municipal corporation furnishes its own materials and makes a public improvement through agents selected by itself, with power to discharge them at will, and to direct them as to the details of the work, they are its servants, and the master who selects and controls them is liable for their negligence." \* \* \* "When, however, the city has power to let the work and it enters into contract with competent contractors, doing an independent business who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents of the city, but are independent contractors, and the city is not liable for their negligence, even when it reserves the right to change, inspect and supervise to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, and the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers which results in injury. (*Berg v. Parsons*, 156 N. Y. 109; *Engel v. Eureka Club*, 137 N. Y. 100; *Butler v. Townsend*, 126 N. Y. 105; *Char-*

lock v. Freel, 125 N. Y. 357; Harrington v. Village of Lansingburgh, 110 N. Y. 145; Ferguson v. Hubbell, 97 N. Y. 507; Town of Pierrepont v. Loveless, 72 N. Y. 211; Kelly v. The Mayor, 11 N. Y. 432; Pack v. The Mayor, 8 N. Y. 222; Blake v. Ferris, 5 N. Y. 48; Reedie v. London & Co. R. Co., 4 Exch. 244; Overton v. Freeman, 21 L. J. C. P. 52). Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not." \* \* \* "James J. Morgan & Co. were not servants employed in the business of a master and subject to his control as to all parts of the work, but were independent contractors engaged in making an entire improvement, free from control as to the manner of performance, although subject to instructions as to results."

See, also, *White v. New York*, 15 App. Div. 440.

A licensed public carman, who carries on business on his own account, with his own capital, etc., is not the servant of one employing him to carry merchandise, so as to make the latter liable for injuries caused by the negligent sliding of a barrel over a skid. *McMullen v. Hoyt*, 2 Daly, (N. Y.) 271.

See, for independent contractors: *Donovan v. Laing & Co.*, 1 Q. B. 629; *Cohen v. Simmons*, 50 N. Y. S. R. 146; *Davison v. Shanahan*, 93 Mich. 486; *St. Johns & Co. v. Shalley*, 33 Fla. 397; *Mickoe v. Wood Mowing & Co.*, 60 N. Y. S. R. 282; *Chicago & Co. R. Co. v. Ferguson*, 3 Colo. App. 414; *Maltbie v. Bolting*, 26 N. Y. Supp. 903; *Morgan v. Smith*, 159 Mass. 570; *McLoughlin v. N. Y. Lighterage Co.* 7 Misc. 119; *Wadsworth Howland Co. v. Foster*, 50 Ill. App. 513.

See, for servant, not independent contractor: *Waters v. Fuel Co.*, 55 N. W. (Minn.) 52; *Brannock v. Elmore*, 21 S. W. (Mo.) 451; *Williams v. Fresno Canal Co.*, 96 Cal. 14; *Donovan v. Oakland*, 36 Pac. (Cal.) 516; *St. Johns & Co. R. Co. v. Shalley*, 33 Fla. 397.

If defects of canal bridge were such that the contractor might, by reasonable tests, have discovered them, the question of his negligence is for the jury. It need not be apparent to everybody, or notice brought home to the contractor. *Stack v. Bangs*, 6 Lansing, 262, reversing non-suit.

Citing *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Conroy v. Gale*, 5 Lansing, 344.

"L," defendant, contracted with "S," defendant, to remove rock, etc., from "L's" lot adjoining plaintiff's lot. "S," subcontracted to "M," who proceeded so negligently as to injure the plaintiff's stable. Such injury was not necessarily caused by the performance of the contract, but by "M's" negligence alone. "M," alone was liable. *King v. Livermore*, and others, 9 Hun, 298, affirming judgment for defendant; s. c., aff'd, 71 N. Y. 605.

Defendant established a grade and ordered sidewalks to conform to it. "A," employed a contractor to conform his walk thereto, and the contractor left one end 15 inches lower than the adjoining walk. A person tripped on it and was hurt. Defendant was not liable. Contractor was

not its agent or servant but that of "A." *Sweet v. Village of Gloversville*, 12 Hun, 302, aff'g nonsuit.

The defendant's contractor, to raise a house, left unguarded a ditch dug without the defendant's knowledge and unnecessarily. Plaintiff was hurt; defendant was not liable, and an owner of real estate under such circumstances is "not" liable for contractor's acts, unless.

1st. Contractor be his employé, or

2nd. Unless work authorized by contract necessarily produced injury, or

3rd. Unless injuries were by the omission of some duty. *Ryder v. Thomas*, 13 Hun, 296, aff'g judg't for def't.

Defendant employed a contractor to excavate for a cellar and build up the same to the level of the curb line, and with another contractor for the balance of the building. First contractor built a fence to keep passers-by from the excavation; the same blew over and injured the plaintiff, while passing. Defendant was not liable for the negligence of contractor. *Martin v. Tribune Association*, 30 Hun, 391, rev'g judg't for pl'ff.

**From opinion.**--"The contract was neither a trespass nor nuisance. The power to permit the defendants to remove the sidewalk and erect under it a vault was given by the legislature to the city authorities. The defendant obtained permission to build this vault, and neither trespass nor nuisance can be alleged against an act, which is permitted in the streets of the city of New York by legislative and municipal authority. *Congreve v. Smith*, 18 N. Y. 79; *People ex rel. Murphy v. Kelly*, 76 id. 475; *Irvine v. Wood*, 51 id. 224; *Crede v. Hartmann*, 29 id. 591.

The principle of those cases is not questioned in *Mairs v. Manhattan Real Estate Association*, 89 N. Y. 498. It was held in that case that permission to build a vault under the sidewalk gave no right to collect the water from the street, and throw it in the excavation and so upon a private owner adjacent. As to passengers upon the street the act done was lawful."

A contractor stipulating to hold city harmless "from all suits for negligence in doing work." is liable for negligence in doing extra work under contract, although done according to plan and under direction of city engineer. *Charlock v. Friel*, 50 Hun, 395, aff'g judg't for pl'ff; s. c. aff'd, 125 N. Y. 357.

Distinguishing *City of Buffalo v. Halloway*, 3 Seld. 493, and following *Kelly v. Mayor*, 11 N. Y. 432.

The defendant employed a firm to repair the truss of a bridge, and this firm contracted with others to do it. Through the negligence of the contractors, and not from the nature of the work itself, the plaintiff was hurt. *Wood v. City of Watertown*, 58 Hun, 298, rev'g judg't for pl'ff.

**From opinion.**—"If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangements, as to the terms and conditions, such employment is in the nature of an independent contract, which imposes upon the employé the responsibility, incurred by acts of negligence, caused by himself or those who are aiding him in the performance of the work. *Hexamer v. Webb*, 101 N. Y. 377, 383; see, also, *Blake v. Ferris*, 5 id. 48; *Jack v. Mayor*, 8 id. 222; *Kelly v. Mayor*, 11 id. 432; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 id. 178; *Ham v. Mayor*, 70 id. 462; *Town of Pierrepont v. Loveless*, 72 id. 211; *Devlin v. Smith*, 89 id. 470; *Herrington v. Village of Lansingburgh*, 110 id. 145."

The defendant, as contractor with the United States, blasted rock at Hell Gate in the East River and so shook the walls of the plaintiff's house at Astoria, L. I., as to do damage. The defendant was not liable, in the absence of proof of negligence. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, rev'g s. c., 58 Hun, 358.

Where a person contracted to supply building with sprinkling system for extinguishing fires, and the system was erected so negligently as to allow the water to escape and do damage, an action therefor against such contractor for injury to tenants could not be defeated by showing that he had sublet such contract, as the injury was produced by a defect in the very article which the defendant had contracted to furnish, and damages were caused by the negligent act of the defendant's agent in letting water in the tank. *Butts v. J. C. Mackey Co.*, 72 Hun, 562.

Upon the trial of an action for personal injuries by a fall on a sidewalk, the plaintiff proved that the defendant owned and was in the actual possession of the property abutting on such sidewalk; that he had dug out cellars and caused the erection of certain buildings thereon; that he visited the premises every day while the excavations were going on, and sometimes half a dozen times each day; that he saw men at work excavating the sidewalk and putting in ashes, and was seen apparently giving directions to men at work both upon such buildings and sidewalk.

Held, that the plaintiff had established by *prima facie* evidence that the work was being done by the defendant or his agents, and that the negligence, if there was any, was chargeable to him.

Upon the trial of such action, the plaintiff having established *prima facie* that the negligence, if any, was that of the defendant or his agents, the defendant testified that the work was being done by an independent contractor; other witnesses testified to independent facts which might be regarded as corroborating the defendant's testimony, but, without his testimony, the evidence would not permit a finding that the work was being done by an independent contractor.

Held, that the court could not assume that it was proved that the work had been done by an independent contractor and dismiss the complaint.

on the ground. *Fisher v. Rankin*, 78 Hun, 407; s. c. aff'd, 149 N. Y. 579.

Contractors held not liable for negligence of sub-contractors who worked directly from the plans and specifications without control as to materials and methods of work. Plaintiff was injured by the falling of a tie beam put in by the sub-contractors. *Wittenberg v. Friederich*, 8 App. Div. 433.

In a contract for construction of a retaining wall, a city reserved privilege of supervision and control of location of wall and materials used. The privileges were exercised and the city held liable for an encroachment by the wall and for the dropping of stones from it onto plaintiff's land. *Goldschmidt v. New York*, 14 App. Div. 135.

A street corporation constructing a bridge under a permit, granted on condition that it assume liability for the negligent performance of the work, was held liable for negligence of independent contractor in leaving a lumber pile unlit. *Weber v. Buffalo R. Co.*, 20 App. Div. 292.

So also where an owner was permitted to maintain a coal chute in the sidewalk on condition that he keep it properly guarded and it was left unguarded by an independent contractor. *Downey v. Low*, 22 App. Div. 460.

See, also, *Campion v. Rollwagen*, 43 App. Div. 117.

Where the contractor was to have entire charge of all the work and assume liability for accidents, no recovery was allowed against the owner for injuries from brick falling from the building into the street. *Wolf v. American Traction Soc.*, 25 App. Div. 98; s. c. rev'd, 164 N. Y. 30, for lack of proof as to who let the brick fall.

Owner of a building employed contractors to take it down. He was not liable for the negligence of the independent contractor in overweighting a floor with brick, causing it to give away. *Cullom v. McKelvey*, 26 App. Div. 46.

A lot owner employed a competent architect to plan a building and a contractor to build, subject to the inspection and supervision of the architect. The owner was not liable for the death of a workman in the collapse of the building, from a defect in the foundation, due to the negligence of the architect and contractor. *Burke v. Ireland*, 26 App. Div. 487. The judgment of the Appellate Court on a second appeal (47 App. Div. 428), to the effect that the duty to secure a firm foundation rested on the owner and that the architect was merely his agent for this purpose, was reversed by the court of last resort, which held that he was an independent contractor, (166 N. Y. 305).

Daily inspection and failure to employ architect to supervise the work did not make owner liable for negligence of a reputable contractor, em-

ployed to alter a building pursuant to adequate plans approved by the building department. *Hawke v. Brown*, 28 App. Div. 37.

Owner not liable for death of his watchman caused by fall of brick to sidewalk from the building he was watching, in the course of construction by independent contractor. He was familiar with the danger and had just warned passers-by. *Neumeister v. Eggers*, 29 App. Div. 385.

Owner of uncompleted building, not yet accepted from contractor but partially leased, held not liable for death of one agreeing to furnish room for lessee, struck by a falling tool while riding in an unprotected elevator. *Jehle v. Ellicott Square Co.*, 31 App. Div. 336.

Contractor was to furnish men and teams for a certain price and work under direction of defendant's foreman, who ordered him to blast out a tree whole. Defendant was liable for death of traveler struck by the tree on a public highway 412 feet distant. *Sullivan v. Dunham*, 35 App. Div. 342; s. c., aff'd, 161 N. Y. 290.

A contractor engaging to construct a section of an elevated road and sub-letting the foundation work to another who agreed to remove all surplus excavation, was held liable to a pedestrian for injuries from an unguarded heap of dirt upon the sidewalk. *Johnston v. Phoenix Bridge Co.*, 44 App. Div. 581; s. c., aff'd, 169 N. Y. 581.

So a railroad company, employing an independent contractor to dredge material from the front of a bulk-head and place it in the rear, was liable for the encroachment thereof on adjoining lands through loose crib work and sheet piling, for the tightness of which the contractor was not responsible. *Braisted v. Brooklyn &c. R. Co.*, 46 App. Div. 204.

A railroad company held liable for negligence of independent contractor in leaving an unguarded embankment in the highway while constructing a crossing. *Deming v. Terminal R. Co.*, 49 App. Div. 493.

See, also, *Higgins v. Brooklyn &c. R. Co.*, 54 App. Div. 69; *Wolf v. Third Ave. R. Co.*, 67 id. 605.

A competent truckman was employed to remove paper from one story in a building to another and left free to use his own methods. He employed and paid other men and sent in bill for the finished work. He was held to be an independent contractor. *Kueckel v. Ryder*, 54 App. Div. 252; s. c., aff'd, 170 N. Y. 562.

Owner is liable to servant of independent contractor for active but not passive negligence. *Callan v. Pugh*, 54 App. Div. 545.

A general contractor for a building, at request of sub-contractor, ordered a servant to run an elevator for them to move their material as they wished. It was for the jury to say whose servant he was. *Biehl v. Robinson*, 72 App. Div. 19.

Defendant employed a contractor to erect a building adjoining a pub-



lic street, for which the latter made an excavation running up to the sidewalk line. It was left unguarded, and plaintiff, a girl of 14, in attempting to walk over a narrow strip of rough snow next to it—the rest of the sidewalk being covered with slush and water.—fell into the excavation. Negligence and contributory negligence were for the jury. *Murphy v. Perlstein*, 13 App. Div. 257.

Plaintiff employed by Smith, a contractor, who was repairing defendant's building, was at the time of the injury engaged in pointing up the elevator shaft, and for that purpose was obliged to use the elevator as a scaffold. At the request of the contractor, defendant furnished one of its servants to operate the elevator according to plaintiff's directions. In doing so the elevator man failed to place the lever in the catch, which caused the elevator to start, causing plaintiff to fall and be injured.

The elevator man was not a servant of the contractor, but of the defendant, and the latter was, therefore, liable for the injury, and a direction of a verdict for the defendant was error. *Higgins v. Western Union Tel. Co.*, 8 Misc. 433. (N. Y. Superior Court.)

**From opinion.**—"It may be assumed that the only theory upon which the defendant can be held answerable for Algar's\* negligence is on the principle of *respondet superior*; and in order to make that applicable it must affirmatively appear that he was at the time acting as its servant doing its business subject to its orders and directions.

The relation of master and servant exists where one is bound to render service, and the other to pay the stipulated consideration. Did Algar *at the time* bear this relation to the defendant? or was he *pro hac vice* the servant of Smith, the contractor? The questions put must be subjected to the tests by which such relation is determined. *First*. It has been judicially said that 'he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, stood in the relation of master to the person doing the act complained of.' *Quarman v. Burnett*, 6 M. & W. 500; *Blake v. Ferris*, 5 N. Y. 48; *Michael v. Stanton*, 3 Hun, 462; *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. 292; 88 N. Y. 645; *Annett v. Foster*, 1 Daly, 507; *Butler v. Townsend*, 126 N. Y. 105; *Broom's Leg. Max.* 669; *Story Agency*, sec. 453b.

*Second*. Another inquiry is, whether at the time the person who did the wrong was in charge of the defendant's property by its assent and authority, and whether the injury was done while rendering obedience to his employer's will. *Cosgrove v. Ogden*, 49 N. Y. 255.

*Third*. The master has a general authority and personal control over the one who stands to him in the relation of servant; in fact, he has a property in the service of those whom he thus employs, acquired by the contract of hiring. The master may maintain an action for loss of service against one who wrongfully imprisons the person employed by him (*Woodward v. Washburn*, 3 Den. 369; *Lawyer v. Fritcher*, 130 N. Y. 239), or who wrongfully entices the servant away. *Wood Mast. & Serv.* secs. 230, 239. If Algar had been imprisoned or enticed while

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\* NOTE.—Algar was the person delegated to operate the elevator.

in charge of the elevator, the right of action for the wrong would in either case have belonged to the defendant, and not to Smith. Tested in this manner it would seem reasonably clear that Algar was at the time the servant of the defendant, and that it was his master, and not Smith. Smith did not employ him or pay him; he had no power to control him or discharge him, was not answerable for his skill as an elevator conductor, nor responsible for his incompetency, because he did not select him, and, for all that appears, never saw him. If the defendant had contracted the services of Algar as an elevator conductor to Smith for a compensation, it would have been liable for his competency and the proper discharge of his duties; and it can make no substantial difference in this case that his aid was given by the defendant gratuitously.

It has been held that if 'A.' a livery stable keeper, furnishes a horse and driver to 'B.' a customer, to be used in driving 'B.' about in his own carriage, the driver while so employed will be deemed the servant of 'A.' and not of 'B.' (*Sammell v. Wright*, 5 Esp. 263), and it makes no difference that the arrangement is a continuing one; that the same driver is always sent; that he wears a livery furnished by 'B.' designed to make the public believe he is 'B.'s' coachman, and that he receives gratuities from 'B.' (*Quarman v. Burnett*, 6 M. & W. 499), the person selecting, retaining and dominating the conduct of the servant being, as a rule, regarded in law the real, true and responsible master as to third persons injured by the servant's misconduct. It is seldom, if ever, otherwise.

'A.' hired a team, wagon and teamster of 'B.'; while used in 'A.'s' business, the harness being out of order, it ran against 'C.'s' horse and killed it. 'C.' sued 'B.' for damages. Held, that the teamster was the servant of 'B.' the bailor, and not of the bailee, and that 'B.' was answerable. (*Crockett v. Calvert*, 8 Ind. 127; *Quinn v. Company*, 46 Fed. Rep. 506. The same rule would apply to a man who hires a carriage and horses to travel on a journey; the carriage and horses are employed for the benefit or pleasure of the traveler, and yet the law has never considered the traveler liable, but the owner only, for the negligence of the driver. *Story's Agency*, sec. 453a; *Richardson v. Van Ness*, 53 Hun. 267; 25 N. Y. St. Repr. 60; 6 N. Y. Supp. 618.

In *Jones v. Mayor &c.*, 14 Q. B. Div. 890, one Dean had contracted with the defendants to furnish a horse and driver to draw a watering cart belonging to the defendants under the supervision of inspectors employed by defendants, whose duty it was to direct the drivers of the watering carts when and where to water the streets. As their order was necessary for this purpose, the inspectors had authority and control over the drivers of the carts. The plaintiff's carriage was injured through the negligence of the driver furnished by Dean. Held, that the plaintiff could not recover of the defendants.

In *Weyant v. N. Y. & Harlem R. R. Co.*, 3 Duer, 360, it appeared that the plaintiff had been thrown out of his wagon by a collision with a railroad car, the property of the New York & New Haven Railroad Company, but which was drawn by horses owned by the New York & Harlem Railroad Company, and was driven by a driver in their employ. The court held that as 'the Harlem Railroad Company was the owner of the horses which drew the car, and the driver was in their employ, paid by them, bound to receive and obey their orders, and liable to be dismissed by them at pleasure,' that company was liable. See, also, *Schular v. Hudson River R. R. Co.*, 38 Barb. 653; *Boniface v. Relyea*, 5 Abb. Pr. (N. S.) 259; 6 Robt. 397; 36 How. Pr. 457.

In *Pack v. City of New York*, 8 N. Y. 222, the contractor engaged to conform

his work to such further directions as might be given by the defendants. The court held that this clause did not change the relations of the parties. It gave the corporation power to direct as to the results of the work, but without control over the contractor or his workmen *as to the manner of performing it*, which control *alone* furnishes ground for holding the master liable for the acts of the servant or agent.

In *Holmes v. Onion*, 2 C. B. (N. S.) 790; 26 L. J. (C. P.) 261, the defendant engaged the services of 'S,' a thatcher, for a certain period of weekly wages, for the purpose of hiring him out to do thatching work for his profit. 'S,' having during the period thatched some stalks of wheat for the plaintiff, for which work the defendant claimed and received payment; held, that the defendant was responsible to the plaintiff for the injury to the wheat occasioned by the negligent manner in which 'S,' did the work.

A case calling for the exposition of the general principles applicable is that of *Sproul v. Hemmingway*, 14 Pick. 1, in which it appeared that a brig, which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi, below New Orleans, was through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision, and the question was, whether the owners of the brig were liable therefor. It was held that they were not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig, were not appointed by him, did not receive their wages or salaries from him, had no power to order or control them in their movements, and had no contract with the master or owner of the steamboat, but only through the master with the owners of the steamboat for a participation in the power of the steamboat, derived from the public use and employment thereof by the owners. See, also, *Fenton v. Steam Packet Co.*, 8 Ad. & El. 835; *Dalyell v. Tyler*, 28 L. J. (Q. B.) 52. It was said that the case most nearly resembling the one cited is that of a vessel chartered, where, for the time being, the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed, and the crew engaged and subsisted by the owners; in which case it was held that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew. *Fletcher v. Brad-dick*, 5 Bos. & Pull. 182.

If Smith had, for his own purpose, borrowed the use of the elevator, and had run it with a conductor of his own selection, a different question would have been presented (*Herlihy v. Smith*, 116 Mass. 265); and so, if Algar had, for Smith's accommodation, and without the direction of the defendant, or contrary to its instructions, operated the machine. *Sheridan v. Charlick*, 4 Daly, 338; *Wyllie v. Palmer*, 137 N. Y. 248. But neither of these contingencies arose. Indeed, Algar was in the act of carrying out his master's orders when the accident occurred, not only within the scope of his employment, but in the specific performance of it."

One who manages and controls a piece of work on his own premises, notwithstanding his contract with another, is liable for injuries caused by negligence. *Dunton v. Niles*, 95 Cal. 494.

See *Engel v. Eureka Club*, 50 N. Y. S. R. 188; *Crenshaw v. Ullman*, 20 S. W. Rep. (Mo.) 1077; *Woods v. Trinity Parish*, 21 West. L. Rep. (D. C.) 259.

The right to have work performed to the satisfaction of an employer's architect does not prevent a person employed to do the work from being an independent contractor. *Frassi v. McDonald*, 122 Cal. 400.

But otherwise, where the principal is to furnish materials, machinery, etc. *McCall v. Mail S. Co.*, 123 Cal. 42.

The relation of independent contractor may exist between two firms though they have a common member. *Hedge v. Williams*, 131 Cal. 455.

A contractor of a municipality is liable for negligence of his servants although his own wages are by the day and hour. *Geer v. Darrall*, 61 Conn. 220.

If work is of a kind which naturally exposes property of another to unusual peril, company will be liable for injuries resulting. *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495.

*Spence v. Shultz*, 37 Pac. Rep., (Cal.) 220.

Goods in carrier's possession as warehouseman were destroyed through the negligent use of an engine employed by an independent contractor in rebuilding a wharf. Carrier was not liable. *Brunswick Grocery Co. v. Brunswick &c. Co.*, 106 Ga. 270.

Owner of lot, long used by public as thoroughfare, held not liable for negligence of independent contractor in leaving a trench unguarded while excavating for a house. *Ridgeway v. Downing Co.*, 109 Ga. 591.

The contractor to whom a building partially destroyed by fire has been turned over for reconstruction, and not the owner is liable to the servant of a sub-contractor for dangerous condition of the premises. *Butler v. Lewman*, (Ga.) 42 S. E. Rep. 98.

Where contractor is in possession of the premises and controls the work of excavation, he and not his employer is liable for injuries sustained by reason of insufficient fencing. *Kepperly v. Ramsdin*, 83 Ill. 354.

Owner not liable for negligence of one engaged to make repairs with entire freedom as to method. *Jefferson v. Jameson &c. Co.*, 165 Ill. 138; rev'g s. c., 60 Ill. App. 587.

See, also, *Pioneer &c. Const. Co. v. Hansen*, 176 Ill. 100; *Chicago &c. Street R. Co. v. Dudgeon*, 69 Ill. App. 57; *Geist v. Rothschild*, 90 id. 324.

A gas company was liable for injury from an explosion due to neglect on the part of an independent contractor in laying pipes and neglect on the part of a gas company in forcing gas through them before they were in proper condition. *Chicago &c. Gas Co. v. Myers*, 168 Ill. 139; aff'g s. c., 64 Ill. App. 270.

A firm held not liable for negligence of servant of one doing its hauling at a specified price per week, furnishing his own men and wagon,

though the latter had the firm's name on it. *Foster v. Wadsworth &c. Co.*, 168 Ill. 514; aff'g s. c., 68 Ill. App. 600.

Landlord held liable for damage to tenant in rebuilding party wall by independent contractor, the rule as to independent contractors does not apply to trespass. All are principals. *Northern Trust Co. v. Palmer*, 171 Ill. 383; aff'g s. c., 70 Ill. App. 93.

See, also, *Florsheim v. Dullaghan*, 58 Ill. App. 593; *East St. Louis v. Murphy*, 89 id. 22; *Wertheimer v. Saunders*, 95 Wis. 573; s. c., 37 L. R. A. 146; *Wilber v. Polansbee*, 97 id. 577.

Owner not liable for negligence of contractor building a house from mere fact that he pays cost and certain per cent of profit. *Alexander v. Mandeville*, 33 Ill. App. 589.

*Hale v. Johnson*, 80 Ill. 185.

Reservation by city of right of superintendence by commissioner of public works does not prevent the contractor being an independent contractor. *Cary v. Chicago*, 60 Ill. App. 341.

A contractor was not liable for the negligence of a sub-contractor, over whom he had no control, as to the details of the work. *Mohr v. McKenzie*, 60 Ill. App. 575.

Reservation of the right to discharge an employé of a contractor does not prevent his being an independent contractor. *Bayer v. Chicago &c. R. Co.*, 68 Ill. App. 219.

Nor does the fact that he is to be paid the cost of material and labor with a percentage added. *Whitney &c. Co. v. O'Rourke*, 68 Ill. App. 487.

Nor, that an owner employs an architect to superintend the work. *Geist v. Rothschild*, 90 Ill. App. 324; *Smith v. Milwaukee &c. Exchange*, 91 Wis. 360.

An electric light company held liable for injury due to the improper running of its plant by an independent contractor. *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

An elevated railway company held liable for negligence of independent contractor constructing its road, in allowing a piece of iron to fall into the street and injure a pedestrian. *Metropolitan &c. R. Co. v. Dick*, 87 Ill. App. 40.

Contractors erecting a building under a contract by which they were to "perform and finish under the direction and to the satisfaction of the said owners all work" in the building and furnish "all labor and materials," were independent contractors. *Bjornson v. Saccone*, 88 Ill. App. 6.

City held liable for injury to private property by negligent performance of a public improvement by an independent contractor. *Chicago*

&c. *R. Co. v. Norton Milling Co.*, 97 Ill. App. 651; s. c. aff'd, 196 Ill. 580.

So, though the work be properly performed. *Cabot v. Kingman*, 166 Mass. 403.

Contractor not liable to pedestrian for injuries from collapse of building negligently constructed, turned over to and accepted by owner. *Daugherty v. Herzog*, 145 Ind. 255.

City was not liable in absence of notice, for the acts of an independent contractor in piling lumber on a street. *Eransville v. Senhenn*, 151 Ind. 42, 61; s. c., 41 L. R. A. 734, 738.

See, also, *Schnurr v. Huntington County*, 22 Ind. App. 188.\*

Owner was held liable for damage to adjoining land by fire set by independent contractor employed to clear land by use of fire. *Cameron v. Oberlin*, 19 Ind. App. 142.

See, also, *Railroad Co. v. Morey*, 47 Oh. St. 207; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335.

One hiring his own help, paid according to work turned out and working in a factory, all the details of management and operation of which were in the hands of its owners, was held not to be an independent contractor. *Indiana Iron Co. v. Gray*, 19 Ind. App. 565.

A party employed to drill a well in schoolhouse grounds left his drilling machine unguarded and a child was injured by it. The danger arising not from the character of the work but from the machinery used, he, and not his employers, were liable to the child. *Wood v. Ind. School Dist. &c.*, 44 Iowa, 27.

*Chicago City R. Co. v. Hennessey*, 16 Bradw. (Ill.) 153, (see, *Ellis v. Sheffield Gas Company*, 22 E. & B. 767); *Robinson v. Webb*, 11 Bush. (Ky.) 464.

Work, over which owner is to exercise no control, though to be done under the direction of an architect and to his satisfaction, is done by an independent contractor. *Humpton v. Uterkirchner*, 97 Iowa, 509.

See, also, *Janesen v. Jersey City*, 64 N. J. L. 243; *Gunther v. Yorkville*, 3 Pa. Super. Ct. 403.

Contractor held liable for negligence of servant of sub-contractor where there was joint supervision and co-operation in the work. *Bau-meister v. Markham*, 101 Ky. 122.

A servant of an independent contractor threw lime into a mortar bed in the street. The owner of the premises was not liable. *Strauss v. City of Louisville*, (Ky.) 55 S. W. Rep. 1075.

Though the express agent of a town agreed to furnish horse and driver for delivery of defendant's parcels, the driver was defendant's servant. *Adam's Exp. Co. v. Schofield*, (Ky.) 64 S. W. Rep. 903.

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\* NOTE.—As to liability of municipalities for obstructions in streets, see "Municipality."

One employed to unload cars under the direction and control of another, though he works with his own tools, is not an independent contractor. *Holmes v. Tennessee &c. R. Co.*, 49 La. Ann. 1465.

A person committing a steam mill to the exclusive control of a contractor is not liable for the negligent use of the same, unless the appliance was, in itself, a nuisance. *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373.

An independent contractor engaged in cutting wood for a railroad company had its cooking car placed on a spur track by the railroad company to facilitate its work; the latter was not liable for the negligence of the former's servant in the use of the car. *Leavitt v. Bangor &c. R. Co.*, 89 Me. 509; s. c., 36 L. R. A. 382.

An owner of a building contracted with a blacksmith to make alterations. The plans were defective and the contractor was incompetent. Landlord was liable for injuries to tenant's goods. *Evans v. Murphy*, 87 Md. 498.

One engaged to make balloon ascensions at a public resort was an independent contractor for whose negligence the proprietor of the resort was not liable. *Smith v. Benick*, 87 Md. 610.

Lot owner liable for injury to adjoining property by excavation by independent contractor. *Bonaparte v. Wiseman*, 89 Md. 12; s. c., 44 L. R. A. 482.

The owner of a house, who has contracted with another, for a fixed sum to raise the house and put another story under it, the contractor to furnish the material and complete the alteration to the satisfaction of the owner, is not responsible if the building fall upon plaintiff's house and damage it. *Conners v. Hennessey*, 112 Mass. 96.

*Lawrence v. Shipman*, 39 Conn. 586.

Where one contracts to take down a building under the directions of, and subject to the approval of, certain trustees, the trustees will be liable for his negligence. *Linnahan v. Rollins*, 137 Mass. 123.

See *Palmer v. Lincoln*, 5 Neb. 136; *Sturges v. Society &c.*, 130 Mass. 414.

Injuries caused by the falling of part of defendant's roof, lately repaired by a contractor under an entire contract, who furnished his own material, &c., are chargeable to the defendant. *Khron v. Brock*, 144 Mass. 516.

The owner of premises directed an independent contractor to pile stones in a place where it would be dangerous. The owner was liable for the latter's negligence though he would not have been, had he not assumed control. *Mahar v. Steuer*, 170 Mass. 454.

The proprietor of a resort engaged an independent contractor to con-

duct an exhibition of marksmanship. It was liable, where a piece of bullet flew off and struck the plaintiff in the eye. *Thompson v. Lowell &c. Street R. Co.*, 110 Mass. 511; s. c., 40 L. R. A. 345.

Lot owner was liable for injury to adjoining land from blasting within eight feet thereof by an independent contractor. *Wetherbee v. Partridge*, 115 Mass. 185.

A physician examining an injured person on behalf of a railroad company, held to be an independent contractor. *Pearl v. West End Street R. Co.*, 116 Mass. 111; s. c., 49 L. R. A. 826.

House owner not liable for injury to pedestrian from fall of a brick through negligence of independent contractor in repairing chimney. *Boomer v. Wilbur*, 116 Mass. 482.

Defendant owned a horse and paid its driver, who had exclusive management of it. Defendant was engaged in a general teaming business, and contracted to do a company's hauling. Driver was defendant's, and not the company's servant. *Driscoll v. Towle*, (Mass.) 63 N. E. Rep. 922.

The wall of one of two adjoining owners leaked. He hired a man to repair it, giving no instructions as to the work, and exercising no control over the latter's men in doing it. He was not liable for their negligence in doing the work, whereby water was turned into the other owner's cellar. *Dutton v. Amesbury Nat. Bank*, (Mass.) 63 N. E. Rep. 405.

A master is liable for the negligence of one who is employed to supply him with ice by the cord, when the master obtains a license to encumber the street for that purpose, and *the injuries received flow from such obstructions*. *Darmstatter v. Moyuehan*, 21 Mich. 188.

*Butler v. Bangor*, 67 Me. 385; *Circleville v. Neuding*, 41 Oh. St. 465; *Wilson v. Wheeling*, 19 W. Va. 323. See, however, *Reed v. Alleghany City*, 29 P. F. Smith (Pa.) 390.

One engaged in a door factory and paid a given price per door was an independent contractor; he was furnished with the lumber and was uncontrolled in his use of the premises. *Wright v. Big Rapids &c. Man. Co.*, 124 Mich. 91; s. c., 50 L. R. A. 495.

Defendants contracted for logs to be delivered at the mouth of a stream. They were not liable for the contractor's allowing them to "jam" in transit to that point. *Overseers of Highways &c. v. Pelton*, (Mich.) 87 N. W. Rep. 1029.

One employing an independent contractor to tear down a building was not liable to the latter's employes, because he was not competent to oversee the actual execution of the work. *Schip v. Pabst Brew. Co.*, 64 Minn. 22.

One employing his own men and paid by the job but subject to orders



as to details of work, held to be servant. *Barg v. Bowsfield*, 65 Minn. 355.

That one was paid for plowing by the acre, instead of by the day, and that he used his own team and tools did not constitute him an independent contractor instead of a servant. *Whitson v. Ames*, 68 Minn. 23.

House owner held liable for injury to pedestrian from fall of ladder left leaning against a house by independent contractors employed to paint it, after they had finished their work. *Moore v. Townsend*, 76 Minn. 64.

Owner not liable for building material left, unlit and unguarded in the street, by an independent contractor. *Aldritt v. Gillette-Herzog Man. Co.*, 85 Minn. 206.

See, also, *Independence v. Slack*, 134 Mo. 66.

Retention of right of supervision does not alter the relationship of independent contractor. *Vosbeck v. Kellogg*, 78 Minn. 176.

A storekeeper liable to customer for injury due to negligence of independent contractor making repairs. *Corrigan v. Elsinger*, 84 Minn. 42.

The actual relation as regards supervision of the work is the test. So that, where a conductor in fact directs the work of a subcontractor, the former is liable, though the contract expresses a relation of independent contractorship. *Klages v. Gillette-Herzog Man. Co.*, (Minn.) 90 N. W. Rep. 1116.

Owner liable for failure to replace cover to coal hole left off by independent contractor. *Benjamin v. Metropolitan Street R. Co.*, 133 Mo. 274.

Owner held liable to pedestrian for failure of independent contractor to guard excavation for foundation adjoining sidewalk. *Wiggin v. St. Louis*, 135 Mo. 558.

Landlord not liable to tenant for failure of independent contractor to guard excavation for out house on the premises. *Wiese v. Remme*, 140 Mo. 289.

An opening in a bridge necessarily resulted from the proper execution of the work. City was liable for the contractor's failure to have it guarded. *Ray v. Poplar Bluff*, 70 Mo. App. 252.

Reservation of power of dictation of method and of discharge of employés destroys the relationship of independent contractors. *Scott v. Springfield*, 81 Mo. App. 312.

One hired for fifty cents to drive an animal is not an independent contractor. *O'Neil v. Blase*, (Mo. App.) 68 S. W. Rep. 761.

A contractor building a railroad, who has exclusive control of the running of engines and cars, will be liable for injuries caused by the negligent running of such engines; and the railroad company will not be liable. *Hitte v. Republican Valley R. Co.*, 19 Neb. 620.

See *Carman v. Steubenville &c. R. Co.*, 4 Oh. St. 399; *Seamon v. Chicago*, 25 Ill. 424.

A railroad corporation is liable for injuries caused by blasting, where it contracted with other parties for the building of a part of its road, and the injuries occurred by reason of the negligence of these other parties. *Stone v. Cheshire R. Co.*, 19 N. H. 427.

*Lowell v. Boston &c. R. Co.*, 23 Pick. 24; *Carman v. Steubenville &c. R. Co.*, 4 Oh. St. 399; *Mellen v. Morrill*, 126 Mass. 545.

Joint contractors apportioned the work between them; one was not liable to a third party for negligence of the other in work assumed by him. *Manchester v. Warren*, 67 N. H. 482.

The owner of a private park who invited the public to witness an exhibition of fireworks, held liable for negligence of independent contractor having the display in charge. *Sebeck v. Plattdeutsche Volksesterverein*, 64 N. J. L. 624; s. c., 50 L. R. A. 199.

Owner held liable for injury to adjoining property from fall of a dangerous wall due to negligence of independent contractor in removing it. *Steinbock v. Corington &c. Bridge Co.*, 61 Oh. St. 215.

See, also, *Covington &c. Bridge Co. v. Patrick*, 5 Ohio N. P. 374.

Owner obtained permission to deposit building materials in the street upon condition that he light and guard them. He was liable for the negligence of an independent contractor in failing to light and guard. *Reuben v. Swigart*, 15 Oh. C. C. 565.

If builder is likewise owner, he will be responsible for inherent weakness in the building. *Godley v. Haggerty*, 20 Pa. St. 387.

If building was erected under personal supervision of owner and leased to government, and damage resulted from poor construction, owner will be liable. *Carson v. Godley*, 26 Pa. St. 111.

It was for the jury to say whether interference by owner with work of independent contractor was the cause of accident. *Pender v. Ruggs*, 178 Pa. St. 337.

The reservation of a right to fix grades and alignment in the construction of a railroad, and the amount of work to be done per month did not alter relationship of independent contractor. *Thomas v. Altoona &c. R. Co.*, 191 Pa. St. 361.

A contractor employed to erect poles along a street employed another to dig the holes, furnish the material, set the poles, repave, &c., complete, for which he was to be paid per pole. Contractor was liable for latter's negligence. *Fox v. Porter*, 6 Pa. Dist. 85.

A city was liable for a failure to exercise the necessary precautions, in digging a subway likely to injure adjoining property, although it em-

ployed an independent contractor to do the work. *Marsh v. Philadelphia*, 8 Pa. Dist. 340.

Plumbers enlarging heating plant pursuant to their own plans held independent contractors. *Hanna v. Cresh*, 16 Montg. Co., L. R. 182.

An owner of premises abutting on the street was not liable for the negligence of an independent contractor engaged in roofing it. *Rubin v. Miller*, 30 Pitts. Leg. J. (N. S.) 351.

A contractor is not liable for injuries caused by faulty construction, after the building has been accepted by the owner. *Curtin v. Somerset*, 48 Phila. L. J. 96.

*Pickard v. Smith*, 10 C. B. N. S. 480; *Collis v. Selden*, L. R. 3 C. P. 495; Wharton on Neg. sec. 438.

Street railway company, under duty to restore street, held not liable for negligence of independent contractor in maintaining a rope across street while work was in progress. *Sanford v. Pawtucket Street R. Co.*, 19 R. I. 537; s. c., 33 L. R. A. 564.

Use of a structure held tantamount to an acceptance and made an owner liable for injury from defect due to negligence of independent contractor. *Read v. East Providence Fire Dist.*, 20 R. I. 574.

Interference by owner with work of contractor must be proximate cause of an accident to make the owner liable. *Wateman v. Shepard*, 21 R. I. 257.

Where the work is intrinsically dangerous, one is liable for negligence of an independent contractor, though it would have been safe if properly done. Defendant was not relieved from the act of his contractor in leaving an excavation in the street unguarded and unlighted. *McCarrier v. Hollister*, (S. D.) 89 N. W. Rep. 862.

The safe construction of a crossing of a highway over a railroad is a duty to the public which the railroad company cannot delegate to an independent contractor. *Taylor &c. R. Co. v. Warner*, 88 Tex. 642.

See, also, *Taylor &c. R. Co. v. Warner*, (Tex.) 60 S. W. Rep. 442; *Dublin v. Taylor &c. R. Co.*, 92 Tex. 535; *Texas Midland R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

A corporation employed a man to bale cotton seed hulls at a given sum per bale; it furnished machinery and power, he supplied the hands and did the work in his own way. He was held an independent contractor. *Wallace v. Southern Cotton-Oil Co.*, 91 Tex. 18.

One using his own men, materials, team and methods, in excavating a reservoir, was held an independent contractor, though he was paid by the day. *Groesbeck v. Pinson*, 21 Tex. Civ. App. 44.

An incorporated company, laying water pipes in a city, is not relieved from liability for injuries, because they were caused by negli-

gence of servants of a sub-contractor. *Water Co. v. Ware*, 16 Wall. 566.

*Robbins v. Chicago*, 4 Wall. 679; *Chicago v. Wallace*, 2 Black. 428; *Colegrove v. Smith*, 33 Pac. Rep. (Cal.) 115.

When the act contracted for becomes a nuisance, as an unguarded excavation in a public sidewalk, the owner is liable for injuries caused thereby. *Chicago v. Robbins*, 2 Black (U. S.) 418.

Contractors who agree to furnish suitable materials, and construct piers, subject to inspection of engineers of the company for whom the piers are to be built, are independent contractors. *Casement v. Brown*, 148 U. S. 582.

*Alabama &c. R. Co. v. Martin*, 14 South Rep. (Ala.) 401.

One engaged to remove dead animals from stock yards, paid and subject to discharge like other employ  s, held not an independent contractor and defendant was liable for his failure to take care of a maimed steer. *Texas &c. R. Co. v. Jueman*, 71 Fed. Rep. 939.

A ship carpenter was not an independent contractor, where the captain and superintendent had the right to direct the manner of performing the work, though the right was not often exercised. *Atlantic Transport Co. v. Coneys*, 82 Fed. Rep. 177.

Plaintiff was injured by blasting. There was nothing to indicate the necessity for blasting when the contract was made, though provision was made for it in the bid. It was an error to take the question from the jury as to whether the acts were expressly authorized or necessary to the performance of the contract. *McNamee v. Hunt*, 87 Fed. Rep. 298.

Ship owner was liable for negligence of employ   of one under a charter, where he, notwithstanding, retained control of the latter's acts. *McGough v. Ropner*, 87 Fed. Rep. 534.

A carrier of passengers cannot relieve itself of the duty of safe carriage by employing an independent contractor. *Barrow S. S. Co. v. Kane*, 88 Fed. Rep. 197.

One employed to superintend work without restriction as to method, receiving a per diem for himself and percentage on pay of labor employed, was held an independent contractor. *Emerson v. Fay*, 94 Va. 60.

Proprietor of resort, inviting public to witness balloon ascension, held liable to patron for injuries from fall of a pole due to negligence of independent contractor in charge of the display. *Richmond &c. R. Co. v. Moore*, 94 Va. 493.

City was liable for the negligence of a contractor, where it had the supervision and control of the work to be done by him. *Cooper v. Seattle*, 16 Wash. 462.

See, also, *Smith v. Seattle*, 20 Wash. 613

It was left to the jury to say whether the work of floating logs down a river necessarily involved such danger as to make defendant liable for flooding plaintiff's land from a dam opened by an independent contractor employed to do the work. *Carlson v. Stocking*, 91 Wis. 432.

Reservation of the right to relet the contract in case of "improper or imperfect performance," held not to bar relationship of independent contractor. *Kuehn v. Milwaukee*, 92 Wis. 263.

Injuries caused by leaving stones in the road, during the process of filling up a drain, not attributable to trustees employing a contractor. *Hall v. Smith*, 2 Bing. 156.

*Duncan v. Findlater*, 6 Cl. & F. 894.

A railroad restaurant proprietor is liable for injuries caused by an open coal hole in which a coal company was putting coal by his orders. *Pickard v. Smith*, 10 C. B. (N. S.) 170.

See *Bush v. Steinman*, 1 B. & P. 404; *Randleson v. Murray*, 8 Ad. & E. 109.

Where a company was authorized by legislature to build a bridge, and its contractor creates an obstruction to navigation, the company is liable. *Ellis v. Sheffield Gas &c. Co.*, 2 E. & B. 167.

See *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Rylands v. Fletcher*, L. R. 3 Eng. & L. App. 330; *Beatrice v. Reid*, 59 N. W. Rep. (Neb.) 770.

## CONTRIBUTORY NEGLIGENCE.

### I. PRINCIPLES GOVERNING.

- (a) Comparative negligence.
- (b) Actions based on trespass.
- (c) Actions based on acts done with willful intent.
- (d) Proximate cause.
- (e) Want of care induced by conduct of wrongdoer.
- (f) Violation of statute.
- (g) When for the determination of the court or jury.
  - 1. When the question is for the court.
  - 2. When the question is for the jury.

### II. CHOICE OF HAZARDS.

### III. VOLUNTARY EXPOSURE TO ASSIST ANOTHER IN DANGER.

### IV. KNOWLEDGE BY THE PLAINTIFF OF THE DEFECT OR DANGER.

### V. DEFECTIVE PEOPLE—INTOXICATED PERSONS.

### VI. INFANTS.

- (a) Care required of parents.
- (b) Degree of care required from and toward infants.
- (c) Instances when recovery was or was not allowed to parent, or to child or its representative.

### VII. CONTRIBUTORY NEGLIGENCE OF THIRD PERSON.\*

#### I. Principles Governing.

The burden of proof is on the plaintiff to show affirmatively by a preponderance of sufficient evidence, not only that the defendant's negligence contributed to the accident, but also that the plaintiff was entirely free from negligence proximately causing the injury.

*Button v. Hudson R. R. Co.*, 18 N. Y. 248; *Deyo v. N. Y. C. R. Co.*, 34 id. 9; *Cunan v. Warren Chemical &c.*, 36 id. 52; *Gonzales v. N. Y. & Harlem R. Co.*, 38 id. 440; *Hart v. H. R. Bridge Co.*, 28 id. 622; *Becht v. Corbin*, 92 id. 658; *Riordan v. Ocean Steamship Co.*, 124 id. 655; *Chisholm v. State*, 141 id. 246, 249.

The greatest negligence on part of defendant will not cure the least negligence contributory to the injury on the part of plaintiff. *Wilds v. H. R. Co.*, 24 N. Y. 430; *Griffin v. N. Y. Central R. Co.*, 40 id. 34.

Hence evidence of the plaintiff's contributory negligence, if any, must be submitted unqualifiedly to the jury. The qualification "if the defendant's brakes were in order and the collision could have been prevented by *ordinary prudence*," is error. *Owen v. H. R. R. Co.*, 35 N. Y. 516.

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\* NOTE.—As to pleading of Contributory Negligence, see "Pleading," *post*.

So, it is error to charge that plaintiff's negligence must have *directly* contributed to it to exempt the defendant. *Button v. H. R. R. Co.*, 18 N. Y. 248.

See *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Chicago &e. C. R. Co. v. Clark*, 2 Bradwell (Ill.) 116.

*Contra Locke v. Sioux City R. Co.*, 46 Iowa, 109; *Needham v. San Francisco R. Co.*, 37 Cal. 409.

Burden of proving freedom from negligence is on plaintiff. *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. 242; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Reed v. Third Ave. R. Co.*, 14 Misc. 458; *Newcomb v. Metropolitan Street R. Co.*, 34 id. 203.

The same general rule requiring plaintiff to show freedom from contributory negligence prevails in the courts of many states. *Neal v. Gillett*, 23 Conn. 437; *Haner v. Northern R. Co.*, (Id.) 62 Pac. Rep. 1928; *West Chicago Street R. Co. v. Boeker*, 70 Ill. App. 67; *Chicago City R. Co. v. Canevin*, 72 id. 81; *Lindberg v. Chicago City R. Co.*, 83 id. 433; *Mutual Wheel Co. v. Mosher*, 85 id. 240; *Potter v. Sjorgren*, 91 id. 530; *Illinois C. R. Co. v. Jones*, 97 id. 131; *Wabash R. Co. v. Jensen*, 99 id. 312; *Crawford v. Chicago &e. R. Co.*, 109 Iowa, 433; *Ward v. Maine C. R. Co.*, 96 Me. 136; *Fuller v. B. & A. R. Co.*, 133 Mass. 491; *McKimble v. B. & M. R. Co.*, 139 id. 542; *Merrill v. East R. Co.*, id. 252; *Commonwealth v. B. & L. R. Co.*, 134 id. 211; *Stinson v. Kenny*, 176 id. 429; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Benedict v. Union &c. R. Co.*, (Vt.) 52 Atl. Rep. 110.

Nevertheless, in the Federal courts as well as in several state courts, contributory negligence is a matter of defense, and recovery does not necessarily depend upon affirmative proof of freedom from negligence contributing to the injury. *King v. Henker*, 80 Ala. 505; *Savannah &c. R. Co. v. Shearer*, 58 id. 672; *Robinson v. W. P. R. Co.*, 48 Cal. 409; *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330; *Louisville &c. R. Co. v. Yniestra*, 21 Fla. 700; *Central R. Co. v. Brinson*, 64 Ga. 475; *Pittsburg &c. R. Co. v. Noel*, 77 Ind. 110; *K. P. R. Co. v. Pointer*, 14 Kas. 37; *Paducah v. Memphis R. Co.*, 12 Bush. (Ky.) 141; *Kentucky &c. R. Co. v. Thomas*, 79 Ky. 160; *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; *Cook v. Missouri &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 230; *Murphy v. Dayton*, 7 Oh. N. P. 227; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *Penn. R. Co. v. Weber*, 76 id. 157; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447; *Carter v. Columbia &c. R. Co.*, 19 S. C. 20; *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056; *Texas &c. R. Co. v. Mayfield*, 56 id. 942; *Galveston &c. R. Co. v. Delmisch*, 57 id. 64; *Galveston &c. R. Co. v. Gordon*, 54 id. 635; *Watertown v. Greaves*, 112 Fed. Rep. 183; *Hemingway v. Illinois C. R. Co.*, 114 id. 843; *Randall v.*

Northern Tel. Co., 54 Wis. 140; *Bessex v. Chicago & C. R. Co.*, 45 id. 477; *Prideux v. City*, 43 id. 513; *Hoyt v. City of Hudson*, 41 id. 105.

**Direct evidence not required—inferences permissible.**

Contributory negligence is not to be presumed, therefore *direct* evidence to disprove it is not required, but there must be presented a state of facts or circumstances from which the plaintiff's freedom from negligence may be inferred. It has been said that its absence may be inferred from the ordinary habits, conduct and motives of men. *Button v. Hudson R. R. Co.*, 18 N. Y. 248; *Johnson v. Hudson River R. Co.*, 20 id. 65; *Cunan v. Warren Chemical & C.*, 36 id. 152; *Warner v. N. Y. Central R. Co.*, 44 id. 465; *Hoffman v. Union Ferry Co.*, 47 id. 176, 186; *Morrison v. N. Y. C. R. Co.*, 63 id. 643; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Palmer v. Dearing*, 93 id. 7; *Cabill v. Hilton*, 106 id. 512; *Chisholm v. State*, 141 id. 246; *Fitzgerald v. New York & C. R. Co.*, 154 N. Y. 263; rev'g s. c., 88 Hun. 359; *Louisville & C. R. Co. v. Yniestra*, 21 Fla. 700; *Southern R. Co. v. Barfield*, (Ga.) 42 S. E. Rep. 95; *Jeffersonville & C. R. Co. v. Goldsmith*, 47 Ind. 43; *Nelson v. C. R. I. Co.*, 38 Iowa, 564; *Knowlton v. Des Moines & C. Co.*, (Iowa) 90 N. W. Rep. 818; *Missouri & C. R. Co. v. Merrill*, 61 Kan. 671; *Mynning v. Detroit & C. R. Co.*, 64 Mich. 93; *Teipel v. Hilsendegen*, 44 id. 461; *Benedict v. Port Huron*, 124 id. 600; *Cummings v. Helena & C. Co.*, (Mont.) 68 Pac. Rep. 852; *Kein v. Union R. Co.*, 90 Mo. 314; *Chicago & C. R. Co. v. Featherly*, (Neb.) 89 N. W. Rep. 792; *Schausten v. Toledo & C. Street R. Co.*, 18 Oh. C. C. 691; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Raulston v. Traction Co.*, 13 Pa. Super Ct., 412; *Cassidy v. Angell*, 12 R. I. 447; *Silcock v. Rio Grande & C. R. Co.*, 22 Utah. 119.

In the absence of allegation of facts from which inference could be drawn that deceased was free from contributory negligence, complaint was dismissed. *Rudolph v. Montant*, 37 App. Div. 396.

**From opinion.**—"It has been settled in this state by a long line of authorities that wherever no fact or circumstance appears from which an inference can be drawn that an injured person was free from contributory negligence, a complaint in an action of this character must be dismissed. The whole subject is well summed up in this case of *Wiwrowski v. L. S. & M. S. R. Co.*, (124 N. Y. 425), as follows: 'The burden of showing that the plaintiff's intestate was free from contributory negligence rested upon the plaintiff. It is true that the want of negligence may be established from inferences which may be properly drawn from the surrounding facts and circumstances, as in the case of *Galvin v. Mayor & C.* (112 N. Y. 223). But such inference cannot be drawn from a presumption that a person will exercise care and prudence in regard to his life and safety, for the reason that human experience is to the effect that persons exposed to danger will frequently forego the ordinary precautions of safety. And when the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit should be granted. (*Cordell v. N. Y.*



&c. R. Co. 75 N. Y. 330. See, also, *Reynolds v. N. Y. &c. R. Co.*, 58 N. Y. 248; *Hoag v. id.*, 111 id. 199; *Bond v. Smith*, 113 id. 378."'

(Presumptions pertinent to this subject will be found under "Evidence," *post*, 1095.)

#### (a). COMPARATIVE NEGLIGENCE.

In several of the states, the doctrine of comparative negligence has been recognized, so that, although the injured person has, to some extent, usually slightly, contributed to his own injury by his negligence, yet, if the defendant was grossly negligent, a recovery is allowed.

*U. P. R. W. Co. &c. v. Rollins*, 5 Kas. 167; *Sawyer v. Sauer*, 10 id. 466; *K. P. R. Co. v. Pointer*, 14 id. 37; *U. P. R. Co. v. Henry*, 36 id. 565; *Wichita &c. R. Co. v. Davis*, 37 id. 743; *Chicago &c. R. Co. v. Murray*, 62 Ill. 326; *Ill. Central R. Co. v. Mallit*, 67 id. 431; *Schmidt v. C. & C. R. Co.*, 83 id. 405; *Ill. Central R. Co. v. Hammer*, 85 id. 526; *Ill. Central R. Co. v. Patterson*, 93 id. 290; *Stratton v. Central &c. R. Co.*, 95 id. 25; *Toledo &c. R. Co. v. Grable*, 88 id. 441; *Chicago &c. R. Co. v. Dimick*, 96 id. 42; *Calumet Ice &c. R. Co. v. Martin*, 115 id. 36; *Chicago &c. R. Co. v. Johnson*, 116 id. 206; *Chicago &c. R. Co. v. Krueger*, 23 Ill. App. 639; *K. P. R. Co. v. Cramer*, 4 Colo. 524; *Kenedy v. Denver &c. R. Co.*, 10 id. 493; *Ward v. M. & St. P. R. Co.*, 29 Wis. 144; *Bloor v. Town of Delafield*, 69 id. 273; *Augusta &c. R. Co. v. McElmurry*, 24 Ga. 75; *Houston &c. R. Co. v. Gorbett*, 49 Tex. 573.

The doctrine has, however, been repudiated in the following recent decisions:

*Denver Tramway Co. v. Reid*, 22 Colo. 349; *Lake Shore &c. R. Co. v. Hessions*, 150 Ill. 546; *Cicero &c. Street Ry. Co. v. Meixner*, 160 Ill. 320; *Atchison &c. R. Co. v. Henry*, 57 Kan. 154; *Sandy River &c. Coal Co. v. Candill*, (Ky.) 60 S. W. Rep. 180; *Friend v. Burleigh*, 53 Neb. 674; *Missouri &c. R. Co. v. Fox*, 56 Neb. 746; *Anderson v. Metropolitan Street R. Co.*, 30 Misc. 104; *Tesch v. Milwaukee Electric R. Co.*, 108 Wis. 593; *Missouri &c. R. Co. v. Holwerson*, 157 Mo. 216; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463; *Galveston &c. R. Co. v. Gordon*, (Tex. Civ. App.) 57 S. W. Rep. 635.

#### (b). ACTIONS BASED ON TRESPASS.

The doctrine of contributory negligence has no relation to, and is no part of an action founded upon a pure tort, as trespass, unless the evidence show recklessness on the part of the plaintiff.

*Clifford v. Dam*, 81 N. Y. 52; *Claxton v. Lexington &c. R. Co.*, 13 Bush. (Ky.) 636; *Kas. Pac. R. Co. v. Pointer*, 14 Kas. 37; *Stratton v. Central City &c. R. Co.*, 1 Am. & Eng. R. Cas. (Ill.) 115; *Tanner v. Louisville &c. R. Co.*, 60 Ala. 621; *Cook v. Central &c. Co.*, 67 id. 533; *Harlow v. Humison*, 6 Cowlus, 189-191; *Dygart v. Schenek*, 23 Wend. 446; *Trapp v. McClellan*, 68 App. Div. 362; *Schaefer v. North Chicago Street R. Co.*, 82 Ill. App. 473; *St. Louis &c. R. Co. v. Jacobson*, (Tex. Civ. App.) 66 S. W. Rep. 1111.

See "Streets—Injuries received on," "Nature of the liability," *post*.

#### (c). ACTIONS BASED ON ACTS DONE WITH WILLFUL INTENT, OR GROSS CARELESSNESS.

Where the defendant's act causing the injury was willful, contributory

**negligence is no defense.** *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; s. c. aff'd, 196 Ill. 156; *Tyler v. Nelson*, 109 Mich. 37; *Bohin v. Chicago & E. R. Co.*, 108 Wis. 333.

In the following cases the defendant's negligence was so willful or gross as to lose him the defense of contributory negligence:

Plaintiff negligently drove on a street car track at 5 a. m., and was struck by a car going 25 miles an hour while the motorman was asleep. Intentional mischief on part of defendant was left to the jury. *Mapes v. Union R. Co.*, 56 App. Div. 508.

Running train 40 miles an hour over crossings in populous city without signals or attempt to check speed. *Louisville & C. R. Co. v. Orr*, 121 Ala. 489.

As to violation of ordinance being equal to willful negligence, see *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Unnecessarily dragging plaintiff 200 feet, where defendant could have stopped the train before he was injured, permitted a recovery, though he was negligently on the track. *Cleveland & C. R. Co. v. Klee*, 154 Ind. 430.

Using inferior machinery would authorize jury in finding a verdict for willful negligence. *Clarton & C. v. Lexington & C. R. Co.*, 13 Bush, (Ky.) 636; *Tanner v. Louisville & C. R. Co.*, 60 Ala., 621; *Cook v. Central & C. R. Co.*, 67 id. 533; *Kansas & C. R. Co. v. Pointer*, 14 Kas. 37; *Ivens v. Cincinnati & C. R. Co.*, 103 Ind. 27.

Company liable where person in charge knew or should have known that cars were so improperly loaded as to imperil the life of a servant or employé. *Louisville & C. R. Co. v. Brice*, 84 Ky. 298; *Stratton v. Central & C. R. Co.*, 1 Am. & E. R. R. Cas. (Ill.) 115; *Shumacher v. St. Louis & C. R. Co.*, 39 Fed. Rep. 174.

Defendant "kicked" coal cars unattended down grade. They collided with other cars and threw plaintiff from the railing of caboose where he had been sitting. *Kansas City & C. R. Co. v. Campbell*, 6 Kan. App. 417.

Neglect to maintain a guard rail about an elevator. *Union Warehouse Co. v. Prewitt*, (Ky.) 50 S. W. Rep. 964.

Plaintiff negligently went upon a trestle 30 feet high and 400 feet long and was overtaken by a train going a mile a minute without warning or attempt to stop. *McLamb v. Wilmington & C. R. Co.*, 122 N. C. 862.

Maliciously blowing whistle to frighten plaintiff's horses. *Brendle v. Spencer*, 125 N. C. 474.

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\*NOTE. —As to liability of carriers of passengers to trespassers, see "Carriers of Passengers," *ante*, p. 417. As to whether negligence or contributory negligence was the proximate cause of the injury, see "Proximate Cause," *post*, p. 664.

Engineer threw water and steam on trespasser stealing a ride. *Galveston &c. R. Co. v. Zantzinger*, 92 Tex. 365; s. c., 44 L. R. A. 553.

Running train 25 miles an hour without a headlight. *McGhee v. Campbell*, 101 Fed. Rep. 936.

Defective brakes prevented prompt stopping of a car. *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281; s. c., 40 L. R. A. 172.

In the following cases defendant, by failing to exercise ordinary care after discovering plaintiff's danger, lost the defense of contributory negligence:

The rule applied, where defendant had actual knowledge of plaintiff's danger. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509; *Louisville &c. R. Co. v. Brown*, 121 id. 221; *Memphis &c. R. Co. v. Martin*, 131 id. 269; *Hector Min. Co. v. Robertson*, 22 Colo. 491; *Tully v. Philadelphia &c. R. Co.*, (Del.) 50 Atl. Rep. 95; *Neet v. Burlington &c. R. Co.*, 106 Iowa, 248; *Atwood v. Bangor &c. R. Co.*, 91 Me. 399; *Ward v. Main C. R. Co.*, 96 id. 136; *Sloniker v. Great Northern R. Co.*, 76 Minn. 306; *Dailey v. Burlington &c. R. Co.*, 58 Neb. 396; *Hall v. Ogden &c. Street R. Co.*, 13 Utah. 343; *Thompson v. Salt Lake Rapid Transit Co.*, 16 id. 281.

But not where he had no actual knowledge, or only constructive knowledge. *Highland &c. R. Co. v. Swope*, 115 Ala. 287; *Memphis &c. R. Co. v. Martin*, 117 id. 367; *Cullen v. Baltimore &c. R. Co.*, 8 App. D. C. 69; *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571; *Missouri &c. R. Co. v. Magee*, 92 Tex. 616; *Texas &c. R. Co. v. Tidwell*, (Tex. Civ. App.) 49 S. W. Rep. 641.

See, also, *Denver &c. R. Co. v. Spencer*, 25 Colo. 9.

In the following cases the defendant lost the defense of contributory negligence by failing to discover plaintiff's danger through lack of ordinary care: *Kloekenbrink v. St. Louis &c. R. Co.*, 81 Mo. App. 351, 409; *Omaha Street R. Co. v. Martin*, 48 Neb. 65 (Plaintiff asleep on track, engineer failed to keep look out); *Baker v. Railroad*, 118 N. C. 1015; *Pickett v. Wilmington &c. R. Co.*, 117 id. 616; *Arrowood v. South Carolina R. Co.*, 126 id. 629; *Hall v. Ogden City Street R. Co.*, 13 Utah, 243; *Shaw v. Salt Lake City R. Co.*, 21 id. 76; *Bias v. Chesapeake &c. R. Co.*, 46 W. Va. 349.

Failure to give timely and sufficient warning of train's approach to public crossing is willful negligence, where defendants could have seen deceased in a dangerous position. *Eskridge v. Aeneumati &c. R. Co.*, 11 Ky. L. R. 557; *Louisville &c. R. Co. v. Maloney*, 7 Bush. (Ky.) 235. See, also, *Battishill v. Humphreys*, 38 N. W. Rep. 581; *Barksdull v. New Orleans &c. R. Co.*, 23 La. Ann. 180.

But if plaintiff's negligence has been willful or gross, or, with knowledge of defendant's negligence, he fails to use ordinary care to avoid danger, the defense of contributory negligence is available to defendant: *Macon &c. R. Co. v. Holmes*, 103 Ga. 655; *Holwerson v. St. Louis &c. R. Co.*, 157 Mo. 216; *Carter v. Columbia &c. R. Co.*, 19 S. C. 20; *Danville Street Car Co. v. Watkins*, 97 Va. 113.

In an action for injuries to a little child from being run over by the defendant's engine, the driver might, with the exercise of ordinary care, have stopped the engine and avoided the injury; hence the contributory negligence of the plaintiff did not constitute a defense. *Kenyon v. N. Y. Cent. &c. R. Co.*, 5 Hun. 479.

**From opinion.**—"Such a case furnished a just and well established exception to the general rule, that, contributive negligence on the part of the plaintiff will defeat a recovery. *Davies v. Mann*, 10 M. & W. 546; *Bird v. Holbrook*, 4 Bing. 628; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Scott v. Dublin &c. R. Co.*, 11 Irish C. L. 377; *Button v. Hudson River R. Co.*, 18 N. Y. 258; *Austin v. N. J. Steamboat Co.*, 43 id. 75; *Haley v. Earle*, 30 id. 208; *Lannen v. Albany Gaslight Co.*, 44 id. 463; *O'Mara v. Hudson R. R. Co.*, 38 id. 445; *Mangum v. Brooklyn R. Co.*, id. 455; *Costello v. The Syracuse &c. R. Co.*, 65 Barb. 92; *Shear. & Red. on Neg.* (3d ed.) sec. 36; *Add. on Torts*, 21."

Complaint that the plaintiff's intestate was a passenger on the defendant's boat, and came to his death by drowning; that his death was caused by a wrongful act, neglect, &c., of the defendant in refusing to stop the boat or render assistance as he requested, was sufficient. No allegation of freedom from contributory negligence needed beyond above.

These words set forth a cause of action against the defendant. The general rule of law is, that absence of negligence contributive to the misfortune must be shown by the plaintiff as an essential prerequisite to recovery; yet, this rule is limited and qualified by an exception, or rather another rule, that, where the exercise of ordinary care on the part of the defendant would have avoided the misfortune, the negligence of the plaintiff will not excuse or avail as a defense. *Kenyon v. The Railroad*, 5 Hun. 479; *Melhado v. Poughkeepsie Trans. Co.*, 27 Hun. 99.

Engineer of a train is bound to use proper efforts in stopping train if he sees a person on horseback likely not to be able to get off the track in time; such person's negligence in getting on the track does not excuse engineer's negligence in failing to stop train. *Tanner &c. v. Nashville R. Co.*, 60 Ala. 621; *Gothard v. Alabama &c. R. Co.*, 67 id. 114; *Cook &c. v. Central &c. R. Co.*, id. 533; *Alabama &c. R. Co. v. Chapman*, 80 id. 615; *Kansas &c. R. Co. v. Cranmer*, 4 Colo. 524; *Colorado &c. R. Co. v. Holmes*, 5 id. 197; *Bunting v. C. P. R. Co.*, 6 Am. & E. R. C. (Nev.) 282.

Mere error of judgment not amounting to consciousness of probable injury is negligence merely and not wanton wrong. *Alabama &c. R. Co. v. Moorer*, 116 Ala. 642.

Omission of a ferryman, knowing of plaintiff's negligence, to guard against the consequences of the same, renders him liable. *Harvey v. Rose*, 26 Ark. 3; *Little Rock &c. R. Co. v. Parkhurst*, 36 id. 371.

Notwithstanding plaintiff's driver approached defendant's track contrary to orders, defendant is liable for not stopping train when it saw plaintiff's predicament, and could have avoided the accident. *Macon &c. R. Co. v. Davis*, 18 Ga. 679; *State v. Manchester &c. R. Co.*, 52 N. H. 528.

Person with knowledge of another's dangerous position with reference to cars under his orders, is liable for negligence if he permits those cars to be moved and injury results therefrom; contributory negligence is no defense. *Morris v. C. B. &c. R. Co.*, 45 Iowa, 29.

If deceased failed to use degree of care reasonable in a person situated as he was, there can be no recovery unless company might reasonably have prevented the injury, notwithstanding his negligence. *Jacob v. Louisville &c. R. Co.*, 10 Bush. (Ky.) 263; *Sullivan v. Louisville Bridge Co.*, 9 id. 81.

Plaintiff's horse left standing in violation of city ordinance injured by defendant's wagon; notwithstanding such violation, defendant liable, if he could have driven by with due care. *Steele v. Buckhardt*, 104 Mass. 59; *Greenwood v. Callahan*, 119 id. 298; *Suttle v. Lawrence*, id. 276; *Smith v. Conway*, 121 id. 216; *Spoffard v. Harlow*, 3 Allen, 176; *Welch v. Wesson*, 6 Gray, 505.

Where defendant's servant saw a child in danger and neglected to use due care, the defendants are liable. *Jamison v. Ill. Central R. Co.*, 63 Miss. 33.

Where plaintiff stopped on railway crossing without looking or listening, and yet engine might have been stopped by exercise of due care, the company was liable for injuries received. *Kelly v. Han. &c. R. Co.*, 75 Mo. 138; *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198; *Railroad v. State*, 38 Md. 364; *Norris v. Litchfield*, 35 N. H. 271; *State v. Railroad*, 52 id. 528.

Boy negligently playing near defendant's street car was injured by the same passing over his foot; defendant was liable, as it was possible to have avoided the accident by exercise of due care. *Hays v. R. Co.*, 70 Tex. 602.

Although the plaintiff may have been guilty of negligence that may, in fact, have contributed to the accident, if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which

happened, the defendant's negligence will not excuse him. *Radley v. London &c. R. Co.*, L. R. 1 App. Cases, 754, 759.

(d). PROXIMATE CAUSE.\*

There must be a causal connection between the plaintiff's negligence and the injury. Wharton on Negligence, § 301. When the plaintiff's negligence is remote and the defendant's negligence is the proximate cause of the injury, the plaintiff may recover.

(See the logical statement of this doctrine in Wharton on Negligence, secs. 73, 155, 323, &c.)

Although a person be placed in peril by his own negligence, or that of another, yet the unoffending party must nevertheless use such care, under the circumstances, to prevent injury, as a person of ordinary prudence would usually exercise in the same predicament. Thus, if "A." be placed in peril by the negligence of "B.," yet "A." must use such reasonable care to avoid injury as the circumstances permit, although he is not responsible for error of judgment. (See "Choice of Hazards.") His negligence will be measured by his opportunities to think, act and escape. So, if "A.," by his own negligence, be placed in peril of injury, from "B.," it is the duty of "B.," on discovering "A.'s" peril, to use in good faith whatever opportunity may be present to avoid injury to "A." If "B." neglect to do this, such neglect and not the previous neglect of "A." will be regarded as the proximate cause of the injury, as then for the first time, it may be, "B." owes "A." a duty to use some degree of care for his safety.

Hence, the care required of the unoffending person toward the one in peril depends entirely upon the circumstances of the case, the nature and extent of the peril, the knowledge that the innocent party has of it; or his opportunity to see and appreciate it, his time and ability to act, and his capacity to extricate the one threatened.

Thus, an engineer, seeing an infant on the track, should use at once and without delay strenuous efforts to stop the train, as his action can alone save the life. If an adult apparently in control of his person and faculties, be in the same place, he may, if time and space permit, use such preliminary warnings as would be liable to cause the negligent person to protect himself. This principle will be fully illustrated by the decisions that follow.

Where a collision took place between two vessels, whereby the plaintiff's vessel, having grounded, was injured, it was held, that the defendants were not necessarily liable, although those in charge of their vessel,

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\* NOTE.—For a discussion of the doctrine of proximate cause, see *Laidlaw v. Sage*, 158 N. Y. 73.

by the utmost diligence, might have seen the plaintiff's vessel in time to have avoided the collision. *Kelsey v. Barney*, 12 N. Y. 425.

The law imposes upon a party subject to injury the active duty of making reasonable exertions to render the injury as light as possible. If the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him. *Miller v. Mariner's Church*, 1 Greenleaf, 51; *Shannon v. Comstock*, 21 Wend. 461; *Heckscher v. McCrea*, 24 id. 309; *Clark v. Marsiglia*, 1 Denio 517; *Spencer v. Halstead*, id. 606; *Locker v. Damon*, 17 Pick. 284; *Hamilton v. McPherson*, 28 N. Y. 12.

The failure of the defendant to place a canal boat in an agreed place in a tow, does not relieve the other party from the necessity of care. The boat was placed outside, and got the storm and waves, and the plaintiff did not use proper care to protect it and prevent injury, and this was the immediate cause of the injury. Defendant was not liable. *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 210.

Notwithstanding the previous negligence of those managing a grounded vessel, if, at the time when the defendant's vessel collided with it and did the injury, which was the subject of the action, such collision might have been avoided by defendant by the exercise of reasonable care and prudence, an action will lie for the injury. *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75; *S. P. Silliman v. Lewis*, 49 id. 319.

The principle is applicable to all who claim indemnity for losses either upon express contract or for torts, that they shall take all reasonable measures to avoid losses or diminish the damages that may occur. *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 210; *Wilson v. Newport Dock Co.*, 4 H. & C. 232; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 753.

The court in an action for injury to plaintiff, on account of a hole in the street, charged, that, if in the use of ordinary care and prudence, such as an ordinarily prudent man would have used, under the same circumstances, the hole might have been discovered, the plaintiff could not recover, and the charge was held proper. But a request to charge that, if the jury shall find, that, if the hole was *one which might have been seen*, &c., no recovery could be had, was unsound. *Minick v. The City of Troy*, 83 N. Y. 514.

Although the defendant was not to blame for the situation, in which the plaintiff's boat was placed, and it became a nuisance, which the defendant had a right, for its own protection, to remove, yet, in exercising that right, it was his duty to use ordinary care to do no unnecessary injury to the boat. *Hicks v. Dorn*, 42 N. Y. 47; *Mark v. H. R. Bridge Co.*, 103 id. 33.

Plaintiff boarded a train moving at the rate of two or three miles an hour, and, after reaching the platform was thrown by a sudden jerk of the train. It was error to dismiss the complaint. The jury should have decided whether the management of the train, and not the act of boarding it while in motion, was the proximate cause of injury. *Distler v. Long Island R. Co.*, 151 N. Y. 424; rev'g s. c., 78 Hun, 252.

Plaintiff, at work in a trench under a street car track, knowing that cars pass frequently, laid his hand on the rail without looking for cars. It was held to be the proximate cause of the injury, though the cars were running at excessive speed. *Nolan v. Metropolitan Street R. Co.*, 65 App. Div. 184.

Ejection from a car was not the proximate cause of a marriage postponement, where the plaintiff refused to board it again unless it was backed to him after it had started on. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Plaintiff was allowed to recover where his wagon was left unattended in a position where the wheels were dangerously near the car track, which motorman should have seen, if he actually didn't. *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352.

As to definition of contributory negligence, see *Nesbit v. Crosby*, (Conn.) 51 Atl. Rep. 550; *Norton v. Volzke*, 158 Ill. 402.

Proximate cause is such natural result as might reasonably have been foreseen. *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208.

It is not necessary that plaintiff's negligence shall have caused the injury. That it contributed thereto is sufficient. *Chicago &c. R. Co. v. Scranton*, 78 Ill. App. 230.

Plaintiff is only bound to use ordinary care in avoiding injury, and it is erroneous to charge that she cannot recover if she could have done anything which would have prevented injury. *Elwood v. Chicago &c. R. Co.*, 90 Ill. App. 397.

If negligence of both contribute, verdict should be for defendant. *Wabash R. Co. v. Jansen*, 99 Ill. App. 312.

Instruction that plaintiff was entitled to recover unless she contributed "equally" with the defendant to cause her injuries, was error. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

Instruction as to plaintiff's negligence, held to express the idea of "contributory negligence," though those words were not used. *Louisville &c. R. Co. v. Bowlds*, (Ky.) 64 S. W. Rep. 957.

Carrying passengers by station, where there was no conveyance to be had, held proximate cause of injury from long walk to reach home in



bad weather; though shelter could have been had among strangers. *Kentucky C. R. Co. v. Biddle*, (Ky.) 34 S. W. Rep. 904.

Failure to look before crossing, held proximate cause of injury from fright of horse; though statutory signals were not given. *Louisville &c. R. Co. v. Surrant*, (Ky.) 44 S. W. Rep. 88.

An instruction is erroneous which gives the impression that plaintiff is not barred unless his negligence was the sole cause. *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323.

Incompetency in a motorman, half blind, and not negligence in allowing a child to approach the track unattended, was the efficient cause of its injuries. *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

The degree of contributory negligence is immaterial. *Ward v. Maine C. R. Co.*, 96 Me. 136.

Decedent stood negligently on car of defendant and was killed by collision of that car and another through negligence of defendant. Defendant was liable. *Northern Cent. R. Co. v. State*, 31 Md. 357.

County commissioners liable for permitting a road to be out of repair, notwithstanding plaintiff was negligent in driving over it. *Kennedy v. County Commissioners &c.*, 69 Md. 65.

Denial of recovery where plaintiff was guilty of negligence which "directly" contributed to the injury, was proper. *Baltimore v. Lobe*, 90 Md. 310.

It must be the direct and proximate cause. *Locke v. Sioux City R. Co.*, 46 Iowa, 109; *Needham v. San Francisco R. Co.*, 37 Cal. 409; *Bowen v. Southern R. Co.*, 58 S. C. 222; *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638; *Missouri &c. R. Co. v. Lyons*, (Tex. Civ. App.) 53 S. W. Rep. 96; *Schwienfurth v. Cleveland &c. R. Co.*, 60 Oh. St. 215; *Martin v. Southern R. Co.*, 51 S. C. 150; *Brady v. Chicago &c. R. Co.*, 59 Neb. 233; *Gutrie v. Missouri &c. R. Co.*, 51 Neb. 746.

The violation of an ordinance against dangerous driving, to bar recovery, must be shown to have contributed to the injury. *Hovey v. Michigan Teleph. Co.*, 124 Mich. 607.

Plaintiff's negligence must enter directly into and form an efficient cause of the accident. *Oates v. Metropolitan Street R. Co.*, 168 Mo. 535.

The act of the one who has the last clear chance of averting danger, is the sole cause of an accident. *Klockenbrink v. St. Louis &c. R. Co.*, 81 Mo. App. 351.

Where bather negligently went beyond his depth, it was error not to submit to the jury the negligence of the bath house company in not using due diligence to find him after notification. *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; s. c., 33 L. R. A. 598; s. c. aff'd, 50 Neb. 214.

To be "contributory," negligence must in some degree proximately contribute to the injury. *Culbertson v. Holliday*, 50 Neb. 229.

Ordinary, not extraordinary, is the degree of care required. The amount of prudence and caution required by ordinary care varies with the danger suggested by the circumstances. *Missouri P. R. Co. v. Fox*, 60 Neb. 531.

A theft is not necessarily the natural and probable consequence of a direction to decorators to enter a private room. *Searle v. Parke*, 68 N. H. 311.

See, also, *Harbison v. Iliff*, 10 Oh. S. & C. P. Dec. 58.

Company is liable where it neglected to stop train and remove to place of safety a person who, to their knowledge, was injured by falling from the train. *R. Co. v. Kassen*, 49 Oh. St. 230.

It is improper to charge that plaintiff cannot recover if he "contributed in any degree" to the injury, instead of "directly" or "proximately." *Matthews v. Toledo*, 21 Oh. C. C. 69.

That a drunken man took the strychnine ordered for another, was not the necessary consequence of failure to properly label it. *Rouker v. St. John*, 21 Oh. C. C. 39.

Defendant ran a train on the wrong track without notifying the plaintiff, a watchman, who was on the track unaware of its approach. Failure to notify was the proximate cause of death. *Lake Shore &c. R. Co. v. Schultz*, 19 Oh. C. C. 639.

Riding on a platform of a street car was not the proximate cause of an accident arising from its negligent management. *Vail v. Cincinnati &c. R. Co.*, 7 Oh. Dec. 28.

Falling off a wagon was not the necessary consequence of a driver's suddenly starting up with the knowledge that a party was standing therein with his back to him. *Flannagan v. Holloway*, 11 Oh. C. D. 313.

When both use ordinary care, however, neither can be chargeable with negligence. It is but an accident for which there can be no recovery. *Murphy v. Dayton*, 7 Oh. N. P. 227.

Selling liquor to a drunkard, in violation of statute, was the proximate cause of injury, though the immediate cause, was the cold which froze his hands, while he lay exposed as a result of his state of intoxication. *Little v. Young*, 5 Pa. Super. Ct. 205.

One cannot be held for consequences which could not reasonably have been foreseen; not being the natural result, but the result of the interposition of a new and independent force. *Miles v. Postal Teleg. &c. Co.*, 55 S. C. 403.

Putting passenger off at wrong station held proximate cause of sickness contracted from walking home one-half mile in bad weather, where

there was no conveyance or place to stop. *Texas &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 34 S. W. Rep. 1051.

When a cause is the immediate cause, the question of proximate cause does not arise. *Central &c. R. Co. v. Hoard*, (Tex. Civ. App.) 49 S. W. Rep. 142.

Father having negligently grasped electric wire was shocked, but revived. Soon after, however, he became dizzy and fell against his son, who fell against the wires. Father's negligence was not the proximate cause of the son's death. *Brush Electric Light &c. Co. v. Leferre*, (Tex. Civ. App.) 55 S. W. Rep. 396.

Refusal to charge that, to enable plaintiff to recover, the defect must have directly and immediately caused the injury, held proper. *Galveston &c. R. Co. v. Newport*, (Tex. Civ. App.) 65 S. W. Rep. 657.

Defining contributory negligence as, such negligence as, with defendant's concurring negligence, is the proximate cause of the injury, held proper. *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 61 S. W. Rep. 769; s. c. aff'd, id. 768.

Charge as to plaintiff's negligence without adding, that it must have contributed to the injury in order to preclude recovery, held improper. *Gulf &c. R. Co. v. Mangham*, (Tex. Civ. App.) 69 S. W. Rep. 80.

Horse car driver negligently attempted to cross before an approaching train. Gateman negligently lowered gates and shut him on track. Both negligent acts were proximate causes of resulting collision. *Washington &c. R. Co. v. Hickey*, 166 U. S. 521.

A defective gate in a crossing, which admitted a boy to the tracks, was not the proximate cause of an injury to a boy while attempting to cross before a train he saw approaching. *Baltimore &c. R. Co. v. Anderson*, 75 Fed. Rep. 811.

Fire from burning oil tank, due to negligent switching, held not the proximate cause of injury, by an explosion, to one voluntarily approaching to assist in subduing the flames. *Cleveland &c. R. Co. v. Ballentine*, 84 Fed. Rep. 935.

Standing in a dangerous place, while applying an unusual strain, held the proximate cause of injury from fall of beam, the defective work on which caused it to stick. *Maryland v. Westoll*, 106 Fed. Rep. 233.

See, also, *The Aldborough*, 106 Fed. Rep. 90; *Rogers v. Warren*, 75 Mo. App. 271; *Boner v. Meyer*, 11 York Leg. Reg. 58; *Wells v. Houston*, 23 Tex. Civ. App. 629; *Hunter v. Tolbard*, 47 W. Va. 258.

Instruction that contributory negligence must have contributed "substantially or directly" to the injury, was proper. *Trumbull v. Erickson*, 97 Fed. Rep. 891.

Defective steam chest, obscuring view of signals, held not proximate

cause of injury to one who did not give a signal in time to avoid the injury had it been seen. *Hunt v. Kane*, 100 Fed. Rep. 256.

Brakeman's failure to apply brakes and stop rear section of train, parted through defective coupling, was held proximate cause of his injury from collision with forward section stopped by engineer contrary to orders. *Richmond &c. R. Co. v. Tribble*, (Va.) 24 S. E. Rep. 278.

Plaintiff is barred, if his negligence contributes in the least degree. The use of the word "material" instead of "least" is objectionable, as it permits the jury to consider degrees of negligence. *Laflam v. Missisquoi Pulp Co.*, (Vt.) 52 Atl. Rep. 526.

Definition of contributory negligence as that which proximately or naturally contributed to the injury was not erroneous. *McLeod v. Spokane*, 26 Wash. 346.

Person riding on cowcatcher is negligent, but company is liable, if its negligence is the immediate cause of injury. *Downy v. R. Co.*, 28 W. Va. 732.

A servant risking danger to save his master's property is not contributorily negligent. *Schwartz v. Shull*, 45 W. Va. 405.

Breaking of a line was proximate cause of fall from wagon striking an obstruction at the side of the road, where the horse was steered by the extra pull on the opposite line. *McFarlane v. Sullivan*, 99 Wis. 361, 367.

See *Deiseurieter v. Krause &c. Co.*, 97 Wis. 279.

The injury must be the natural and probable consequence of the act: such as should have been foreseen. *Couard v. Ellington*, 104 Wis. 367.

An instruction that the proximate cause is the direct and natural cause, instead of the natural and probable one, is erroneous. *Barter v. Chicago &c. R. Co.*, 104 Wis. 307; *Mauch v. Hartford*, 112 id. 40.

Probable to the ordinary man. Probable from the standpoint of the one charged, is erroneous. *Hudson v. Northern P. R. Co.*, 107 Wis. 620.

#### (c). WANT OF CARE INDUCED BY CONDUCT OF WRONGDOER.

**If the defendant by his act or his conduct has led the plaintiff to believe, that care is not needed on his part, the plaintiff is not negligent in failing to use care or continuing the risk.**

A boy of eleven, standing on a pier, was requested by the mate of a tug to "cast" the stern line by which she was moored. Being unfamiliar with the movements of the vessel, he was injured, in attempting to do so, by his failure to notice the vessel as she swung around. The question of whether the defendant had created a dangerous situation into which the plaintiff was invited and which he was unaware of should have been left to the jury. *Geibel v. Elwell*, 19 App. Div. 285.

Where an automobile came so suddenly upon plaintiff as to induce fright, defendant cannot complain of his error of judgment. *Thies v. Thomas*, 11 N. Y. Supp. 216.

Where defendants agreed to stop running a "fan" in a planing mill for the space of one hour, and the plaintiff relied on that understanding, and was injured by the negligent starting of the same, they were liable. *Kinney v. Folkert*, 78 Mich. 681; *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Morrissey v. Ferry Co.*, 47 Mo. 521.\*

Gates were open as an indication that it was safe to cross the track. Traveler was not held to the same degree of care as otherwise. *Threlkeld v. Wabash R. Co.*, 68 Mo. App. 121.†

Plaintiff was misled as to the safety of crossing by the absence of signals or warnings. *Schweinfurth v. Cleveland &c. R. Co.*, 60 Oh. St. 215.

Road was left unbarriaded; See *Snyder v. Penn. Township*, 14 Pa. Super. Ct 145.

An imprudent action, when placed in a perilous position by another's negligence, is not contributory negligence. *International &c. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Plaintiff attempted to cross a track but stepped back on seeing an engine approaching, which had been obstructed by other cars in the way, when he was struck by still other cars "kicked" along with no one at the head to protect pedestrians from injury. *Steele v. Northern P. R. Co.*, 21 Wash. 281.

Plaintiff cannot recover on the ground that defendant's negligence placed him in a situation of sudden danger which required him to form a hasty judgment, where it was in fact his own negligence which placed him in such position. *Dummer v. Milwaukee Electric R. &c. Co.*, 108 Wis. 589.

#### (f). VIOLATION OF STATUTE.

**Where the defendant directly violates a positive enactment, contributory negligence has been held in some instances to be immaterial.**

Failure to obey an ordinance as to the inclosure of elevator shafts, had it been the proximate cause of the accident, would have been tantamount to willful injury. See *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Contributory negligence is no defense to an action based upon the statute imposing on railroads the duty of fencing their tracks. *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; *Jeffersonville &c. R. Co. v. Ross*, 37 id. 545; *Louisville &c. v. Whitesell*, 68 id. 291; *Fort Wayne*

\* NOTE.—This rule would be applicable to similar instances as above, occurring between master and servant. See "Master and Servant," *post*, p. 1386.

† NOTE.—See also "Crossings," *post*, p. 733.

&c. R. Co. v. Herbold, 99 id. 91; Louisville &c. R. Co. v. Cahill, 63 id. 340.

See, also, "Domestic Animals," *post*.

Sale of liquor to an habitual drunkard in violation of statute held not to give action for his death. *Bissell v. Starzinger*, 112 Iowa, 266.

Statutory liability for acts of a vicious dog does not exclude the defense of contributory negligence. *Bush v. Wathen*, (Ky.) 47 S. W. Rep. 599.

See, also, "Domestic Animals," *post*.

Person about to cross defendant's track has a right to presume that an ordinance limiting speed of trains will be observed. Such presumption is not negligence to defeat an action for injuries inflicted under those circumstances. *Correll v. B. C. R. &c. R. Co.*, 38 Iowa 120; *contra*, *Taylor v. M'f'g. Co.*, 143 Mass. 470.\*

That plaintiff was a trespasser, did not *per se* prevent his recovery, where defendant violated a statute regulating the speed of its trains. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Defendant does not escape statutory liability for act of his dog in frightening a horse by the fact that plaintiff's situation, in driving a skittish horse in an unsafe carriage, was dangerous anyway. *Chickering v. Lord*, 57 N. H. 555.

Selling liquor to drunkard in violation of statute made seller liable for injuries from exposure and cold. *Littell v. Young*, 5 Pa. Super. Ct. 205.

A statute, requiring constant lookout and performance of certain acts on discovery of obstruction, and imposing liability for injury due to violation thereof, construed to impose an absolute liability regardless of contributory negligence. *Louisville &c. R. Co. v. Truett*, 111 Fed. Rep. 876.

#### (g). WHEN FOR THE DETERMINATION OF THE COURT OR JURY.

Depending upon the facts presented in each particular case, the question of negligence may be one of law or fact. It is sometimes, however, considered that the court should always conclude, whether the facts established impute negligence.†

There are four heads to this subject:

(A). When the facts are uncontroverted or incontrovertible, and the question of negligence is for the court.

(B). When the facts are uncontroverted or incontrovertible, and the question of negligence is for the jury.

\* NOTE.—This rule does not apply in New York to railway crossings. See "Crossings," *post*, p. 733.

† NOTE.—For further illustration of circumstances which require or justify a finding of negligence, see specific headings.

(C). When the facts are to be found by the jury, and the question whether such facts, if so found, impute negligence is to be determined by the court.

(D). When the facts are to be found by the jury, and the question, whether such facts, if so found, impute negligence, is to be determined by the jury.

I. The jury should pass on the question of the existence or non-existence of the facts, that is, determine where the weight of testimony lies, when there is a conflict of evidence. *Maheer v. Central Park &c. R. Co.*, 61 N. Y. 52, 55; *Hackford v. N. Y. Central &c. R. Co.*, 53 id. 654; *Bernhard v. Rensselaer &c. R. Co.*, 1 Abb. Ct. App. Dec. 131; *Hozman v. The Hoboken Land &c. Co.*, 50 N. Y. 53; *Hamilton v. Third Ave. R. Co.*, 53 id. 25.

II. The question whether the facts impute negligence is for the jury, when the circumstances are such, that men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, or when the inferences to be drawn from, or the significance to be attached to the testimony are doubtful. *Thurber v. Harlem &c. R. Co.*, 60 N. Y. 331; *Hays v. Miller*, 70 id. 117; *Nolan v. Brooklyn City &c. R. Co.*, 87 id. 67; *Belton v. Baxter*, 58 id. 415; *Cook v. N. Y. Central R. Co.*, 3 Keyes 476; *Oschsenbein v. Shapley*, 85 N. Y. 214; *The People v. Conroy*, 97 id. 80; *Connolly v. Knickerbocker Ice Co.*, 114 id. 104, 107; *Weber v. N. Y. Central &c. R. Co.*, 58 id. 456; *Bernhard v. Rensselaer &c. R. Co.*, 1 Abb. Ct. of App. Dec. 131; *Massoth v. Delaware &c. Canal Co.*, 64 N. Y. 524; *Sullivan v. N. Y. Central &c. R. Co.*, 34 id. 29; *Beisiegel v. N. Y. Central &c. R. Co.*, id. 622; *Ernst v. The H. R. R. Co.*, 35 id. 9; *Hogan v. Eighth Ave. &c. R. Co.*, 15 id. 383; *Keller v. N. Y. Central &c. R. Co.*, 24 How. 177; *Bagley v. Bowe*, 105 N. Y. 111; *Griffin v. N. Y. Central R. Co.*, 112 id. 126; *Gardner v. Friederich*, 163 N. Y. 568; aff'g s. c., 25 App. Div. 521; *Mohr v. Wetherill*, 33 Misc. 791.

(The views here expressed also relate to the negligence of the defendant, and the decisions relating thereto are also gathered at this place.)

#### 1. WHEN THE QUESTION IS FOR THE COURT.

Facts may be undisputed and may so clearly indicate, that the injured person did, to some extent, contribute to his own injury, as to reasonably justify the court in so declaring.

*Morrison v. Erie R. Co.*, 56 N. Y. 302; *Deyo v. N. Y. C. R. Co.*, 34 id. 13; *McIntyre v. N. Y. C. R. Co.*, 37 id. 287; *Filer v. N. Y. C. R. Co.*, 49 id. 47; *Solomon v. Manhattan E. R. Co.*, 103 id. 437; *Hunter v. Cooperstown & S. &c. R. Co.*, 112 id. 377; *Weber v. N. Y. C. &c.*

R. Co., 58 id. 451; *Davis v. N. Y. C. &c. R. Co.*, 47 id. 400; *Hackford v. N. Y. C. &c. R. Co.*, 53 id. 654; *Lane v. The Atlantic Works*, 111 Mass. 136; *Gonzales v. N. Y. &c. R. Co.*, 38 N. Y. 440; *Van Schaick v. Hudson R. Co.*, 43 id. 527; *Wilcox v. Rome &c. R. Co.*, 39 id. 358; *Wilds v. The Hudson R. Co.*, 29 id. 315; *Woodward v. N. Y. L. E. R. Co.*, 106 id. 369. See *Penn. R. Co. v. Kilgore*, 32 Pa. St. 292.

Jury decide on facts, but not the inference therefrom. *Pleasants v. R. Co.*, 95 N. C. 195; *Empire &c. Co. v. McIntosh*, 82 Ky. 554; *Witty v. C. &c. R. Co.*, 83 id. 21; *Trow v. C. R. Co.*, 24 Vt. 187.

The question of contributory negligence has more uniformly been left to the jury, in the case of injury to infants, inasmuch as the degree of care required is that which can be expected of one of immature understanding; hence such cases should not be confused with those where the conduct of an adult is involved. *Byrne v. N. Y. Central &c. Co.*, 83 N. Y. 620; *Dowling v. The N. Y. Central &c. R. Co.*, 90 id. 670; *Connolly v. Knickerbocker Ice Co.*, 114 id. 107; *Stone v. Dry Dock &c. R. Co.*, 115 id. 111. See "Contributory Negligence, Infants," p. 704.

See, however, *Thompson v. Buffalo R. Co.*, 145 N. Y. 196.

The question was not for the jury, where expert horsemen testify that a runaway team can be guided, if not stopped, and defendant's coachman, a competent servant, testified that *his* team became unmanageable and could not be guided. *Cadwell v. Arnheim*, 152 N. Y. 182.

**From opinion.**—"In actions for the recovery of damages, charged to the negligent acts of a defendant, it must appear that there has been some breach of duty." \* \* \* "It will not do to submit a question of negligence to a jury, when the facts are equally consistent with the presence or the absence of negligence; or where the jury could do no more than surmise as to the negligence of the defendant." \* \* \* "There was absolutely no evidence on the part of the plaintiff to show that the defendant's servant was negligent in the performance of any duty; unless the opinions of persons who were not witnesses of the occurrence, as to what a driver might have done in such an emergency, can be regarded as such evidence, and that we are not prepared to hold." \* \* \* "To submit the case to the jury, under the evidence, was to invite their speculation upon the question; with nothing in the facts to militate against the truth of the coachman's statements."

In an action for death of a brakeman by reason of failure to provide warnings of a low bridge, the mere evidence that plaintiff, who was standing on top of the car before coming to the bridge, was found thereon, lying insensible, after passing it, was held insufficient to present a question for the jury. *Fitzgerald v. New York &c. R. Co.*, 154 N. Y. 263; rev'g s. c., 88 Hun. 359.

**From opinion.**—"In an action to recover damages for negligence, the burden is upon plaintiff to establish by a fair preponderance of evidence every fact that is essential to his cause of action. It is not enough to show that the defendant



was negligent and that the plaintiff was free from negligence, but it is also necessary to show that the negligence of the defendant caused the injury for which a recovery is sought. The negligence must be connected with the injury by natural and uninterrupted sequence, as cause is connected with effect."

\* \* \* "No evidence was given tending to show any wound or bruise upon his person, or that he died from violence instead of disease." \* \* \* "While it is true that slender evidence is sometimes permitted to become the basis of a finding of fact, it is when it appears that there is no more to be had, and it is allowed under the necessity of the case in order to prevent injustice. No such necessity existed upon the trial under review."

Injury to eyes by an explosion of quick lime stolen by boys, was not, as a matter of law, the proximate result of placing the lime in the street. *Beetz v. Brooklyn*, 10 App. Div. 382.

**From opinion.**—"Usually the question of proximate cause is one of fact for the jury to answer. But where the facts present a clear case, the question is to be disposed of as one of law by the court. And the law requires that the injury must so directly result from the wrongful act that according to common experience and the usual course of events, it might, under particular circumstances, have reasonably been expected. (*Jex v. Straus*, 122 N. Y. 293.)"

Lamp trimmer was negligent *per se*, where, seeing a wagon approach within striking distance of the leg wires of the lamp he had lowered to trim, he did not suspend work or give any other warning than that to two previous vehicles, which the driver of the third did not hear. *Campbell v. Wood*, 22 App. Div. 599.

Pedestrian was negligent *per se* in attempting to slowly cross street car tracks without looking out for, or noticing, cars in plain sight, approaching from each direction, until the one on the further track blocked his passage from that on the nearer. *Martin v. Third Ave. R. Co.*, 27 App. Div. 52.

Where an engineer, competent and intelligent, knowing of a dangerous defect in the locomotive, persisted in its use. *Bridges v. Tennessee Coal &c. R. Co.*, 109 Ala. 287.

Where plaintiff went upon a railroad crossing on a dark night without stopping and listening and stood there talking with another till struck. *St. Louis &c. R. Co. v. Martin*, 61 Ark. 549.

Where plaintiff's own testimony clearly shows that he could have avoided injury by the use of reasonable care. *Taylor v. Georgia Marble Co.*, 108 Ga. 807.

When conclusion of negligence necessarily results from the statement of facts. *Chicago &c. R. Co. v. O'Connor*, 119 Ill. 586.

Demurrer to a complaint by a passenger, charging railway company with negligence in maintaining gravel heaps on its right of way, where there was no station, sustained. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

**From opinion.**—"The duties and liabilities imposed by the relation of carrier and passenger are questions of law, but whether there has been a negligent discharge of a duty so imposed is a question of fact or law upon the same conditions as any other question of negligence. Some of the acts charged as negligent, we think, could not be brought within any of the duties created by the relation, and we apprehend that reasonable minds would not disagree in the conclusion that they were not negligent as applied to the circumstances alleged to exist, and therefore the court might so pronounce them as matter of law. Of this class are charges of negligence in not lighting the railroad grounds where there was no station, merely to illuminate a passing train with its platform changing the depot and business from one side to the other without notifying plaintiff, or allowing gravel piles along the road where there was no station nor the slightest reason to suppose that passengers would fall off or try to get off."

Where the inferences deducible from the complaint necessarily establish negligence it is demurrable. *Smith v. Chicago &c. R. Co.*, 86 Ill. App. 647.

It is only where the facts authorize the finding by the jury that the question is one of fact. It cannot be allowed arbitrarily to declare what is negligence. *Chicago &c. R. Co. v. Maloney*, 99 Ill. App. 623.

When sender of message fails, after being notified, to make address more definite. *Western &c. Tel. Co. v. McDaniel*, 103 Ind. 294.

Where child of seven and a half, bright and able to comprehend the danger, went to sleep after playing on defendant's tracks. *Krenzer v. The Pittsburg &c. R. Co.*, 151 Ind. 587.

Where deceased recklessly stood for two or three minutes in front of a train approaching in full view. *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571.

When there is but one reasonable inference the court must decide. *Gaston v. Bailey*, 24 Ind. App. 24.

Where only one conclusion can be drawn from the facts. *Mabbott v. Illinois C. R. Co.*, (Iowa) 89 N. W. Rep. 1076.

Where it was undisputed that two independent causes produced the injury. *Missouri &c. R. Co. v. Columbia*, (Kan.) 69 Pac. Rep. 338.

Where plaintiff, in putting his glasses in his pocket, stuck his arm out of the car window and was struck by a passing bridge timber, an obvious danger. *Clarke v. Louisville &c. R. Co.*, 101 Ky. 34.

Where the facts are admitted or established by undisputed testimony. *Henderson Trust Co. v. Stuart*, (Ky.) 55 S. W. Rep. 1082; s. c., 48 L. R. A. 49.

Where the jury could draw no other conclusion. *Exchange Bank v. Trimble*, (Ky.) 56 S. W. Rep. 156.

Only when proof of contributory negligence is clear should peremptory instruction be given. *Standard Oil Co. v. Eiler*, (Ky.) 61 S. W. Rep. 8.

Where plaintiff's testimony as to looking and listening is contradicted by the established facts. *Northern C. R. Co. v. Medairy*, 86 Md. 168.

Where plaintiff deliberately stuck his head and shoulders out of the car, looking backwards. *Cummings v. Worcester &c. Street R. Co.*, 166 Mass. 220.

Where motorman failed to stop his car after seeing a fellow workman run to notify plaintiff, who was deaf. *Lyons v. Bay Cities &c. R. Co.*, 115 Mich. 111.

Where traveler, familiar with crossing, failed to stop, look or listen when an approaching train could have been seen and heard. *Stewart v. Michigan C. R. Co.*, 119 Mich. 91.

Where pedestrian passed through gates at a crossing and stood on main track while train on side track passed. *Buckley v. Flint &c. R. Co.*, 119 Mich. 583.

What are proper elements of damages are questions of law. *Camp v. Wabash R. Co.*, (Mo. App.) 68 S. W. Rep. 96.

Deceased, with unobstructed view of track, at crossing, fell from a load of hay and was run over. *Brady v. Chicago &c. R. Co.*, 59 Neb. 233.

Where negligence on part of plaintiff is the only reasonable inference to be drawn from his own testimony. *Neal v. Carolina C. R. Co.*, 126 N. C. 634.

Or the whole evidence. *Halton v. Southern R. Co.*, 127 N. C. 255.

Whether evidence *tends to show* negligence is for the court, though, whether the evidence constitutes negligence, is for the jury. *Omaha Street R. Co. v. Martin*, 48 Neb. 65; *Cincinnati Street R. Co. v. Murray*, 53 Oh. St. 570; s. c., 30 L. R. A. 508.

Where plaintiff got off a car, standing still, on the left side where there was a ditch, when the right was smooth and safe. *Bland v. Roxborough &c. R. Co.*, 13 Pa. Super. Ct. 93.

A servant continued in service, where he was warranted in believing that the defect had been remedied. *Missouri &c. R. Co. v. Nordell*, 20 Tex. Civ. App. 362.

Where the uncontradicted facts are that plaintiff, familiar with a crossing did not make any attempt to look out for a train plainly in sight. *Northern P. R. Co. v. Freeman*, 114 U. S. 379; rev'g, 83 Fed. Rep. 82.

See, also, *Pyle v. Clark*, 75 Fed. Rep. 644.

See, also, "Crossings," *post*, p. 733.

In jumping from a car to an adjoining track on which a train was known to be due. *MacLeod v. Graven*, 73 Fed. Rep. 627.

Where negligence clearly contributed directly to the injury, it is error to leave it to the jury to determine whether it was the proximate cause. *Louisville &c. R. Co. v. Johnson*, 81 Fed. Rep. 679.

Direction for defendant held proper, where a boy of 12 was injured when he caught a turntable and tried to hold it off his brother. *Thomason v. Southern R. Co.*, 113 Fed. Rep. 80.

When but one reasonable conclusion can be drawn from the facts, contributory negligence is for the court, if more than one, it is for the jury. *Hemingway v. Illinois C. R. Co.*, 114 Fed. 843.

Where plaintiff stepped behind one car and in front of another without taking precaution to guard against the latter. *Burgess v. Salt Lake City R. Co.*, 17 Utah, 406.

Where the facts are undisputed. *Pool v. Southern Pac.*, 20 Utah, 210.

Where plaintiff shows in the course of his proof that he is guilty of contributory negligence. *Silcock v. Rio Grande R. Co.*, 22 Utah, 179.

Proximate cause is for the court on uncontradicted testimony. *Schwartz v. Shull*, 45 W. Va. 405.

Where the testimony of a boy of eighteen was that he did not know the effect of putting his finger into the rolls of an ordinary straw cutter, as it was highly improbable. *Roth v. Barrett Man. Co.*, 96 Wis. 615.

Where an employé, familiar with all the surroundings, gets under a descending elevator to put a pail on top of one about to ascend. *Powell v. Ashland Iron &c. Co.*, 98 Wis. 35.

It is for the court to define what constitutes proximate cause, and for the jury to find it. *Deisenrieter v. Kraus-Merkel Malting Co.*, 91 Wis. 279.

Where a boy of seventeen was familiar with the danger incident to removing saw dust with a stick and knew that it could be removed with safety by stopping the saw. *Larson v. Knapp &c. Co.*, 98 Wis. 178.

## 2. WHEN THE QUESTION IS FOR THE JURY.\*

Choice of hazards in a perplexing situation. *Filer v. N. Y. &c. R. Co.*, 49 N. Y. 47; *Probst v. Delemater*, 100 N. Y. 266. See, also, *Bernard v. Rensselaer &c. R. Co.*, 1 Abb. Ct. of App. 131; *Diekens v. N. Y. &c. R. Co.*, id. 504.

A gas company allowed gas to be turned on in an apartment house without inspecting the pipes. A boy of eighteen searched for a gas leak with a lighted candle. *Schmeer v. Gas Light Co.*, 147 N. Y. 529; s. c., 30 L. R. A. 653.

Plaintiff, at the invitation of a conductor, boarded a train moving at the rate of two or three miles an hour, and was thrown by a sudden jerk. Whether in such case, plaintiff having once reached a place of safety, the accident was not caused by reason of the subsequent mismanagement of

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\* NOTE.--For further illustrations of facts from which the conclusion of negligence is to be drawn by the jury, see specific headings.

the train. *Distler v. Long Island R. Co.*, 151 N. Y. 424; s. c., 35 L. R. A. 162.

Driver of a hose cart, going to a fire, collided with a truck negligently left in the street. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

Whether negligence of crew is attributable to master temporarily deranged, where it was apparent that he was unfit to command and the mate should have assumed control. *Williams v. Hays*, 157 N. Y. 541; s. c., 43 L. R. A. 253; rev'g s. c., 2 App. Div. 183.

A guest at a hotel retired with his window open, light burning, clothes, &c., conspicuously displayed about the room. *Becker v. Warner*, 90 Hun. 187.

Where one, employed for other work, was killed in explosion of a barrel overcharged with steam, while working around the barrel at direction of the superintendent. *Crowell v. Thomas*, 90 Hun. 193.

Whether an under crossing of a railroad 13 feet 2 inches wide was sufficient. *Windsor v. Delaware &c. Canal Co.*, 92 Hun. 127; s. c. aff'd, 155 N. Y. 645.

Whether it was negligence to fail to see a doctor for two days after getting a cinder in one's eye, when there is no evidence that the delay aggravated the injury, or that the sight could have been saved anyway. *Morrison v. Long Island R. Co.*, 3 App. Div. 205.

Failure to properly light a station platform to show passengers alighting from cars how to step. Getting off in a crowd without looking to see where one is stepping. *Fox v. New York*, 5 App. Div. 349; *Green v. Middlesex Valley R. Co.*, 31 App. Div. 412.

A father left his child of seven on a street crossing for a moment, while assisting his wife to alight, after looking and seeing no car within 150 feet. *Kitchell v. Brooklyn &c. R. Co.*, 6 App. Div. 99.

Driver attempted to cross the track when car was far enough away for the gripman to have stopped. *Smith v. Metropolitan Street R. Co.*, 7 App. Div. 253.

Mother of child seven years and four months old, left unattended on the street for half an hour, had cautioned it to remain in front of the house, but allowed it to remain away for half an hour. *Hyland v. Burns*, 10 App. Div. 386.

Woman, while looking in her pocketbook for change, fell over man in hallway of elevated railway station, posting bills. *Lycett v. Manhattan R. Co.*, 12 App. Div. 326.

Failure to supply a heavy truck with a brake. *Hurley v. New York &c. Brew. Co.*, 13 App. Div. 167.

Conflict of testimony as to signals at a crossing. *Sayer v. King*, 21 App. Div. 624.

One of a group of children, crossing and recrossing track in play in view of car for some distance, was struck and caught up by the fender, but jolted off and run over within the distance in which the car might have been stopped after striking it. *Howell v. Rochester R. Co.*, 24 App. Div. 502.

Failure to stop a car to ascertain the trouble, when flashing or flaming began in the motor box, due to presence of dirt. Passenger jumped from fright, at subsequent burning out of fuse. *Poulsen v. Nassau Electric Co.*, 30 App. Div. 246.

Where the testimony was such that the judge could not tell whether the jury had correctly concluded, their verdict will not be disturbed. *Wilhelm v. Brooklyn &c. R. Co.*, 32 App. Div. 637.

Paying a raised draft, where, by referring to letters of advice from the drawee, the alteration could have been discovered in time to have prevented the payment. *Continental Nat. Bank v. Tradesman Nat. Bank*, 36 App. Div. 112.

Running a car on steep grade at such a speed that it could not be stopped within 40 feet. *Fullerton v. Metropolitan Street R. Co.*, 37 App. Div. 386.

Plaintiff crossed a track after looking both ways as far as he could when the flagman had rolled up his flag and walked towards his shanty. *Mauley v. New York &c. R. Co.*, 39 App. Div. 144.

Collapse of warehouse, unaccompanied by an earthquake or the like. *Kaiser v. Latimer*, 40 App. Div. 149.

Where the evidence is conflicting, as to whether cars obstructed the view and whether plaintiff might, notwithstanding, have seen the train approach. *Chapman v. New York &c. R. Co.*, 41 App. Div. 618.

Failure to stop a street car for 15 feet, when it could have been stopped within 25 or 35 feet, with a pedestrian in the fender by contributory negligence. *Green v. Metropolitan Street R. Co.*, 42 App. Div. 160.

Where the danger is known, the evidence is sufficient on the question of contributory negligence to go to the jury. *Boyle v. Degnon-McLean &c. Co.*, 47 App. Div. 311.

See, also, *Knoll v. Third Ave. R. Co.*, 46 App. Div. 527; s. c. aff'd, 168 N. Y. 592; *Morrissey v. Smith*, 67 App. Div. 189.

Chimney had been allowed to remain in a dangerous condition for a year or more. *Kaiser v. Washburn*, 55 App. Div. 159.

Where plaintiff's own testimony, though uncorroborated and contradicted, is the only evidence of lack of contributory negligence. *Steinle v. Metropolitan Street R. Co.*, 69 App. Div. 85.

Extent of intoxication of passenger, conductor's knowledge thereof and condition of place of ejection. *Louisville &c. R. Co. v. Johnson*, 108 Ala. 62; s. c., 31 L. R. A. 372.

Whether one had knowledge of defects which he had every opportunity to observe. *Whalley v. Zenida Coat Co.*, 122 Ala. 118.

On a conflict of evidence, as to whether plaintiff was alone negligent or whether defendant after seeing his peril could have avoided injury by ordinary care. *Memphis &c. R. Co. v. Martin*, 131 Ala. 269.

Use of a light to discover a leak of gas not knowing its presence in large quantities. *Pine Bluff &c. Co. v. Schneider*, 62 Ark. 109; s. c., 33 L. R. A. 366.

Horse tied to a wagon so that it could not move forward without pulling it along by its mouth so as to injure itself. *Johnson v. Stewart*, 62 Ark. 164.

Invalid lady passenger, promised assistance, attempted to alight unassisted. *St. Louis &c. R. Co. v. Baker*, 67 Ark. 531.

A woman ejected from a train attempted to walk three miles to next station. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668; s. c., 32 L. R. A. 193.

Where the evidence is capable of different inferences. *Wahlgren v. Market Street R. Co.*, 132 Cal. 656.

Passenger 60 years of age got down on the steps of a slowly moving car at night. *Denver Tramway Co. v. Reid*, 22 Colo. 319.

Whether duty resting on engineer, when he saw the danger, was properly performed. *Nolan v. N. Y. C. &c. R. Co.*, 53 Conn. 461.

Conduct of defendant in view of things likely to happen. *Dexter v. McCready*, 54 Conn. 171; *Wright v. Georgia R. Co.*, 34 Ga. 330.

A flagman voluntarily placed at a crossing, unnecessarily absent during passing of a train. *Dundon v. New York &c. R. Co.*, 67 Conn. 266.

Gripman failed to replace side platform gates voluntarily maintained by company, after admitting a passenger. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

A threshing machine, operated by an engine in close proximity. *Adair v. Southern &c. Ins. Co.*, 107 Ga. 297.

Failure of a driver to see an electric light wire, the size of a person's little finger, five feet from the ground. *Lloyd v. City &c. R. Co.*, 110 Ga. 165.

Where there is evidence sufficient to overcome presumption of defendant's negligence and yet evidence of its negligence. *Southern R. Co. v. Loughridge*, 111 Ga. 173.

Where the injury occurs in another state, the court should not, in the absence of a statute or ordinance there defining the acts as negligence, at-

tempt to tell the jury what acts do or do not constitute negligence. *Savannah &c. R. Co. v. Evans*, 115 Ga. 315.

A child of two left unattended two or three minutes in a room adjoining a railroad track. *Chicago &c. R. Co. v. Logue*, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

Bank permitted a customer's agent to purchase a draft on a distant city under unusual circumstances. *Lamson v. Illinois Trust &c. Bank*, 166 Ill. 162; aff'g s. c., 62 Ill. App. 377.

Due care in controlling a frightened horse; persistency in ringing bell of locomotive and running at an unlawful rate of speed. *Illinois C. R. Co. v. Keller*, 71 Ill. App. 474.

Where reasonable men may differ in the conclusions drawn from the evidence. *Marwell v. Durkin*, 86 Ill. App. 251; s. c., 185 Ill. 546.

Where sensible and impartial men may draw different conclusions from the facts, the question is for the jury. *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308.

Where there is a dispute as to facts. *Greenleaf v. Ill. Central R. Co.*, 29 Iowa, 14.

Removal from one car to another of passenger for alleged misconduct. *Marquette v. Chicago &c. R. Co.*, 33 Iowa, 562.

Heavy wrench dropped from platform, fifty feet above where people were standing. *Armbright v. Zion*, 108 Iowa, 338.

One loading a car stepped into a hole in a car floor, which plaintiff testified was covered by debris and which others testified was in plain sight and had been mentioned on the car. *King v. Chicago &c. R. Co.*, 108 Iowa, 748.

An engine run rapidly and without warning past a brakeman standing in a precarious situation. *St. Louis &c. R. Co. v. French*, 56 Kan. 584.

Whether speed of cars and mode of moving them imputed negligence to company. *Louisville &c. R. Co. v. Mahony*, 7 Bush. (Ky.) 235.

Where a brakeman, whose duties required him to be on top of the car, sat thereon, during a long journey with his legs over the side, which were struck by a mail bag suspended too near the track. *Louisville &c. R. Co. v. Milliken*, (Ky.) 51 S. W. Rep. 796; *Owensboro R. Co. v. Hill*, (Ky.) 56 S. W. Rep. 21.

Conduct of parties at time of boiler explosion. *Cumberland &c. R. Co. v. State*, 37 Md. 156.

Brakeman stood between a moving car and side of tunnel, a position he had occupied with safety before changes in tracks had been made. *Baker v. Maryland Coal Co.*, 84 Md. 19.

Failure of master to furnish, and attempt of servant to put terra cotta coping on a wall without, iron ties. *Gibson v. Sullivan*, 164 Mass. 557.



When testimony respecting defendant's negligence is conflicting. *Mynning v. D. L. &c. R. Co.*, 64 Mich. 93.

Where evidence as to death by intoxication was conflicting. *Maier v. Massachusetts &c. Asso.*, 104 Mich. 687.

Defendant lighted a pipe and lay down to sleep upon hay and straw. *Lillibridge v. McCann*, 117 Mich. 84; s. c., 41 L. R. A. 381.

Where the evidence is not free from doubt in the minds of candid and intelligent men, the question is for the jury. *Becker v. Detroit &c. R. Co.*, 121 Mich. 580.

Where evidence was conflicting as to whether plaintiff overloaded scales which broke. *McIntyre v. Detroit Safe Co.*, (Mich.) 89 N. W. Rep. 39.

Under instructions from the court as to what constitutes negligence, conduct of parties susceptible of different interpretations. *Johnson v. Winona &c. R. Co.*, 11 Minn. 296; *Carroll v. Minn. &c. R. Co.*, 14 id. 57.

Question as whether cow got on the track near where she was killed. *Lepp v. St. Louis &c. R. Co.*, 87 Mo. 139.

Whether falling into water was the proximate cause of death, which occurred three days thereafter. *Wiese v. Remme*, 140 Mo. 289.

Negligence of gripman in failing to see a boy's danger, due to his negligence, and stop the car in time to avoid injury. *Baird v. Citizen's R. Co.*, 146 Mo. 265.

Where there was a conflict of testimony as to whether signals were given. *Young v. Missouri &c. R. Co.*, 72 Mo. App. 263.

Case cannot be taken from the jury, where the probative force of the evidence does not exclude all but one reasonable inference. *Linn v. Massillon Bridge Co.*, 78 Mo. App. 111.

Where there is a conflict of evidence as to whether plaintiff looked or not and whether it would have been negligence not to look; the view of the track being partly obstructed. *Chicago &c. R. Co. v. Pollard*, 53 Neb. 730.

Whether due care requires slackening speed, or having a flagman at a grade crossing, where the track is unobstructed for a long distance. *Huntress v. Boston &c. R. Co.*, 66 N. H. 185.

Where conductor seized passenger standing on running board to save himself from stumbling. *Whalen v. Consolidated T. Co.*, 61 N. J. L. 606; s. c., 41 L. R. A. 836.

Where the evidence warrants an inference, the question must go to the jury. *Bliss v. Bergen &c. T. Co.*, 64 N. J. L. 601.

Whether defendant could not have prevented injury, notwithstanding

plaintiff's prior contributory negligence. *Nathan v. Charlotte Street R. Co.*, 118 N. C. 1066.

*Wheeler v. Gibbon*, 126 N. C. 811.

Material facts disputed, or inferences of fact. *Pittsburg &c. R. Co. v. Kane*, 5 Cent. (Pa.) 909; *Pittsburg &c. R. Co. v. Evans*, 53 Pa. St. 250; *Huelsenkamp v. Cit. R. Co.*, 34 Mo. 45; *Kennedy v. North &c. R. Co.*, 36 id. 351; *Barton v. St. Louis &c. R. Co.*, 52 id. 253.

Where a fraction of time only was allowed deceased to escape train. *Penn. R. Co. v. Ogier*, 35 Pa. St. 60.

Whether defendant company was negligent in permitting ice on platform steps, and passengers were on platform although car was not full. *Neslie v. Second &c. R. Co.*, 113 Pa. St. 300.

Whether conductor discharged his duty to the company in ejecting passenger from car on a dark night at a station that could not be seen. *Arnold v. Penn. R. Co.*, 115 Pa. St. 135.

Whether a car stopped long enough for plaintiff to alight, or whether he jumped or was jolted off. *Moran v. Versailles T. Co.*, 188 Pa. St. 557.

Fire spread from combustible material allowed to remain in road to cinder dump on adjoining land requiring a wide trench to stop it. *Grow v. Pottsville*, 197 Pa. St. 337.

Where inconsistencies in plaintiff's own testimony are not so glaring as to indicate untruthfulness. *Strader v. Monroe Co.*, (Pa.) 51 Atl. Rep. 1100.

Evidence tending to show negligence. Refusal of nonsuit was proper. *Bodie v. Charleston &c. R. Co.*, 61 S. C. 468.

Contributory negligence stated to be exclusively within the province of the jury. *Knoxville v. Cox*, 103 Tenn. 368.

Facts controverted, or conflict of evidence. *T. & P. R. Co. v. Levi*, 59 Tex. 674.

When facts are pleaded alleging unskillfulness of defendant by reason of the employment by him of unskillful persons. *Rowland v. Murphy*, 66 Tex. 534.

Passenger paid no attention to a freight train, which gave no appearance of starting, while boarding a passenger train with others. *St. Louis &c. R. Co. v. Casseday*, (Tex. Civ. App.) 48 S. W. Rep. 6; s. c. rev'd on another point, 50 S. W. Rep. 125.

Where plaintiff did not stop or look at a crossing; but the wagon made no noise in the sand, and the train did not signal. *Northern P. R. Co. v. Freeman*, 83 Fed. Rep. 82.

It is only when the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence becomes one of law for the court. *McGhee v. Campbell*, 101 Fed. Rep. 936.

For various phases of this proposition see the following cases: *Western Gas &c. Co. v. Danner*, 97 Fed. Rep. 882; *Missouri &c. R. Co. v. Byrne*, 100 id. 359; *Nelson v. New Orleans &c. R. Co.*, id. 731; *Neininger v. Cowan*, 101 id. 787; *Mason &c. R. Co. v. Yockey*, 103 id. 265; *Texas &c. R. Co. v. Carlin*, 111 id. 777; *Hemmingway v. Illinois C. R. Co.*, 114 id. 843.

Where uncertainty arises either from a conflict in the evidence or in the conclusions which it is possible to draw therefrom. *Linden v. Anchor Min. Co.*, 20 Utah, 134.

Safety and suitability of a platform for unloading horses. *Chesapeake &c. R. Co. v. American Exch. Bank*, 92 Va. 495.

Jury must base their verdict on all the facts. *Kilpatrick v. Grand Trunk R. Co.*, (Vt.) 52 Atl. Rep. 531.

Whether the failure to stop the engine was through negligence or unavoidable accident, when loss of nut or pin prevented applying air brakes. *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119; s. c., 46 L. R. A. 153.

Where there is a conflict of evidence. *Burian v. Seattle Electric Co.*, 26 Wash. 606; *Foley v. Huntington*, 51 W. Va. 396.

Question of driver's negligence depending on grade of the track, velocity of car, crowded condition of crossing, facilities of driver for seeing &c. *Dahl v. Milwaukee &c. R. Co.*, 62 Wis. 652.

Ambiguous circumstances: situation of deceased when struck by train. *Hoye v. Chicago &c. R. Co.*, 62 Wis. 666.

## II. Choice of Hazards.

**Where one, by the negligence of another, is so placed that he must choose on the instant and in the face of grave and impending peril between two hazards, and to make such choice as a person of ordinary prudence might make, his choice cannot constitute contributory negligence.** *Twombly v. Central Park &c. R. Co.*, 69 N. Y. 158.

A passenger seeing a serious and inevitable collision attempted to escape and was injured on the platform of the car. This did not constitute contributory negligence. The rule of the company as to passengers on the platform did not preclude recovery. *Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 314.

The law does not require delay in an effort to escape until exact danger shall have been ascertained. Instinctive effort to escape a sudden and impending danger resulting from the negligence of another does not relieve the latter.

A person frightened by an express wagon, driving up suddenly on the walk behind her, without looking around sprang forward, striking

against a wall, and was hurt. The defendant was liable. *Coulter v. A. M. U. Express Co.*, 56 N. Y. 585; rev'g 5 Lans. 67.

See, also, *Salter v. Utica &c. R. Co.*, 59 N. Y. 631; 75 id. 273; 88 id. 42.

Passenger on street car jumped therefrom at railway crossing on account of approaching train. The defendant was liable. The evidence of what other passengers do, as a part of the *res gesta*, is competent on the question of prudence. *Twonley v. Central Park, N. & E. R. Co.*, 69 N. Y. 158; *Filer v. N. Y. C. &c. R. R. Co.*, 49 id. 41; *Stokes v. Saltonstall*, 13 Peters 181.

Where there was imminent danger of a collision, a passenger was not negligent in jumping from the car, although he would have escaped injury if he had remained quiet. Traveler jumped from a vehicle at a railway crossing. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

But there must be some justification for the act. *Muldowney v. Ill. Cent. R. Co.*, 36 Iowa, 462.

A boy was stealing a ride on the rear steps of a horse car in charge only of the driver. The driver came towards him in a menacing manner, whereupon the boy jumped from the car and was injured by a car approaching from the opposite direction, which he could have seen for some little time before the accident. The evidence authorized the jury to find that the decedent negligently jumped towards or in front of the moving car, and it was error therefore to decline to charge, that, if the boy's want of care in jumping off the car caused the injury, he was guilty of contributory negligence and could not recover. *Hogan v. Central Park R. Co.*, 124 N. Y. 611; distinguishing *Clark v. N. Y. &c. R. R. Co.*, 113 id. 610; affirming 40 Hun, 605.

If a party, by his own negligence, has placed himself in peril, and in a sudden exigency mistakes his best course through an error in judgment, he is not thereby relieved from the original negligence, if it contributes to cause injury to another. *Schneider v. Second Ave. R. R. Co., et al.*, 133 N. Y. 583. See *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75.

If the alternative is desperate, the course adopted will constitute negligence, unless it constitute rashness. Accuracy of judgment is not required. *Roll v. N. C. R. R. Co.*, 15 Hun, 496.

The rule applied in the case of collision of bicycle and team.

(Opinion)—If plaintiff found at the last moment that defendant did not turn to his right, and he *did* make a mistake in not turning to his (defendant's) left, yet being called on to act suddenly, his mistake, under the circumstances, was not negligent. *Schimpf v. Sliter*, 64 Hun, 465.

Plaintiff while crossing a street, suddenly found himself confronted with a car passing in front of him, and a rapidly approaching wagon on one side. Having no time for mature consideration he was not negligent in running to the other side ahead of the wagon instead of stepping backward, the wiser course. *Canton v. Simpson*, 2 App. Div. 561.

Plaintiff's horse shied at defendant's steam roller. The bit broke, the horse became unmanageable. Plaintiff's act of jumping out of the buggy in such an emergency was not negligent *per se*. *Haistead v. Warsaw*, 43 App. Div. 39.

"The rule that a person in a position of danger is not responsible for a mistake of judgment in getting out, is subject to the qualification that he must have got into danger without negligence or fault of his own." (*Aiken v. R. R. Co.*, 130 Pa. St. 380; 11 Am. St. Rep. 115.) *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g non-suit.

Passenger in stage coach not guilty of contributory negligence, if, at time of accident, he leaps from coach, and is injured. *Cook v. Parkham*, 24 Ala. 21; *Mobile & C. R. Co. v. Ashcraft*, 18 id. 16; *Georgia R. Co. v. Rhodes*, 56 Ga. 645; *So. West. R. Co. v. Paulk*, 24 id. 356; *Stokes v. Saltonstall*, 13 Pet. 181.

Recovery was had by a passenger who, riding in the night time in the last car of defendant's train, jumped from the same in reasonable apprehension that a rear end collision was imminent. *Railway Co. v. Murray*, 55 Ark. 248.

Passenger in stage coach not guilty of contributory negligence if, at time of accident, he leaps from coach, and is injured. *Frink v. Potter*, 11 Ill. 406; *S. P. Galena & C. R. Co. v. Yarwood*, 11 id. 509; *Chicago & C. R. Co. v. Becker*, 16 id. 25; *Toledo & C. R. Co. v. O'Connor*, 11 id. &c. 391; *Coal Co. v. Healer*, 84 id. 126.

No recovery was allowed a person who jumped from a smoking car when he saw the car following was derailed, no reasonable apprehension of danger existing. *Mobile & C. R. Co. v. Klein*, 43 Ill. App. 63.

Boy stealing a ride when struck at by conductor, jumped and fell under car on adjoining track. Error to direct for defendant. *Hagerstrom v. West Chicago Street R. Co.*, 67 Ill. App. 63.

Where, by reason of defendant's negligence the plaintiff is placed in a position in which he is unable to act, contributory negligence is no defense. *Chicago & C. R. Co. v. Becker*, 16 Ill. 25.

Plaintiff standing on the footboard of an engine about to jump the track, jumped from the engine. His act was not imprudent under the circumstances, though had he remained on he would not have been injured. *Chicago & C. R. Co. v. Kinnare*, 16 Ill. App. 391.

Plaintiff saw that the gang plank was gone and that the boat was mov-

ing away from the dock, but thought he could jump to it. It was an error of judgment for which he was accountable. *Atkins v. Lackawanna T. Co.*, 79 Ill. App. 19.

The court cannot say that one course or another taken to avoid injury caused by another's negligence was contributory negligence. *Hawkins v. Johnson*, 105 Ind. 29; *Indiana Car Co. v. Parker*, 100 id. 181; *Indianapolis &c. R. Co. v. Carr*, 35 id. 510.

Where there is no adequate justification for fright, jumping from a car is regarded as reckless. *Wooley v. Louisville &c. R. Co.*, 107 Ind. 381; *Gulf &c. R. Co. v. Wallen*, 65 Tex. 568.

Extraordinary care in a place of danger is not required; but only ordinary care proportionate to the danger. *Goodrich v. Burlington &c. R. Co.*, 97 Iowa, 521.

Driver jumped from his wagon when collision with a train at a crossing was imminent. Recovery was permitted. *Edgerton v. O'Neill*, 4 Kan. App. 73.

Plaintiff has no right to bring injury upon himself needlessly, and if he does, cannot recover for it. *So, Corington &c. R. Co. v. Ware*, 84 Ky. 267.

Plaintiff alighting because horse was made unmanageable by obstacle in the road not contributorily negligent. *Card v. City of Ellsworth*, 65 Me. 541; *Larrabee v. Sewall*, 66 Me. 316; *Sears v. Denins*, 105 Mass. 310; *Land v. Tyngsboro*, 11 Cush. 563; *Ingalls v. Bills*, 9 Mete. 1.

Plaintiff was not excused for her lack of judgment in a moment of peril from an approaching train, where she could have seen the train coming before she got on the track. *Richfield v. Michigan C. R. Co.*, 110 Mich. 406.

One incapable, by reason of defendant's negligence, of choosing the safest way of escape, is not guilty of contributory negligence, as where the unexpected and rapid approach of cars bewildered deceased. *Mark v. St. Paul &c. R. Co.*, 30 Minn. 493; *Wilson v. Northern &c. R. Co.*, 26 id. 278; *Stevenson v. Chicago &c. R. Co.*, 18 Fed. Rep. 493; *Collins v. Davidson*, 19 id. 83; *B. & O. R. Co. v. McKensh*, 81 Va. 71.

Negligence of a railway company whereby a street car appeared to be in imminent danger of being enclosed within the two guards at the railway crossing when an engine was bearing down upon it, is actionable; and one leaping from the street car is not guilty of contributory negligence. *Kleiber v. Peoples' R. Co.*, 107 Mo. 240.

Person jumping from carriage with runaway horses not guilty of contributory negligence. *Siegrist v. Arnot*, 10 Mo. App. 197; *Dutzi v. Geisel*, 23 id. 676.

Plaintiff, in stepping aside to dodge a board apparently pushed toward

her, injured her knee. Her action was prudent and reasonable under the circumstances as they appeared. *Ellick v. Wilson*, 58 Neb. 584.

Plaintiff, in an attempt to control his team, drew them to one side and against a stump, of which he knew, but had at the moment lost sight of. *Nebraska Tel. Co. v. Jones*, 60 Neb. 396.

Driver with spirited horse attempted to cross before an approaching train running at high speed at a grade crossing where there was no flagman. His administrator recovered. *Folsom v. Concord & C. R. Co.*, 68 N. H. 454.

Not responsible for error of judgment in choice of hazards in moment of peril. *Pennsylvania R. Co. v. Snyder*, 55 Oh. St. 312.

In case of a danger suddenly arising, a party must have reasonable opportunity to become conscious of the same to avoid it. *Hestonville & C. R. Co. v. Keely*, 102 Pa. St. 115; *Belk v. State*, 125 Ill. 584.

Plaintiff in charge of engine was put in dangerous situation by breaking of governor belt, and was not defeated in an action for injuries received for error of judgment. *Schall v. Cole*, 107 Pa. St. 1; *Penn. R. Co. v. Werner*, 89 id. 59; *Coombs v. Cordage Co.*, 102 Mass. 512.

Although a person is not responsible for error of judgment when, without his own fault, he is placed in a position of danger, he is not thereby relieved from the effect of his own negligence if by it he was brought into such danger. *Aiken v. Penn. & C. R. Co.*, 130 Pa. St. 38; Dictum in *Penn. R. Co. v. Werner*, 89 id. 59; *Chicago & C. R. Co. v. Halsey*, 133 Ill. 248; *Abend v. Terre Haute R. Co.*, 111 id. 203; *Noyes v. Southern & C. R. Co.*, 24 Pac. (Cal.) 927.

Best judgment not required in position of danger. *Cannon v. Pittsburg & T. Co.*, 194 Pa. St. 159.

See, also, *Missouri & C. R. Co. v. Rogers*, 91 Tex. 52; rev'g s. c., 40 S. W. Rep. 849.

Where deceased should have had reasonable apprehension of danger but disregarded it, his representative cannot recover. *Nashville & C. R. Co. v. Smith*, 9 Lea (Tenn.) 470.

Person in great pain not held to same reasonableness as if he were well. *R. Co. v. McManewitz*, 70 Tex. 73.

That a threatened danger was apparent only, was not a defense, where the circumstances reasonably created apprehension. *Bryant v. International & C. R. Co.*, 19 Tex. Civ. App. 88.

See, also, *International & C. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Person not necessarily charged with contributory negligence, because he adopted a course imperiling his safety. *Carroll v. Minn. & C. R. Co.*, 14 Minn. 57; *Cottril v. Chicago & C. R. Co.*, 47 Wis. 634.

No contributory negligence, if passenger in moment of danger attempts to escape and puts himself in greater danger. *Iron R. Co. v. Mowery*, 36 Oh. St. 418; *Gumz v. Chicago &c. R. Co.*, 52 Wis. 672; *Schultz v. Chicago &c. R. Co.*, 44 id. 638.

### III. Voluntary Exposure to Assist Another in Danger.

A person seeing a little child on the railroad track, and a train swiftly approaching, rushed and succeeded in saving the child's life but thereby lost his own. Held, that the question of contributory negligence was for the jury. Such an action to save property would have been *per se* negligent. *Eckert v. L. I. R. Co.*, 43 N. Y. 502. See 17 Ind. 102.

If the owner of property is injured in protecting his property against the effect of the defendant's negligence, he may recover therefor. *Rexter v. Starin*, 73 N. Y. 601.

Plaintiff's testimony was to the effect that at the time of the accident she came to the track to see a train go by, which was then at a station about a half mile distant, and plainly in sight as she approached the track. She found some small children playing about the rails; she told them to get off the track, and they not heeding her warnings, she stepped upon it to make them get out of the way, when her foot was caught between the plank and the rail. Held, that plaintiff was not a trespasser, and was not chargeable with negligence in thus going upon the track.

If she stepped upon the track in the humane effort to save younger children from danger, she was not a trespasser. *Eckert v. L. I. R. Co.*, 43 N. Y. 502. The answer made is that there was no approaching danger and she was merely meddlesome and the contrary theory is pure sentiment. But she saw the train at Roseville; she knew it was coming; she knew that it moved swiftly; and the little children playing on the track were in danger; and whoever saw them would naturally be alarmed for their safety and try to warn them off. *Spooner v. Delaware, Lack, &c. R. Co.*, 115 N. Y. 22.

A father plunged into a canal to save his child that had fallen through an opening in a railing, negligently left unguarded, and was drowned. Recovery was allowed for the loss of the father's life. *Gibney v. State*, 137 N. Y. 1.

Had there been negligence on the part of defendant's car the plaintiff's act in rushing in front of it to save her child would not have been contributory negligence. *Hirschman v. Dry Dock &c. R. Co.*, 46 App. Div. 621.

Boy was not negligent in trying to regain his hat which had blown into a hole above which was a tilted iron grating. *Finnegan v. Biehl*, 61 N. Y. Supp. 1116; s. c. rev'd on another point, 63 id. 147.



Plaintiff was not negligent in attempting to rescue a child in danger of being run over by a train, where there was a chance of her succeeding. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489.

Where defendant has not been negligent as to either, it cannot be held for death of one seeking to save another. *Jackson v. Standard Oil Co.*, 98 Ga. 749.

A mother was not negligent in attempting to save her child, which had come in contact with an electric light wire. *Walters v. Denver &c. Light Co.*, 12 Colo. App. 145.

Engineer facing danger to save passengers not charged with contributory negligence. *Penn R. Co. v. Olney*, 89 Ind. 453.

An incompetent servant closed an opening to a cupola of molten metal so negligently that the metal began to escape; and plaintiff, to avert injury to those about, attempted to close it. It was an act of danger but not of recklessness. *Maryland Steel Co. v. Marney*, 88 Md. 482.

Plaintiff could not recover where he remained in the vicinity of a fire to save property of slight value until his means of escape to safety was cut off. *Berg v. Great Northern R. Co.*, 70 Minn. 272.

Voluntarily exposing one's self to danger constitutes contributory negligence. *Ferguson v. Traction Co.*, 47 Leg. Intel. (Pa.) 494; *Railroad v. Thomas*, id. 223.

But when one voluntarily exposes himself to danger to save another he is not guilty of contributory negligence. *Peyton v. Texas &c. R. Co.*, 41 La. Ann. 861; *Penn. &c. R. Co. v. Langandorff*, 48 Oh. St. 316; *Linnehan v. Sampson*, 126 Mass. 506; *Donahue v. St. Louis &c. R. Co.*, 83 Mo. 560; *Dictum in Gov. St. R. Co. v. Hanlon*, 53 Ala. 70; *Condiff v. Kansas &c. R. Co.*, 25 Pac. (Kas.) 562.

But where plaintiff was injured in putting out fire to save property, in which she had no interest, she did not recover against one negligently setting such fire. *Pike v. Grand Trunk R. Co.*, 39 Fed. Rep. 255. Nor did person going on railway track to save his cattle. *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182, rev'g 79 Hun. 611.

#### IV. Knowledge by the Plaintiff of the Defect or Danger.

Where a person knows of a defective and dangerous place or appliance, he must (1) use the care that a person of ordinary prudence would employ in attempting to use such place or appliance at all; (2) if he does use it he must exercise the reasonable care demanded by the circumstances. The conditions may be so obviously dangerous that the court may impute negligence to the injured person, or as in other cases, such question of negligence may be properly left to the determination of the jury.

One who forgets and uses such defective place to his injury may not be negligent *per se*; and so where one is urged or necessitated by force of cir-

cumstances, and so where the person charged as a wrongdoer; by inducement leads a person to use a defective machine or place to work, or gives assurance of correcting the defect and so when the danger was not appreciated or understood, the use or continued use thereof may not be negligent *per se*.

But if the injured person, using the care required of him under the circumstances, should have known of or seen the danger, he may not recover.

The defendant, whose duty it was to repair a surface pipe, sent an agent who carelessly lighted a match in the cellar and caused an explosion of gas which escaped from the defective pipe, which injured the plaintiff. The defendant was liable, and the fact that the plaintiff's father caused the leak was too remote to constitute contributory negligence. *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459.

Although the captain of a canal boat knew that the gates of a lock were dilapidated, he was not negligent in using the lock to take his boat through, unless the danger was so obvious as to preclude navigation. *Johnson v. Belden*, 41 N. Y. 130; 2 Lansing, 433.

A gas company, in removing a gas meter, left the supply pipe so that it discharged gas into the building. This was negligence. (*Lannen v. Albany Gas Light Co.*, 44 N. Y. 459; *Holden v. Liverpool Gas Co.*, 3 C. B. 1.) The plaintiff for a long time knew that gas had escaped into the cellar, and after the same had been kept closed for five days, he sent a servant into it with a light.

The finding that the plaintiff was negligent was sustained. The fact that the plaintiff had formerly, on numerous occasions, done the same act, was not *per se* proof, that it was safe. *Lanigan v. N. Y. G. L. Co.*, 11 N. Y. 29.

A school teacher knowing of a defect in the floor of a schoolroom, but intent on her duties, was not precluded from recovering. *Bassett v. Fish*, 15 N. Y. 303.

Knowledge of a trench in the street by the plaintiff, for several days, before the accident, did not establish contributory negligence *per se*, but the question was for the jury. It seems that he was not obliged to be conscious of the danger, while driving in the night. *Weed v. Village of Ballston Spa*, 16 N. Y. 329.

A woman, on a dark night, stepped in a hole in a walk, which had long been obviously and notoriously out of order, and dangerous. The woman knew it, but did not know of the hole. The question was for the jury. *Niran v. City of Rochester*, 16 N. Y. 619.

The plaintiff knew of the general, but not of the precise location of a switch placed too high on a public street, and covered by snow and slush, and was going slowly when he was injured by it. For the jury.

*Wooley v. Grand Street &c. R. Co.*, 83 N. Y. 121; distinguishing *Lowery v. B. C. &c. R. Co.*, 76 id. 28.

Previous knowledge of a location from which a person of ordinary intelligence might apprehend danger imposes greater care, yet the degree of care is for the jury.

There was a hole in the oilcloth on the edge of steps, which the defendant, a lessee, had agreed to repair; the plaintiff, his tenant, did not take hold of the banisters, as she had a cloak about her, although she knew of the hole. Her negligence was for the jury. *Palmer v. Dearing*, 93 N. Y. 7; *Diveny v. City of Elmira*, 50 id. 512.

A plumber, fixing a gas pipe, let the gas escape and killed the plaintiff's horses. The fact, that the plaintiff knew of the escape and danger, was not *per se* evidence of negligence. *Lee v. The Troy C. G. L. Co.*, 98 N. Y. 115.

Defendant, for the purpose of removing certain cases of merchandise from his store, in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store; after they had been there about three minutes, plaintiff came along the sidewalk, and seeing the skids attempted to pass around them by the steps and was injured. In an action to recover damages, held defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel; and that she was not entitled to recover. *Welsh v. Wilson*, 101 N. Y. 255.

In an action for injury from falling on the sidewalk, there was evidence to show that the embankment of snow and ice, causing the damage was perfectly visible, and that there was a slight covering of recent snow over the ice. It was not *per se* negligence for the plaintiff to attempt to pass over the same. *Evans v. City of Utica*, 69 N. Y. 166; *Brusso v. City of Buffalo*, 90 id. 679; *McGuire v. Spence*, 91 id. 303; *Bullock v. Mayor &c.*, 99 id. 654. *Pomfrey v. Village of Saratoga Springs*, 104 id. 459, affirming 34 Hun. 607, and judgment for plaintiff.

The plaintiff's intestate was killed by a car kicked on a switch; within ten feet of the track a person could see the car. If the deceased saw it he was negligent; if he did not, he was negligent. *Woodman v. N. Y. L. E. & W. R. Co.*, 106 N. Y. 369; distinguishing *Greany v. Long Island R. Co.*, 101 id. 419.

Defective machinery suddenly started a saw, and injured the plaintiff, who had full knowledge of such defect. The jury should have been charged that the plaintiff could not recover, in case he had such knowledge. *Odell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 323, rev'g judg't for pl'ff; *Powers v. N. Y., L. E. &c. R. Co.*, 98 id. 274; *Monaghan v. N. Y. C. &c. Co.*, 45 Hun. 113.

"M." was employed by the defendants, who were engaged in manufacturing steam heating apparatus, to test the radiators, and see if they were steam tight, which was done, by attaching the radiator to a pipe connected with the steam boiler. One of them exploded, while "M." was hammering upon it, as he had been warned not to do, and he was injured. "M." was negligent and the defendant was not liable. *Moeller v. Brewster*, 131 N. Y. 606.

During the construction of an elevated railroad the defendant used a steam engine and apparatus, placed upon the platform on wheels, which moved along, as the work progressed, upon girders raised upon cross beams. The girders gave way and the platform fell to the ground, and the plaintiff, an employé of the defendant, who had been working upon the platform for some time, was injured. Although the defects were apparent, yet, as the plaintiff, although having knowledge thereof, might not have been advised of the danger that might result therefrom, and, as knowledge thereof might have required some skill or judgment not available to him or to an ordinary observer, it could not be held, as a matter of law, that such consequences were obvious and within the hazards assumed by him. *Davidson v. Cornell*, 132 N. Y. 228.

A chain holding a trap in the bottom of a coal car broke and let the trap down, and "M." who was standing on the coal, passed through the trap with the coal and was injured. Two weeks before, a link in the chain was broken, and "M." and his co-employés fastened the links with a wire; two days before the accident, it was found that the trap allowed the coal to escape, and to remedy this, boards were put over the trap by the employés, in "M's" presence, and to his knowledge. There were other perfect cars from which "M." had the selection; he had been directed by the train master to see that the traps were all perfectly safe, and to send cars with broken chains to the repair shop and to use none that were imperfect.

The case was improperly submitted to the jury as the defendant's negligence was not shown and plaintiff's negligence was established. *Shields v. N. Y. C. & H. R. R. Co.*, 133 N. Y. 557.

Where the plaintiff was not shown to have exercised any care, but was injured by slipping upon a ridge of ice covered by an inch or two of light snow, that was plainly visible, and formed a dangerous obstruction, she was negligent *per se*. *Weston v. City of Troy*, 139 N. Y. 281.

Building was in process of construction but had a temporary floor and a temporary elevator. At the time plaintiff walked through the building the elevator was at the ground floor, and he walked over its platform and on through the building to the office where he received his pay. In returning over the same route he fell through the open shaft; the elevator

having in the meantime been removed. He knew the elevator was in constant use and was liable to be removed. He could not see and he was not warranted in assuming that it would be still in position on his return. *Kennedy v. Friederich*, 168 N. Y. 379; rev'g s. c., 45 App. Div. 631.

Defendant's watchman was in the habit of discharging fire arms to frighten off poachers on a preserve. It was error to refuse to charge that, if plaintiff knew the watchman's habit and went thereon at night, he could not recover. *Magar v. Hammond*, 171 N. Y. 377; rev'g s. c., 54 App. Div. 532.

The fact that the plaintiff had thrown a log of wood overboard from his vessel, did not make him liable for contributory negligence, in an action against the defendant, for unloosing her from the wharf, and placing her in the stream, where she was injured by the log. *Satterly v. Hallock*, 5 Hun, 178.

Plaintiff's wife, residing for several years on the northeast corner of a street, fell in a hole for such time existing in the sidewalk on the southeast corner of the same street. Contributory negligence was for the jury. *Driscoll v. Mayor*, 11 Hun, 101; aff'g judg't for pl'ff; distinguishing *Durkin v. City of Troy*, 61 Barb. 437, and following *Mosey v. City of Troy*, id. 581.

When a person knows, that a defect exists inside walk, he is bound to use reasonable and proper care to avoid injury. *Koch v. Village of Edgewater*, 14 Hun, 544.

At defendant's bathing ground, the plaintiff's intestate went to the top of a structure to which were fastened ropes for a swing for the bathers, but not intended to dive from, and dived therefrom into water three and one-half feet deep and was killed by striking his head against the smooth bottom. There were men standing up in the water, showing its depth. No liability as the deceased was negligent. *Hinz v. Starin*, 46 Hun, 526.

Proof that the plaintiff knew that the sidewalk was not in repair does not *per se* preclude recovery for injuries received from the use thereof. Under such circumstances the plaintiff was not required to turn from the sidewalk and go around the dangerous place. *Halloway v. Lockport*, 54 Hun, 153.

Although the defendant violated chapter 469, Laws 1884, requiring a warning signal to be placed at a bridge crossing its tracks, yet, a brakeman aware of such violation, and that the bridge was dangerous, did not recover for injury received therefrom. *Fitzgerald v. N. Y. C. & H. R. R. Co.*, 59 Hun, 225; rev'g judg't for pl'ff; following *Williams v. Delaware & C. R. Co.*, 116 N. Y. 632; *Ryan v. L. I. R. Co.*, 51 Hun, 608.

Where a portion of a walk over an excavation was left, and a passenger approaching in the day time, attempted to step across the trench, instead

of walking upon that portion of the walk left and was thereby injured, she was guilty of contributory negligence. *Stevenson v. Equitable Gas Light Co.*, 60 Hun. 11; rev'g judg't for pl'ff; following *Welch v. Wilson*, 101 N. Y. 254; *Pomfrey v. Village of Saratoga Springs*, 104 id. 459; aff'g 34 Hun. 601.

Where the owner of a canal boat voluntarily remained at a dock after he had ascertained that his boat was liable to be injured by the condition of the bottom of the dock, he was negligent and could not recover. *Washington v. Staten Island T. R. Co.*, 68 Hun. 81.

Where a person was crossing a street that had been torn up, to his knowledge, and his attention was diverted for a moment, the question of contributory negligence was for the jury. *Dale v. City of Syracuse*, 11 Hun. 452; s. c. aff'd, 148 N. Y. 550. Citing *Driscoll v. Mayor*, 11 Hun. 101; *Thomas v. Mayor*, 28 id. 110; *Palmer v. Dearley*, 93 N. Y. 10; distinguishing *McCabe v. Buffalo*, 45 N. Y. S. Repr. 456; *Splittorf v. State*, 108 N. Y. 205.

The presumption, which a traveler may indulge, that the streets of a city are safe, has no application where the danger is known and obvious.

When a person approaches a point of danger it is his duty to do so with a care and caution commensurate with the dangers of the locality. *Neddo v. The Village of Ticonderoga*, 11 Hun. 524; s. c. aff'd, 148 N. Y. 735.

Plaintiff working on the frame of a building, walked over a beam only three and a half inches wide, directly in front of an elevator shaft which he knew was in constant use as a hoist; was negligent *per se*. *Clancy v. Guaranty Const. Co.*, 25 App. Div. 355.

Plaintiff was negligent in riding with another and not taking precautionary measures upon approaching an obstruction in the street, when he knew driver was so intoxicated as not to see it. *Meenagh v. Buckmaster*, 26 App. Div. 451.

Temporary forgetfulness of a known danger was not *per se* negligence. That plaintiff had worked for a day in plain sight of an uncovered hole in a trestle, did not bind him to an assumption of the risk on a subsequent night. *Boyle v. Dequon-McLean Const. Co.*, 47 App. Div. 311.

Plaintiff could not recover, where he notified the janitor of a building that the bottom of the dumb waiter was rotten, but continued to use it nevertheless for three weeks. *McGuire v. Board*, 58 App. Div. 388; s. c. aff'd, 111 N. Y. 612.

One who knows of a danger from the negligence of another, and undertakes and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. (*Fitzgerald v. Company*, 155 Mass. 155; 31 Am. St. Rep. 537.) *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g nonsuit.

Plaintiff's knowledge that soda was wet and would burn, was a defense to an action for injury from allowing it to get wet. *Curran v. New York Cent. &c. R. Co.*, 30 Misc. Rep. 181.

Where plaintiff, a licensee, knew that the lots were in use by contractors with derricks having guy ropes anchored therein, he assumed the risk in going there in the dark. *McCann v. Thileman*, 36 Misc. 145; rev'g s. c., 35 id. 855.

Where a person injured knew of the defect from whence the injury arose he was held not to have been *per se* negligent in the following instances:

Person knew dangerous condition of a highway. He at night cautiously used a walk known to be defective in width. *Montgomery v. Wright*, 12 Ala. 411; *Turnpike Co. v. Jackson*, 44 Am. Rep. 214.

Defect in walk known to exist but hidden by snow. *Aurora v. Dale*, 90 Ill. 46; *Hutchinson v. Collins*, id. 410.

Knowledge of a danger is an important element but does not necessarily preclude recovery. *Lake Shore &c. R. Co. v. Pinchin*, 112 Ind. 592; *Looney v. McLean*, 129 Mass. 33; *Gilbert v. Boston*, 139 id. 313; *Dewire v. Bailey*, 131 id. 169; *Lawless v. Connecticut R. Co.*, 136 id. 1; *Goodfellow v. Boston &c. R. Co.*, 106 id. 461; *Maloney v. Metropolitan &c. R. Co.*, 104 id. 73; *Lyman v. Amherst*, 107 id. 339; *Frost v. Waltham*, 12 Allen, 85; *Haton v. Ipswich*, 12 Cush. 488; *Reed v. Northfield*, 13 Pick. 94; *Whitford v. Southbridge*, 119 Mass. 564.

Person passed over defendant's track, raised nine inches from the surface, where defect was known. *Evansville &c. R. Co. v. Carrener*, 113 Ind. 5. See, also, *Wilson v. Trafalgar &c. Co.*, 93 Ind. 281; *Turnpike Co. v. Jackson*, 86 id. 111; *Murphy v. Indianapolis*, 83 id. 76; *Turner v. Buchanan*, 82 id. 147; *Toledo &c. R. Co. v. Bramagan*, 75 id. 490; *Rice v. Des Moines*, 40 Iowa, 638; *Walker v. Decatur*, 67 id. 307; *Ross v. Davenport*, 66 id. 548; *Osage City v. Brown*, 27 Kas. 14; *Emporia v. Schmidling*, 33 id. 485. See, also, *South Bend v. Hardy*, 98 Ind. 577; *Nave v. Flack*, 90 id. 205; *Wilson v. Trafalgar Co.*, 83 id. 326; *Huntington v. Breen*, 77 id. 29; *Hartman v. Muscatine*, 70 Iowa, 511; *Munger v. Marshalltown*, 59 id. 763; *Hanlon v. Keokuk*, 7 id. 488.

Going upon a defective walk. *Barnes v. Marcus*, 96 Iowa, 675, 682.

Person having knowledge of a hole in a bridge attempted to cross it. *Prince George's Co. v. Burgess*, 61 Md. 29; *S. P. Kelly v. So. Minnesota R. Co.*, 28 Minn. 98; *Mackenzie v. Northfield*, 30 id. 156; *Estell v. Lake Crystal*, 27 Minn. 243; *Nichols v. Minneapolis*, 33 id. 130; *Lowell v. Watertown*, 58 Mich. 568; *Plattsmouth v. Mitchell*, 20 Neb. 228; *Reed v. Northfield*, 13 Pick. 94; *Haton v. Ipswich*, 12 Cush. 488.

Driving home after signs of unruliness in a horse usually gentle. *Creamer v. McIlvain*, 89 Md. 343; s. c., 45 L. R. A. 531.

Person crossing a bridge without a railing over a deep ravine, on a dark and rainy night. *Locwer v. Sedalia*, 77 Mo. 431.

Engineer knew his air brake was out of order and used it. *Flynn v. Kansas &c. R. Co.*, 78 Mo. 195; *S. P. Buesching v. St. L. Gaslight Co.*, 73 id. 219; *Stoddard v. St. Louis &c. R. Co.*, 65 id. 521; *Keegan v. Kavanaugh*, 62 id. 230; *Conroy v. Iron Works*, id. 35; *Smith v. St. Joseph*, 45 id. 449.

Pedestrian in the night time cautiously used a walk known by him to be defective in width. *Erie v. Schwring*, 10 Harris (Pa.) 384.

Person, because of darkness, walked on dangerous side of road. *Millcreek Township v. Perry*, 10 Cent. (Pa.) 299.

Person paying toll had the right to presume defect in bridge previously known to exist had been repaired. *Monongahela Bridge Co. v. Bevard*, 10 Cent. (Pa.) 415; *Humphreys v. Armstrong County*, 56 Pa. St. 204.

Person ran on sidewalk in the dark. *Shenandoah v. Erdman*, 11 Cent. (Pa.) 440.

Engineer used machinery which, though dangerous, might have been used safely; it was reasonable to suppose, with extraordinary caution. *Patterson v. Pittsburg &c. R. Co.*, 76 Pa. St. 389; *Altoona v. Lotz*, 7 Atl. Rep. (Pa.) 240.

Person failed to repair sewer gas pipe, and was injured by explosion of gas. *Kibele v. Philadelphia*, 105 Pa. St. 41.

A husband knew of defect in sidewalk where his wife was injured. *Nanticoke v. Warne*, 106 Pa. St. 373.

Choosing more dangerous of two routes. *Mellor v. Bridgeport*, 191 Pa. St. 562.

Servant used a hammer known to him to be defective having been ordered to do so by the foreman on pain of discharge. *East Tennessee &c. R. Co. v. Duffield*, 12 Lea, (Tenn.) 63; *Louisville &c. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866.

It was for the jury to say whether plaintiff was negligent in going to sleep on a boat at a wharf, only 150 to 300 feet from where blasting operations were going on. *Smith v. Day*, 100 Fed. Rep. 244; s. c., 49 L. R. A. 108; rev'g s. c., 86 Fed. Rep. 62.

One driving, used a road not properly fenced, although there was another and safer road. *Templeton v. Montpelier*, 56 Vt. 328.

Knowledge of defect in highway and possibility of taking another route does not establish, as matter of law, contributory negligence. *McKeigue v. Jamesville*, 68 Wis. 50; *Spearbracker v. Larrabee*, 25 N. W. (Wis.) 555; *Brennan v. Friendship*, 29 id. 902.



Where injured person knew of the defect a recovery was not allowed in the following instances:

Employé entered service with knowledge of dangerous condition of machinery; employer ignorant of the same. *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Fox v. Glastonbury*, 29 id. 204.

Plaintiff, disregarding warnings, ventured too near a blast. *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

Employé used hand-car, which he knew to be in a dangerous condition. *Bell v. Western &c. R. Co.*, 70 Ga. 566; *S. P. Johnson v. Western &c. R. Co.*, 55 id. 133; *Western &c. R. Co. v. Adams*, id. 279; *McDade v. Georgia R. Co.*, 60 id. 119; *Atlanta &c. R. Co. v. Campbell*, 56 id. 586; *Western &c. R. Co. v. Bishop*, 50 id. 465; *Central &c. R. Co. v. Kenney*, 58 id. 485.

One whose duty was to report condition of stove, failed to report, and was injured by overturn of same. *Atlanta &c. R. Co. v. Ray*, 70 Ga. 674.

Plaintiff voluntarily entered a building partially destroyed by fire. *Hulson v. King*, 95 Ga. 271.

Person attempted to cross a known excavation on planks, in the night time, instead of going around it. *Momence v. Kendall*, 14 Ill. App. 229; *S. P. Quincy v. Barker*, 81 id. 30; *Lovenguth v. Bloomington*, 71 id. 238; *Centralia v. Krouse*, 64 id. 19; *Aurora v. Pulfer*, 56 id. 270.

Plaintiff walked up to a steam pipe, (about to explode) after steam and water began to escape. *Mandel v. Wheeler*, 59 Ill. App. 459.

Pedestrian went upon a sidewalk known to be defective, without having exercised special care. *Chicago v. Richardson*, 15 Ill. App. 198.

Plaintiff, finding himself in danger in a blockade of wagons, gave no alarm. *United States Exp. Co. v. McCluskey*, 11 Ill. App. 56.

Person stumbled in the dark over an obstruction known to him to be on the sidewalk. *Gasport v. Evans*, 112 Ind. 133; *S. P. Indianapolis v. Cook*, 99 id. 10; *Brucker v. Covington*, 69 id. 33; *Jonesboro v. Baldwin*, 57 id. 86; *Riest v. Goshen*, 42 id. 339; *Mount Vernon v. Dusehett*, 2 id. 586.

Plaintiff went up into a building which he knew to be unfinished, and without stairways, and without light or guide. *De Graffenried v. Wallace*, (Ind. Terr.) 53 S. W. Rep. 452.

Woman chose dangerous road at night, when she might have taken a safe one. *Parkhill v. Brighton*, 61 Iowa. 103; *S. P. Fulliam v. Muscatine*, 30 N. W. (Iowa) 861; *McGinty v. Keokuk*, 24 id. 506; *Corlett v. Leavenworth*, 27 Kas. 673.

One having knowledge of dangerous condition must show justification in exposing himself to it. *Coates v. Burlington &c. R. Co.*, 62 Iowa. 186.

A woman stepped off the sidewalk, without cause. *Alline v. LeMars*, 11 Iowa, 654; *Kennedy v. Chicago &c. R. Co.*, 68 id. 559; *McLaury v. McGregor*, 54 id. 517.

Injury occasioned by a fall upon the ice at a place where plaintiff knew walking to be dangerous. *Wilson v. Charlestown*, 8 Allen, 137; *Todd v. Old Colony R. Co.*, 3 id. 18; *Gavett v. Manchester &c. R. Co.*, 16 Gray, 501; *Lucas v. New Bedford &c. R. Co.*, 6 id. 64; *Haton v. Ipswich*, 12 Cush. 488.

Where warehouse was burned by sparks from defendant's engine, owner of the warehouse knowing the danger but using the engine. *Marquette &c. R. Co. v. Spear*, 44 Mich. 169; *Lyon v. Detroit &c. R. Co.*, 31 id. 429.

Where peril was unnecessarily assumed by injured person. *Harris v. Winton*, 64 Mich. 441.

Plaintiff who knew of the existence of a turntable fell into it, on his way home at night. *Early v. Lake Shore &c. R. Co.*, 66 Mich. 349.

Person in day time drove at a rapid rate along a street where there was an accumulation of cobblestones. *McCool v. Grand Rapids* (Mich.) 24 N. W. Rep. 631.

A person knowing there were holes in the ice unnecessarily allowed his cattle to go at large upon it. *LaRiviere v. Pemberton*, (Minn.) 48 N. W. Rep. 406.

Fireman, with knowledge of defective throttle valve, neglected to observe due caution when tending to the machinery. *V. & M. R. Co. v. Wilkins*, 41 Miss. 404.

Plaintiff touched a wire to show his capacity to judge of its proper insulation. *Anderson v. Jersey City Electric Light Co.*, 64 N. J. L. 664.

Plaintiff, a civil engineer, put himself where an explosion of gas, known to him to be escaping, injured him. *Gas Co. v. Robinson*, 99 Pa. St. 1; *Mansfield Coal &c. Co. v. McEnery*, 91 id. 185; *Mulherrin v. D., L. & W. R. Co.*, 81 id. 366; *Ingram v. Lehigh Coal &c. Co.*, 148 Pa. St. 177; *McClafferty v. Fisher*, 1 Cent. (Pa.) 571; *Folsom v. Underhill*, 36 Vt. 580.

Foot passenger attempted to cross high ridge of snow, known to her to exist, when she might have gone around it. *Erie v. Magill*, 101 Pa. St. 616; *Baker v. Fehr*, 1 Ont. (Pa.) 10; *Goshorn v. Smith*, 11 Nor. (Pa.) 135; *McKee v. Bidwell*, 24 P. F. Smith. (Pa.) 218; *Pittsburg &c. R. Co. v. McClurg*, 6 id. 294; *Catawissa R. Co. v. Armstrong*, 2 id. 282; *Penn. R. Co. v. Ogier*, 11 Cas. (Pa.) 60.

A woman without cause stayed on ground where she knew blasting was being done, and was injured by the shock. *Fox v. Borkey*, 126 Pa.

St. 164; D., L. & W. R. Co. v. Cadow, 120 id. 559; Barnes v. Sowden, 119 id. 53.

Driving with timid horse on road known to be undergoing repair. *Snyder v. Penn.*, 14 Pa. Super. Ct. 145.

Plaintiff chose a route at night which he knew lead over a hatch, walking without caution and taking his chances of its being closed. *Claus v. Northern S. S. Co.*, 89 Fed. Rep. 646.

With knowledge that an express train was about to pass, horses were left standing alone untied within twenty or thirty feet of the track. *Silcock v. Rio Grande &c. R. Co.*, 22 Utah, 119.

Defective coupling pin caused train to part. Brakeman on rear portion with knowledge of the fact, failed to put on brake which would have avoided the collision. *Richmond &c. R. Co. v. Tribble*, 97 Va. 495.

Brakeman passing along tops of cars touched trolley wire, which he knew hung low. *Daurille Street Car Co. v. Watkins*, 97 Va. 713.

Plaintiff knew the existence of a pit in a yard which he was in the habit of crossing, but attempted to cross on a night so dark that he could not see either the pit or the path a safe distance in front of it. *Anderson v. Northern P. R. Co.*, 19 Wash. 340.

In the case of an injury from a roof known to be leaky. *Muth v. Frost*, 68 Wis. 425; *Achtenhagen v. Watertown*, 18 id. 331.

Traveler knew of dangerous character of a stream and had but to ascertain its condition. *Hopkins v. Rush River*, 70 Wis. 10.

Plaintiff knew of the dangerous condition of the fence around a pasture he turned his horse into. *Roy v. Stuckey*, 113 Wis. 77.

## V. Defective People—Intoxicated Persons.\*

A person defective in sight or hearing is not precluded from using the streets, highways and public places, provided he can do so with a reasonable assurance of safety; and whether such person was guilty of negligence contributing to his injury has usually been submitted to the jury. If the injured person were intoxicated, he is precluded from recovering, if his condition contributed to the injury; but he is not usually regarded as *per se* negligent.

### DEFECTIVE SIGHT AND HEARING.

The plaintiff's organs of sight were affected by a disease, so as to diminish her powers of vision considerably, yet she could distinguish colors, persons and objects having a distinct outline. While passing on a sidewalk, she fell into an excavation. The test of her ability to be abroad was, whether she could walk the streets with "a reasonable assurance of

\* NOTE. —An insane person may be negligent. *Williams v. Hays*, 143 N. Y. 442; see, also, 3 Barb. 647; 65 Hun 477; But see Whart. on Negligence, § 89.

safety," and this was for the jury. The streets and sidewalks are for the benefit of all conditions of people at all times. *Davenport v. Ruckman and the Mayor, &c.*, 37 N. Y. 568.

"E.," plaintiff's intestate, with her husband "J.," were crossing Buffalo river in the night time, in a small scow, which "J." was sculling, when the scow was struck and sunk by a steam-tug belonging to defendant, and "E." was drowned. Plaintiff's evidence tended to show that "J." was nearly blind, but able-bodied and familiar with the management of small boats; that he had been accustomed to cross the river daily, with his wife, at that place and hour, he sculling and she giving directions; that it was usual for persons to be on the water in that kind of water craft; that the night was not so dark but that an object, the size of the scow could be seen one hundred feet away, also that there was a lighted lantern in it; that "J." called to those on defendant's tug; it was not stopped or its speed slackened, but it sheered from its course towards the scow; that if it had kept on in a straight course the collision would not have happened. Held, that the evidence justified a finding of negligence on the part of those managing the tug; that it was their duty to keep a lookout ahead, and it was inferable from the evidence that this was not done; also that the facts that deceased was upon the water in the night time, and in a scow, or that she was with a blind man to propel and turn the scow; did not establish contributory negligence, as a matter of law; but that the question was properly submitted to the jury. *Harris v. Uebelhoefer*, 75 N. Y. 169.

#### BLINDNESS.

An old person with defective sight using reasonable care under the circumstances is not negligent in using streets. *Peach v. City of Utica*, 10 Hun. 477; *Davenport v. Ruckman*, 37 N. Y. 568, 573.

It is not negligence *per se* if a blind person, unattended, falls into a hole in the sidewalk left uncovered for the purpose of raising goods from below. *Smith v. Wildes*, 143 Mass. 556; *Salem v. Goller*, 76 Ind. 291; *Sleeper v. Sandown*, 52 N. H. 244.

A person infirm in one sense should be more vigilant in the use of his other senses when in a place of danger. *Fenneman v. Holden*, 75 Md. 1; *Illinois &c. R. Co. v. Buckner*, 28 Ill. 299; *Purl v. St. Louis &c. R. Co.*, 72 Mo. 168; *Zimmerman v. Han. &c. R. Co.*, 71 id. 476; *Ormsbee v. Boston &c. R. Co.*, 14 R. I. 102; *Cleveland &c. R. Co. v. Terry*, 8 Oh. St. 570; *Central R. of N. J. v. Feller*, 84 Pa. St. 226.

A blind person must use a greater degree of diligence than one who can see. *Stewart v. Nashville*, 96 Tenn. 50.

## DEAFNESS.

Deaf mute crossing defendant's tracks in Rochester on a dark night waited for a freight train to pass, and then stepped on the track when he was struck by an engine running backwards without a light at the rate of twenty miles an hour, which was following the freight train. Plaintiff's and defendant's negligence for jury. *Waldole v. N. Y. C. & H. R. Co.*, 19 Hun, 69. See 95 N. Y. 214.

Deafness does not excuse care at a crossing. See cases, *supra*, beginning with *Fenneman v. Holden*.

A person not sufficiently dull to need a guardian must use the same care as others. *Worthington v. Meuser*, 96 Ala. 310.

## AGE.

An old person is not bound to use a greater degree of diligence than a young one. *Culbertson v. Holliday*, 50 Neb. 229.

## INTOXICATION.

In an action for injuries from a defective sidewalk to an intoxicated man, contributory negligence is for the jury. *Healy v. Mayor*, 3 Hun, 708; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Robinson v. Piocher & Co.*, 5 Cal. 460.

An intoxicated man on a dark night crossed a bridge although warned that it was not safe, and although a safe bridge was within a few feet, and was killed. No liability. *Wood v. Incorporated Village of Audes*, 11 Hun, 543.

Plaintiff fell down an embankment in the street. Defendant claimed that he was intoxicated; the rule was "if the jury found that the plaintiff was under the influence of liquor and that the intoxication contributed to bring about the accident, the plaintiff cannot recover." *Lyuch v. Mayor*, 47 Hun, 524.

The fact that a person was intoxicated when he sustained an injury is not *per se* evidence of contributory negligence on his part, and the question whether the intoxication of the person injured contributed to the injury sustained should be submitted to the jury for its determination. *Newton v. Central Vt. R. Co.*, 80 Hun, 49.

If jury believe a person was intoxicated, and that he would not have been injured had he been sober, he cannot recover. *Bradley v. Second &c. R. Co.*, 8 Daly, 289; *Ernst v. Hudson R. Co.*, 39 N. Y. 61; *Gonzales v. N. Y. &c. R. Co.*, 38 id. 110; *McCall v. N. Y. &c. R. Co.*, 54 id. 615; *Weber v. N. Y. &c. R. Co.*, 58 id. 451.

Negligence of an intoxicated person standing on platform of a crowded

car with his hands in his pockets was for the jury. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

The care required of an intoxicated person is not greater than that required of a sober one. *Chicago &c. R. Co. v. Drake*, 33 Ill. App. 114.

If the plaintiff's drunkenness contributed to the injury there can be no recovery. *Chicago &c. R. Co. v. Bell*, 10 Ill. 102; *Toledo &c. R. Co. v. Riley*, 41 id. 514; *Illinois &c. R. Co. v. Cragin*, 11 id. 117; *Chicago &c. R. Co. v. Lewis*, 5 Ill. App. 242; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Alger v. Lowell*, 3 Allen 402; *Strand v. Chic. &c. R. Co.*, 67 Mich. 380.

But if intoxication causes one to expose himself to a danger, which he could, if sober, have avoided by ordinary prudence, a recovery is precluded. *Woods v. Tipton County*, 128 Ind. 289.

Where the plaintiff, licensed to do so, had sold the defendant liquor, and been injured by his negligence in driving, a recovery was allowed. *Cassady v. Magher*, 85 Ind. 228.

The plaintiff, claiming to have been injured on defective sidewalk, and shown to have been intoxicated, must disprove such intoxication. *Hubbard v. Mason City*, 60 Iowa, 400; *Cramer v. Burlington*, 42 Iowa 315.

It was proper to charge that no recovery could be had if deceased voluntarily so intoxicated himself as to prevent the execution of his task with safety. *Cogdell v. Wilmington &c. R. Co.*, 130 N. C. 313.

Drunkenness is not a defense unless it was proximate cause of the injury. *Davis v. Oregon &c. R. Co.*, 8 Ore. 172; *Buesching v. St. Louis &c. R. Co.*, 6 Mo. App. 85; *Hershey v. Mill Creek*, 8 Cent. (Pa.) 252; *R. Co. v. Bondron*, 92 Pa. St. 115; *Houston &c. R. Co. v. Reason*, 61 Tex. 613; *Cassady v. Stockbridge*, 21 Vt. 391; *Fitzgerald v. Weston*, 52 Wis. 354; see, also, *Burns v. Elba*, 32 id. 605.

Intoxication does not *per se* establish contributory negligence. *Seymer v. Lake*, 66 Wis. 651; *Aurora v. Hillman*, 90 Ill. 61; *Thorp v. Brookfield*, 36 Conn. 320; *Tompkins v. Oswego*, 15 N. Y. Supp. 371.

Whether intoxication contributed to the injury was for the jury. *Rhymer v. Menasha*, 107 Wis. 201.

## VI. Infants.

The usual principles of contributory negligence, when applied to infants are largely modified. The characteristic features of the doctrine in such case are these:

- (1) In New York and some other states it is considered where the child is *non sui juris*, that is, without the discretion or ability to care for his own safety, his parent, guardian or usual protector, in legal theory, shares in the child's responsibility, so that, in a given instance of injury through de-

defendant's negligence, the inquiry is, not entirely, and may be, not at all, whether the child was guilty of contributory negligence, but was the parent, guardian, etc., guilty of negligence contributing to the accident. *Ihl v. 42d Street R. Co.*, 47 N. Y. 317; *Kunz v. The City of Troy*, 104 id. 244; reversing 36 Hun, 615; *Huerzeler v. The Central Cross-Town R. Co.*, 139 id. 490.

But in a majority of the states this doctrine is not accepted in an action brought in behalf of the infant himself for injury, but only where the action is by the parent for his own benefit.

- (2) Whenever care is required of a child, he is not bound to exercise the care demanded of an adult of ordinary capacity, but only such care as would naturally be expected of a person of his age; and greater care must be exercised for the protection of children than is requisite in the case of an adult.

An infant may not be altogether exempted from the exercise of care and prudence in approaching a known danger. *Honegsberger v. The Second Ave. R. Co.*, 1 Keyes, 510, rev'g 1 Daly, 89. If the infant be of tender years and *non sui juris*, the negligence is imputable to his parents or guardians. If he be *sui juris*, it is imputable to himself. *Thurber v. Harlem B. M. & F. R. R. Co.*, 60 N. Y. 333. But, as was said by Cowen, J., in a case where the infant was between two and three years of age (*Hartfield v. Roper*, 21 Wend. 620): "When he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury;" and whenever it affirmatively appears either that the injury was occasioned by the fault of the party injured, or where there is an entire absence of evidence showing that he is free from fault, he cannot recover. *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 426.

But if the child, though *non sui juris*, has not committed or omitted an act, which would constitute contributory negligence in a person of years of discretion, an injury by the negligence of another cannot be defended upon the alleged negligence of the parent. *McGarry v. Loomis*, 63 N. Y. 104; *Ihl v. Forty-second St. R. Co.*, 47 id. 317. *Cumming v. The Brooklyn City R. Co.*, 104 id. 669. See, *Sheridan v. Brooklyn City R. Co.*, 36 id. 39; *Kunz v. City of Troy*, 104 id. 244, reversing 36 Hun, 615, and judgment for defendant.

Negligence of parent or person in charge of an infant *non sui juris* is imputable to the infant. *Fitzgerald v. St. Paul &c. R. Co.*, 29 Minn. 336, *Hartfield v. Roper*, 21 Wend. 614.

*Holly v. Boston Gas-Light Co.*, 8 Gray, 123; *Wright v. Malden R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 id. 40; *Brown v. European &c. R. Co.*, 58 Me. 384; *Lafayette &c. R. Co. v. Huffman*, 28 Ind. 287; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 135 id. 333; *Collins v. South Boston R. Co.*, 142 id. 301; *Casey v. Smith*, 152 id. 294.

This rule has been followed in Illinois. *City of Chicago v. Major*, 18 Ill. 349; *City of Chicago v. Starr*, 42 id. 174; *Toledo &c. R. Co. v. Grable*, 88 id. 441; Chi-

Chicago City R. Co. v. Robinson, 27 Ill. App. 26, aff'g 127 Ill. 9; Chicago &c. R. Co. v. Logue, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

So in O'Mally v. St. Paul &c. R. Co., 43 Minn. 289; Baltimore R. Co. v. State, 30 Md. 47; Apsey v. Detroit R. Co., 83 Mich. 432; Ewen v. Chicago &c. R. Co., 38 Wis. 613; Hoppe v. Chicago &c. R. Co., 61 id. 357; Phillips v. Duquesne Traction Co., 8 Pa. Super. Ct. 210.

So in an action by a parent. Pittsburg &c. R. Co. v. Vining's Adm'r, 27 Ind. 513. Lafayette &c. R. Co. v. Huffman, 28 Ind. 287; action by a child.

In an action by father, Jeffersonville &c. R. Co. v. Bohen, 40 Ind. 445; 49 id. 154; Slattery v. O'Connell, 153 Mass. 94.

*Contra*, Shippy v. Ausable, 85 Mich. 280; see, also, Battishill v. Humphreys, 64 id. 503, and cases therein; Westerfield v. Lewis, 43 La. Ann. 63; Newman v. Phillipsburgh &c. R. Co., 50 N. J. L. 446; Gulf &c. R. Co. v. McWhirter, 77 Tex. 356; Jansen v. Siddal, 41 Mo. App. 279; Chicago &c. R. Co. v. Wilcox, 33 id. 450; Ludden v. Columbus &c. R. Co., 7 Oh. N. P. 106.

Contributory negligence for the death of a child was held not to be a defense. Wymore v. Manhaska Co., 78 Iowa, 396, where a child was killed while riding with his parents; also in Norfolk &c. R. Co. v. Groseclose's Adm'r, 13 S. E. Rep. 454. Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, where the parents were killed in a wagon in which they and several of their children, who were beneficiaries, were riding, and it was held that the contributory negligence of the children did not defeat the action. And so in an action which the husband brought, as administrator, for the death of his wife through the negligence of a druggist, it was held that his negligence would not defeat a recovery where there were children benefited in the recovery. Davis v. Guarnieri, 45 Ohio St. 470.

### *Question whether child was sui juris is for jury:*

It is usually, although not always so, a question of fact for the jury, whether the child was *sui juris*. Mangum v. Brooklyn R. Co., 38 N. Y. 455.

Fallon v. The Central Park &c. R. Co., 64 N. Y. 13, aff'g 6 Daly, 8; Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308; Muller v. Brooklyn &c. R. Co., 18 App. Div. 177.

As in the case of a boy aged six or seven. Honesburgher v. The Second Ave. &c. R. Co., 33 How. 195.

A child just past seven years of age may not, as matter of law, be held to be *sui juris*, so as to be chargeable with negligence.

In administering civil remedies the law does not fix any arbitrary period, when an infant becomes *sui juris*. When the inquiry is material, it becomes a question of fact for the jury, unless the child is of so very tender years, that the court can safely decide.

It seems, in an action based upon negligence for an injury to an infant, who may or may not have been *sui juris*, when it occurred, and the fact is material upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence showing that the party injured was not, as matter of fact, capable of exercising judgment



and discretion. *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104, reversing 46 Hun, 184.

A girl of nine was *sui juris*; having testified that she knew the danger but thought that the car was far enough away to permit her to pass in safety. *Hicks v. Nassau Electric R. Co.*, 47 App. Div. 479.

Where a child of six years of age fell into an excavation. *Mackey v. Vicksburg*, 64 Miss. 777.

See, also, *Westbrook v. Mobile &c. R. Co.*, 66 Miss. 560; *Meeks v. Southern &c. R. Co.*, 56 Cal. 513.

Age and mental capacity of a boy of 14 are proper elements of consideration for the jury in determining whether he is negligent. *Texas &c. R. Co. v. Phillips*, 91 Tex. 278; *Missouri &c. R. Co. v. Rodgers*, 89 id. 680.

The burden of showing that a child was *non sui juris* is on him or the parent. *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104.

*Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

Presumption was that a boy of twelve years was *sui juris*. *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

*It is sometimes a question of law:*

Whether the child was *non sui juris* was determined, as a matter of law, in the following cases: *Hartfield v. Roper*, 21 Wend. 615. (Age two years, was not.)

*Ihl v. The Forty-second Street &c. R. Co.*, 47 N. Y. 317, (age three years, was not); *Predegast v. N. Y. C. &c. R. R. Co.*, 58 id. 652; *McGarry v. Loomis*, 63 id. 106 (age four years, was not); *McMahon v. The Mayor*, 33 id. 642 (age eleven years, was); *Tucker v. New York &c. R. Co.*, 124 id. 308, (boy of twelve, was).

A girl of twelve, ordinarily intelligent, was held *sui juris* as matter of law. *Noonan v. Obermeyer &c. Brew. Co.*, 50 App. Div. 377.

A child of four and a half, held, as matter of law, not capable of contributory negligence. *Crawford v. Southern R. Co.*, 106 Ga. 870.

Nor a child of five. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

Or three and a third. *North Kankakee Street R. Co. v. Blatchford*, 81 Ill. App. 609.

Boy of eleven was *prima facie, sui juris*. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453; *Cleveland &c. R. Co. v. Heiman*, 16 Oh. C. C. 487.

A bright boy of twelve, in catching his foot in a turntable, while on it at night was negligent *per se*. *Carsou v. Chicago &c. R. Co.*, 96 Iowa, 583.

A child of four and a half held *non sui juris* as matter of law. *Kansas City &c. R. Co. v. Herman*, (Kan. App.) 62 Pac. Rep. 543.

So of a child of three and a half. *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

Of less than four. *South Covington &c. R. Co. v. Herrklotz*, (Ky.) 47 S. W. Rep. 265.

Or between two and three. *Toledo &c. Inv. Co. v. Putney*, 10 Oh. C. D., 698.

Child of five was not negligent in running on track in front of car giving no notice of its approach. *Fickler v. Cleveland &c. R. Co.*, 6 Oh. N. P. 36.

Child too young to exercise judgment was not negligent in going on a railway heedless of signals. *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106.

So of a child three years and ten months. *Woekner v. Erie Electric Motor Co.*, 176 Pa. St. 451.

Or one of six. *Walbridge v. Schuylkill &c. R. Co.*, 190 Pa. St. 274.

Under 14. the presumption of incapacity prevails, but is rebuttable. *Phillips v. Duquesne T. Co.*, 8 Pa. Super. Ct. 210.

An infant of sixteen months cannot be guilty of negligence. *Mason v. Southern R. Co.*, 58 S. C. 70.

A child six years old was incapable of contributory negligence. *Central Trust Co. v. Wabash &c. R. Co.*, 31 Fed. Rep. 246.

*Kay v. R. Co.*, 65 Pa. St. 269; *Mascheck v. R. Co.*, 3 Mo. App. 600; *Fink v. Missouri Furnace Co.*, 10 id. 61; *Walters v. Chicago &c. R. Co.*, 41 Iowa, 71; *Indianapolis &c. R. Co. v. Pitzer*, 7 West (Ind.) 396 (child of seven years); *Taylor v. Delaware &c. R. Co.*, 113 Pa. St. 162; *Chicago &c. R. Co. v. Stumps*, 69 Ill. 409; *Dowling v. Allen*, 88 Mo. 293.

Infants between seven and fourteen are presumed guiltless of negligence. *Roanoke v. Shull*, 97 Va. 419.

Negligence not imputed to child of two years and ten months. *Dicken v. Liverpool Salt &c. Co.*, 41 W. Va. 511; see, also *Gunn v. Ohio River R. Co.*, 42 W. Va. 676; s. c., 36 L. R. A. 571.

#### (a). CARE REQUIRED OF PARENTS.

Negligence of parent in permitting child to be out of her sight 15 or 20 minutes in vicinity of street car tracks, was left to the jury. *For v. Oakland &c. R. Co.*, 118 Cal. 55.

Parents, however poor, must use the care a reasonably prudent person would use under the circumstances to keep young children out of danger. *Aurora v. Seidelman*, 34 Ill. App. 215.

*Mahew v. Burns*, 103 Ind. 328.

There is no distinction between parents able to employ attendants for their children and those who are not, on the subject of contributory negligence. *Indianapolis R. Co. v. Pitzer*, 109 Ind. 179.

Hagan's Petition, 7 Ont. L. J. 311; *Cumming v. B. C. R. Co.*, 104 N. Y. 669.

The question of the proper selection of a caretaker and of the latter's negligence was for the jury, where a child of three and three-quarters escaped from her unawares, and she failed to go in front of a car to rescue it. *Kroesen v. Newcastle &c. Street R. Co.*, 198 Pa. St. 30.

#### (b). DEGREE OF CARE REQUIRED FROM AND TOWARD INFANTS.

If the child be *sui juris*, yet he is not bound to exercise the care demanded of an adult of ordinary capacity, but only such care as would naturally be expected of a person of his age, and greater care must be exercised for their protection than is required in the care of an adult.

No one, whether sick, lame, imbecile or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence. *Sheridan v. Brooklyn &c. R. Co.*, 36 N. Y. 43.

The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised toward them by engineers than toward those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years. *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 449.

The rule, requiring the absence of contributory negligence, was not established out of any tenderness for the negligent infliction of an injury, but to discourage carelessness; and that, in determining whether the fault exists, the condition of the person whose acts are in question should be considered; and the old, the lame, the infirm or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them; no greater degree of care is required than the capacity of the person allows him to exert. *Mowery v. The Central City R. Co.*, 51 N. Y. 666.

In applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must show himself free from fault, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care

to be reasonably expected in view of his age and condition. *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 252.

This is in harmony with the well established rule, that persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases; and with another principle asserted by courts, that carriers of persons for hire are called upon to care more tenderly and prudently for the aged, the infirm and the partially helpless, than for the vigorous and healthy of their passengers. *Thurber v. Harlem B., M. & C. R. Co.*, 60 N. Y. 336.

*McGovern v. N. Y. C. & C. R. Co.*, 67 N. Y. 417; *Dowling v. N. Y. C. & C. R. Co.*, 90 id. 670; *Stone v. Dry Dock & C. R. Co.*, 115 id. 111, rev'g 46 Hun, 184.

It may be that this evidence would show the want of that care which the law would exact of an adult. But does it show the want of that care which is demanded of an infant of plaintiff's age? She cannot be supposed to have had that knowledge of the speed of trains and the importance of looking again, just before taking the step upon the track, which an adult would have. The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from adults. *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 621; but see *Thompson v. Buffalo R. Co.*, 145 id. 196.

A boy of eight attempted to cross so near a car that he was struck, upon its suddenly starting ahead. Degree of care required of him was a question for the jury. *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; rev'g s. c., 26 App. Div. 48.

**From opinion.**—"The question of plaintiff's contributory negligence is for the jury, and he is not to be judged by the standard of intelligence and judgment applied to an adult in full possession of his faculties. Judge Andrews said in *McGovern v. N. Y. & C. R. Co.*, (67 N. Y. 421): 'The law is not so unreasonable to expect or require the same degree of care or circumspection in a child of tender years as in an adult.' The child in the case cited was a lad eight years old. The rule as above stated has been repeatedly applied by this court to infants varying in age from six to fifteen years. (*O'Mara v. H. R. R. Co.*, 38 N. Y. 449; *Reynolds v. N. Y. C. & C. R. Co.*, 58 N. Y. 248; *Byrne v. N. Y. C. & C. R. Co.*, 83 N. Y. 621, and cases cited; *Dowling v. N. Y. C. & C. R. Co.*, 90 N. Y. 671; *Moehus v. Herrmann*, 108 N. Y. 353, 354; *Stone v. Dry Dock & C. R. Co.*, 115 N. Y. 109, 110; *Swift v. Staten Island & C. R. Co.*, 123 N. Y. 645, 650)." \* \* \* \* "The presumption that the plaintiff was *non sui juris* was not met by direct evidence, but the plaintiff was a witness and his testimony, as well as the manner of giving it, gave the jury an opportunity to measure his intelligence, and it was for them to say whether he was in fact *sui juris*, and if they should conclude that he was not, then the further question remained for their consideration whether he exercised that degree of care and caution which should be expected from one of his age, experience and intelligence."

Boy of five was playing near a pile of bricks in the street which ob-

structed his view of an approaching team. Another having thrown his book across the narrow passage left, he ran after it. His negligence was for the jury. *Keller v. Haaker*, 2 App. Div. 245.

It was left to the jury to say what degree of care should be required of a child of just past seven if it found that he was in fact *sui juris*. *Penny v. Rochester R. Co.*, 1 App. Div. 595.

Plaintiff, a boy of sixteen, employed to operate a machine about which he was instructed, was held presumptively *sui juris*, and of sufficient intelligence to comprehend its dangers; and was chargeable with the degree of care required of an adult. *Kochler v. Syracuse &c. Man. Co.*, 12 App. Div. 50.

An instruction that if the child was *sui juris* he was bound to exercise care reasonably to be expected of one of his age, was proper. *Muller v. Brooklyn &c. R. Co.*, 18 App. Div. 177.

A boy of eight to show his ability attempted, as he had done before, to cross a plank set to brace boards placed against the interior of a trench, when he became dizzy and fell. Contractor was not negligent. *Powers v. Creem*, 22 App. Div. 480.

Boy rode on log carrier and turned feed wheel, instead of turning it from the floor of the saw mill. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 119.

An infant is required to use prudence in proportion to its capacity. *Birge v. Gardiner*, 19 Conn. 599.

*Daley v. Norwich &c. R. Co.*, 26 Conn. 591; *Pueblo &c. Street R. Co. v. Sherman*, 25 Colo. 114; *Weldon v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 1; *Chicago &c. R. Co. v. Dewey*, 26 Ill. 258; *Chicago &c. R. Co. v. Murray*, 71 id. 601; *Hund v. Geier*, 72 id. 393; *Chicago &c. R. Co. v. Wilcox*, 24 N. E. Rep. (Ill.) 419; *Paducah v. Memphis &c. R. Co.*, 12 Bush. (Ky.) 41; *Collins v. South Boston &c. R. Co.*, 142 Mass. 301; *Mattey v. Whittier*, 140 id. 337; *Messenger v. Dennie*, 141 id. 335 (137 id. 197); *Hunt v. Salem*, 121 id. 294; *Dowl v. Chicopee*, 116 id. 93; *Elkins v. Boston &c. R. R. Co.*, 115 id. 190; *Lynch v. Smith*, 104 id. 52; *Edliff v. Wabash R. Co.*, 64 Mich. 196; *Chicago &c. R. Co. v. Smith*, 46 id. 504; *Daniels v. Clegg*, 28 id. 32; *Flaherty v. Union R. Co.*, 45 Mo. 70; *Boland v. Missouri R. Co.*, 26 id. 484; *Duffy v. Missouri R. Co.*, 19 Mo. App. 380; *Philadelphia &c. R. Co. v. Spearen*, 47 Pa. St. 30; *Rauch v. Lloyd*, 31 id. 358; *Penn. R. Co. v. Kelley*, 31 id. 372; *Robinson v. Cone*, 22 Vt. 213; *R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

Error to charge in effect, that if a child did not have the capacity to exercise the care of a prudent adult, he was not chargeable with any negligence. *Western &c. R. Co. v. Rogers*, 104 Ga. 224.

The degree of care required of one of tender years is that required of an ordinarily prudent person of that age under similar conditions. *Norton v. Volzke*, 158 Ill. 402.

See, also, *Illinois C. R. Co. v. Bandy*, 88 Ill. App. 629; *Tulley v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 537; *Baltimore &c. R. Co. v. Cumberland*, 12 App.

D. C. 598; *Riley v. Missouri &c. R. Co.*, 68 Mo. App. 652; *Anderson v. Union &c. R. Co.*, 81 Mo. App. 116; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; *Lake Erie &c. R. Co. v. Mackay*, 53 Oh. St. 370; s. c., 39 L. R. A. 757; *Queen v. Dayton Coal &c. Co.*, 95 Tenn. 458; s. c., 30 L. R. A. 82; *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224; *Cleveland &c. R. Co. v. Heiman*, 16 Oh. C. C. 487; *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82; *Roth v. Union Depot Co.*, 13 Wash. 525; s. c., 31 L. R. A. 855; *Dicken v. Liverpool Salt &c. Co.*, 41 W. Va. 511.

Though a child of five is a technical trespasser, yet an owner is liable for leaving dangers which are attractive to children unguarded like an elevator shaft. Child of an employé, playing about the store, was injured by the descending elevator. *Siddall v. Jansen*, 168 Ill. 43; rev'g s. c., 67 Ill. App. 102.

A child of nine passing through space three feet wide between cars of a train obstructing a crossing, was not negligent *per se*. *Lehman v. Eureka &c. Works*, 114 Mich. 260.

Test is, the capacity of discretion or intelligence to distinguish the presence of danger. *San Antonio Waterworks Co. v. White*, (Tex. Civ. App.) 44 S. W. Rep. 181.

But an instruction; that a girl of 13 was bound to the care usually exercised by the great mass of ordinarily prudent children of her age, was erroneous. *Collins v. Janesville*, 107 Wis. 436.

(c). INSTANCES WHEN RECOVERY WAS OR WAS NOT ALLOWED TO PARENT, OR TO CHILD OR ITS REPRESENTATIVE.

*The following were actions by infant, or in the infant's behalf:*

An infant between three and four years of age escaped into the street through an open window which was four feet above the floor, and was the only means of egress. It went on the defendant's track and was injured by the negligence of the car driver. It was not contributory negligence *per se*, as such a child was not *sui juris*. Question as to the child's being *sui juris* is for the jury. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, rev'g nonsuit.

**From opinion.**—"In *Darley v. Norwich R. Co.* (26 Conn. 591), it was held, the negligence could not be imputed to a child of such tender years as to be wholly incapable of the exercise of care. In *Robinson v. Cone* (22 Vermont), it was held, that all that could be required of such a child was the exercise of such care as it was capable of. In *Lynch v. Mordin* (41 Eng. Com. Law, 422), it was held, where the defendant's cartman had left his horse and cart standing unattended in the street for half an hour, and children gathered around it for play, and the plaintiff got into the cart, and, while getting out, another lad started the horse, thereby causing the plaintiff to fall, and the cart to run over him, breaking his leg, that the plaintiff could recover. It will be observed, that, in this case, the plaintiff

(seven years old), had done a positive act (getting into the cart), in itself wrongful, and which had directly contributed to the injury, and which would most clearly have barred an action by an adult for a similar injury, yet the court held that he had acted from childish instinct, and that this was not an impediment in the way of a recovery."

The plaintiff, aged twelve, could not find a seat in a car with his mother and was permitted to go into the next car. At a station the plaintiff attempted to go to his mother and was hurt. The mother was not *per se* negligent. *Downs v. N. Y. C. R. R. Co.*, 47 N. Y. 83.

It is not negligence *per se* for parents, on a quiet street, to allow a child of six years to go unattended on the street. Child was injured on sidewalk by timber piled thereon. *Cosgrove v. Ogden*, 49 N. Y. 255.

A child of five years came into the house for a drink, and was there told to go into the back yard, where it had been playing, but it went on the car track in the street, and, after an absence of five minutes, was injured. Contributory negligence was for the jury. *Fallen v. C. P., N. & E. R. R. Co.*, 64 N. Y. 13.

If a child, crossing a track, used the care required of persons *sui juris*, the neglect of the parent in allowing the child abroad is immaterial. The poverty of the mother preventing the proper care of the child is not evidence to rebut evidence of negligence in that regard. *Cumming v. B. C. R. R. Co.*, 104 N. Y. 669; 38 Hun. 362.

A child of two years was in his father's bakery, and while the father went behind the counter for two minutes, the child escaped into the street and was run over by the defendant's car. Nonsuit was error. *Weil v. D. D., E. B. & C. R. Co.*, 119 N. Y. 147.

Defendant's engine ran over a child two and one-half years old. The engine could have been stopped. Defendant liable. The child, with the consent of parents, started to go to grandparents, "just around the corner." *Kenyon v. N. Y. C. & H. R. R. Co.*, 5 Hun. 479; s. c. aff'd, 76 N. Y. 607.

The negligent driving of a father colliding with a street car, was not imputed to a child 21 months old in the arms of its mother, sitting by his side, in an action by it. *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. 206.

Negligence of a driver of delivery wagon, imputed to infant of four riding with him by consent of its mother, in an action by it. Her consent was not negligence. *Healey v. Ehret*, 42 App. Div. 27.

The negligence of the parents of a child of five, in allowing it to go upon the street at night unattended, was imputed to it. *Lowery v. New York Ice Co.*, 44 App. Div. 657; aff'g s. c., 26 Misc. 163.

*In an action by a child for injury the negligence of the parent did not prevent a recovery in the following instances:*

Custodian of a child of five. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

In an action by a girl of four for injuries, negligence of another is not involved. *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283.

A child's leg cut off by grip car. *Chicago &c. R. Co. v. Wilcox*, (Ill.) 24 N. E. Rep. 419.

In an action by infant *non sui juris*, negligence of parent or custodian was not imputable to it. *Evansville v. Seuhenn*, 151 Ind. 42.

See, also, *Jeffersonville v. McHenry*, 22 Ind. App. 10; *Union P. R. Co. v. Young*, 57 Kan. 168.

A child of two years of age driving with its parents was killed by the falling of bridge. *Wymore v. Mahaska County*, 78 Iowa, 396.

See *Slater v. Burlington &c. R. Co.*, 71 Iowa, 209.

A child of four or five years, injured while crossing defendant's track. *Westbrook v. Mobile &c. R. Co.*, 66 Miss. 560.

*Lannan v. Albany Gas-Light Co.*, 46 Barb. 264; *Daley v. Norwich &c. R. Co.*, 28 Conn. 591.

Boy of three years crushed by cable car. *Winters v. Kansas &c. R. Co.*, 99 Mo. 509.

*Boland v. Missouri R. Co.*, 36 Mo. 484; see, also, *Stillson v. Han. &c. R. Co.*, 67 id. 671.

Boy of eleven allowed by father to work at dangerous employment. *Huff v. Ames*, 16 Neb. 139.

Child of five run over while playing in the street. *Bisaillon v. Blood*, 64 N. H. 565.

Parent negligently permitted a boy of three to be exposed to danger. *Warren v. Manchester Street R. Co.*, 70 N. H. 352.

A girl of sixteen lawfully riding with her father, injured by concurrent negligence of father and defendant. *Street R. Co. v. Eadie*, 43 Oh. St. 91.

*Bellefontaine &c. R. Co. v. Snyder*, 18 Oh. St. 399.

Child of four sent on an errand by its parents and run over by defendant's car. *Erie &c. R. Co. v. Schuster*, 113 Pa. St. 412.

*Smith v. O'Connor*, 48 Pa. St. 218; *Glassey v. Hestonville &c. R. Co.*, 57 id. 172; *G. H. & H. R. R. Co. v. Moore*, 59 Tex. 64.

Parents failed to get medical aid for a child of fifteen months for four days. *Texas &c. R. Co. v. Beckworth*, (Tex. Civ. App.) 32 S. W. Rep. 809.

A girl of between eleven and twelve was permitted to go near a defect in the highway. *Roanoke v. Shull*, 97 Va. 419.



*And in the following instance it was held, as a matter of law, that it was not negligence in the parent:*

To allow a child physically and mentally able to take care of himself to travel the streets alone. *Barksdull v. New Orleans R. Co.*, 23 La. Ann. 180.

*Karr v. Parks*, 40 Cal. 188.

To allow a child of seven to go to school through city streets alone. *Berry v. Lake Erie &c. R. Co.*, 70 Fed. Rep. 679.

*The following were actions by parents, or child's administrator:*

It is not *per se* negligent to permit a boy of eight years to ride on cars without a protector. Brakeman tried to lift boy on car and he slipped out of his hand and was hurt. *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49.

Where the court had charged that there could be no recovery if the infant was negligent, it was not obliged to charge as to his being *sui juris*, and as to negligence of guardian. *Sheridan v. Brooklyn City & Newtown R. Co.*, 36 N. Y. 39.

Parent was not negligent in allowing the child to cross the track, and the negligence of the child, on account of its age, did not excuse the defendant. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y. 317.

A child three years old, in charge of one nine and one-half years of age, was sent across the street car track. Recovery. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y. 317.

A mother opened a door to empty a tub, and her child, two years of age, slipped out and got on the defendant's land where cars were stored. The mother looked for him and found him under an engine, dead. The child was not *sui juris* and the negligence of the mother was for the jury. *Prendergast v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 652.

Boy killed at crossing. No recovery was allowed, as he was not shown to have been free from negligence. *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248.

**Although less degree of care is required of an infant than a mature person, yet he is chargeable with some care in approaching a known danger, and absence of negligence must be shown.**

A boy seven years of age ran across a track, in full view of the train, against the warnings of the trainmen. Defendant was not chargeable. *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420.

It is not *per se* negligence on the part of a parent or guardian to permit a child *non sui juris* to play in the street. *Kunz v. City of Troy*, 104 N. Y. 344.

Where there is no other place for amusement in a crowded locality, it is not *per se* negligent to allow a bright child of four and a half years to play on the sidewalk unattended, under proper instructions. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, affirming 41 Hun, 404.

Law does not require same care from a boy of eight at a crossing as of an adult. *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

*McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417; *Stone v. Dry Dock & C. R. Co.*, 115 id. 104; *Huerzeler v. Central Cross Town R. Co.*, 139 id. 490.

In an action for death of child, while a charge that if the child was so immature as to be *non sui juris* its negligence could not be considered, was correct by itself, it was error to charge, that if there was no negligence on the part of the child, it made no difference how negligent the parents might have been. *Neun v. Rochester R. Co.*, 165 N. Y. 146; rev'g s. c., 28 App. Div. 622.

A girl of eight years waited for a long freight train to pass on one of the several tracks in the city, keeping her eye on the direction the train was moving, and as it passed she stepped on the track and was killed by a caboose that was following a few rods behind. Negligence and contributory negligence for jury. If *deceased had been an adult the court could have said she was guilty of contributory negligence*. *Ryan v. N. Y. C. & H. R. R. Co.*, 37 Hun, 186.

Action was by a father to recover for injuries to a child, about nineteen months old, caused by the latter's being struck by a train while on the track of a railway. The child was left by the father with its mother, who, while attending to her household work, sent the child into the yard, which was near the railroad of the defendant, where the mother's sister was then at work, and the child wandered onto the track about 190 feet distant, and was injured about five minutes after leaving the house. The question of contributory negligence on the part of the plaintiff should have been submitted to the jury. *Meagher v. The Cooperstown & Charlotte Valley R. R. Co.*, 75 Hun, 455.

Where child of three was sent on errand in charge of one of five on a car street, judgment for death of the child was reversed. *Albert v. Albany R. Co.*, 5 App. Div. 544; s. c. aff'd, 154 N. Y. 780.

In an action for the death of a child under five, a mother's negligence in allowing it to go upon the street in the company of her brother of fifteen with instructions as to its care was left to the jury. *Ehrmann v. Nassau Electric R. Co.*, 23 App. Div. 21.

So it was for the jury to say whether the custodian of a child of five, a sister of 24, was negligent in allowing it to cross the street unattended, though within her sight. *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. 585.

It was not negligence *per se* to allow a child of three to play in the street attended only by a sister of six or eight, though also presumably *non sui juris*. *Kennedy v. Hills Bros. Co.*, 51 App. Div. 29.

Contributory negligence of parents held a defence to a statutory action for death of child. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509.

Negligence of parent is immaterial in action by child's administrator if former is to receive no benefit from the recovery. *Murphy v. Derby Street R. Co.*, 73 Conn. 249.

Mother was not negligent *per se* so as to preclude recovery, where her child wandered to the track from depot, where she lived, when her back was turned momentarily. *Chicago &c. R. Co. v. Logue*, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

In an action for death a finding, that it was not negligence for parent to allow a child of about seven and a half to go to school with a sister of eleven, though in the neighborhood of railroad crossings, was sustained. *Illinois C. R. Co. v. Bundy*, 88 Ill. App. 629.

Negligence of a mother was imputed in an action by father as child's administrator. *Toner v. South Covington &c. R. Co.*, (Ky.) 58 S. W. Rep. 439.

A father's negligence will not be imputed in an action by child's administrator, though he be indirectly benefited by the recovery. *Warren v. Manchester Street R. Co.*, 70 N. H. 352.

In a statutory action for death of child, contributory negligence of administrator held not a defense.

Contributory negligence of a beneficiary bars recovery for his share but not for share of others. *Wolf v. Lake Erie &c. R. Co.*, 55 Oh. St. 517; s. c., 36 L. R. A. 812; *Ploof v. Burlington T. Co.*, 70 Vt. 509.

*In an action by a parent the negligence of the child or parent prevented a recovery in the following instances:*

Negligence of parent in allowing child of three to play in the street at night unattended and unwarned, where a railway passed the door. *Juskowitz v. Dry Dock &c. R. Co.*, 25 Misc. 64.

A child of seven years was allowed to pick up coal near the railroad track. *Coal &c. Co. v. Brawley*, 83 Ala. 311.

A child of eighteen months, left with one a little older, crawled on the railroad track. *St. Louis &c. R. Co. v. Freeman*, 36 Ark. 11.

Parent permitted his child of six to go alone across railroad tracks. *St. Louis &c. R. Co. v. Dawson*, 68 Ark. 1.

Parents permitted child of eleven to cross railroad track at a dangerous place. *Baltimore &c. R. Co. v. Pletz*, 61 Ill. App. 161.

Where the parent allowed child to play near an excavation of which he had knowledge. *Mayhew v. Burns*, 103 Ind. 328.

*Chicago v. Starr*, 42 Ill. 174.

Parents failed to restore a barrier blown from a dangerous excavation on the premises. *Wiese v. Remme*, 140 Mo. 289.

Parent permitted child to be on the street alone where there were street cars. *Hogan v. Citizen's R. Co.*, 150 Mo. 36.

Girl of twelve attempted to hold up a door, over a cellar stairs while descending them. *Torrath v. Burke*, 63 N. J. L. 188.

Father sent child of three and a half past a place where there was an opening in a fence protecting the street from a declivity. *Cincinnati v. Gregory*, 3 Oh. N. P. 142.

Father allowed child to stray upon railroad track. *Pa. &c. R. Co. v. James*, 81 Pa. St. 194.

*Glassey v. Hestonville*, 57 Pa. St. 172; dictum in *Huff v. Ames*, 16 Neb. 139.

A child of seven years was allowed to serve water on street cars. *Smith v. Hestonville &c. R. Co.*, 92 Pa. St. 450.

*R. Co. v. Pearson*, 22 P. F. Smith (Pa.) 169; *R. Co. v. Long*, 25 id. 257; *Duff v. Allegheny &c. R. Co.*, 10 Nor. (Pa.) 458.

A child of seven years trespassed upon railroad track without the knowledge of the parent. *Cauley v. Pittsburg &c. R. Co.*, 95 Pa. St. 398.

*Philadelphia &c. R. Co. v. Hummell*, 8 Wright (Pa.) 278. See, also, *Rogers v. Lees*, 140 Pa. St. 475; *Westerburg v. Kinzua*, 142 id. 471.

Where parent allowed child of seven to cross bridge not repaired. *Old City Bridge Co. v. Jackson*, 114 Pa. St. 321.

In an action by father for loss of services and expenses, his contributory negligence defeated a recovery. *Phillips v. Duquesne Traction Co.*, 8 Pa. Super. Ct. 210.

*In an action by a parent, the negligence of the parent or the child was for the jury, or did not prevent recovery, in the following instances:*

Father released the hand of his children, about 2 and 4 respectively, to play about his feet on the street while talking for a moment with a friend. *Coghlan v. Third Ave. R. Co.*, 7 App. Div. 124.

A bright boy of eight and a half was not negligent in being in the middle of the street with roller skates. *Schaffer v. Baker Transfer Co.*, 29 App. Div. 459.

Father's negligence at a railroad crossing, in an action for death of his child in the arms of its mother riding with him. *Lewin v. Lehigh Valley R. Co.*, 52 App. Div. 69.

A child of less than five years, unusually intelligent, fell into an excavation of which she knew. *Rider v. New York*, 18 N. Y. Sup. Ct. (J. & S.) 221.

Where a boy, subject to occasional fits, was permitted to go at large, and was drowned. *Platt &c. Co. v. Dowell*, 30 Pac. (Col.) 68.

Allowing child of four years of age to go upon the street unattended. *Chicago v. Hessing*, 83 Ill. 204.

*Chicago v. Major*, 18 Ill. 349.

A child of four years went upon the street unaccompanied or accompanied by a young child. *Stafford v. Rabens*, 115 Ill. 196.

*Indianapolis v. Emmelman*, 108 Ind. 530.

Where child of tender years went upon railroad track. *Payne v. H. &c. R. Co.*, 70 Iowa, 584.

Where a child of five years went in front of residence to play. *Westerfield v. Lewis*, 43 La. Ann. 63.

A child of twenty months was allowed to go into the street for exercise. *Bliss v. South Hadley*, 145 Mass. 91.

Where a child, left for a moment on the front stoop, escaped to a railroad track. *Rosencrans v. Lindell R. Co.*, 108 Mo. 9.

*Frick v. St. Louis &c. R. Co.*, 75 Mo. 542; *Keons v. St. Louis &c. R. Co.*, 65 id. 592; *O'Flaherty v. Union R. Co.*, 45 id. 70; *Wissner v. St. Paul &c. R. Co.*, 47 Minn. 468; *Creed v. Kendal*, 156 Mass. 291; *Strutzel v. St. Paul &c. R. Co.*, 47 Minn. 543; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Philadelphia v. Long*, 75 id. 257.

Child intrusted to elder sister from whom it escaped and ran off unobserved. *Woeckner v. Erie &c. Motor Co.*, 182 Pa. St. 182.

Child of two and a half left on door step with hand organ playing and car passing in street. *Karahuta v. Schuylkill T. Co.*, 6 Pa. Super. Ct. 319.

Father not barred because he "thoughtlessly" permitted a child to go into the street. *Dan v. Citizen's Street R. Co.*, 99 Tenn. 88.

Child was allowed to play where lumber was negligently piled. *Texas &c. R. Co. v. Herbeck*, 60 Tex. 602.

Child riding in carriage between father and uncle held not in the custody of uncle, and his negligence was immaterial. *Taylor &c. R. Co. v. Warner*, (Tex. Civ. App.) 60 S. W. Rep. 442.

A child of four years, two blocks from home, fell into an unguarded tunnel in the street. *Morgan v. Ill. &c. R. Co.*, 5 Dillon (U. S.) 96.

*Marshall v. Murray*, 148 Mass. 91; *Gibbens v. Williams*, 135 id. 333; *Slattery v. O'Connell*, 153 id. 94; *McGeary v. Eastern &c. R. Co.*, 135 id. 363; *Fink v. Missouri &c. R. Co.*, 10 Mo. App. 61.

Child of two years was left, during the absence of parents, in a yard with its brothers and sisters, one of eight years, where a neighbor was

at work, and escaped therefrom and wandered to a railroad track. Parents were not negligent *per se*. *Garner v. Trumbull*, 94 Fed. Rep. 321.

Child of 15 months strayed from yard of house near track. *Bias v. Chesapeake &c. R. Co.*, 46 W. Va. 349.

A child of sixteen months was left with a child of seven years for a few moments and got on the defendant's track, as it had before done. *Hoppe v. Chicago &c. R. Co.*, 61 Wis. 357.

*In the following instances the court held, that although child was sui juris he might recover:*

Child of ten years rolling hoop on the street. *Chicago &c. R. Co. v. Keefe*, 114 Ill. 222.

*Kerr v. Forgue*, 54 Ill. 482.

Where infant knew trespassing on a turntable was wrong but not that turntable was dangerous. *Union Pac. R. Co. v. Dunden*, 37 Kas. 1.

*R. Co. v. Stout*, 17 Wall. (U. S.) 657.

A bright boy of eleven was not, as a matter of law, negligent in going along a dangerous reservoir to fish and play. *Price v. Atchison Water Co.*, 58 Kan. 551.

A boy of fourteen, a trespasser, was killed while uncoupling cars. *Kentucky R. Co. v. Gastlinean*, 83 Ky. 119.

*Smith v. O'Connor*, 48 Pa. St. 218.

A boy was injured on railroad track. *O'Connor v. Boston &c. R. Co.*, 135 Mass. 352.

*Lane v. Atlantic Works*, 111 Mass. 136; *Mulligan v. Curtis*, 100 id. 512.

A girl of sixteen, familiar with the spot, was killed at a crossing where the track was visible for a mile, and the headlight of the locomotive was burning. *Copley v. New Haven &c. R. Co.*, 136 Mass. 6.

Boy of ten, crossing street, was not *per se* negligent in stepping on to a rail, still hot from welding, where there was nothing to give notice thereof. *Kane v. West End Street R. Co.*, 169 Mass. 64.

A child of seven sought refuge from cattle upon a railroad trestle. *Cassida v. Oregon R. Co.*, 14 Ore. 551.

*McMillan v. B. & M. R. Co.*, 46 Iowa 231.

Boy of thirteen, who looks both ways before crossing a street, was not negligent *per se* in crossing before a wagon some distance away. *Streifeld v. Shoemaker*, 185 Pa. St. 265.

Nor is a boy of fourteen, who, when half over a crossing, where view was obstructed, retreats before cars passing on tracks ahead of him and is struck by cars passing on tracks behind him. *Steele v. Northern P. R. Co.*, 21 Wash. 287.

*In the following instances the court held that child was sui juris and could not recover:*

A bright boy of thirteen skated over a place in the river from which he knew ice had been cut only a few days before. *Sickles v. New Jersey Ice Co.*, 153 N. Y. 83; rev'g s. c., 80 Hun. 213.

A boy of thirteen stood within two and a half feet of the ends of an open drawbridge knowing that it would close with a considerable jar. *Ward v. New York*, 19 App. Div. 48.

A bright girl of over seven upon seeing a train approaching instead of stepping back ran along the track ahead of it. *McCarthy v. New York &c. R. Co.*, 31 App. Div. 181.

A boy of twelve years working on a dangerous machine, if he did not use care according to his years. *Glover v. Gray*, 9 Ill. App. 329.

A boy of eleven years, trespassed on defendant's track. No recovery unless child was willfully injured, or the railroad might have expected the accident. *Massero v. R. Co.*, 68 Iowa, 602.

See *Benton v. Chicago &c. R. Co.*, 56 Iowa, 496.

A boy of fourteen who knew of the danger and could have avoided it, if he had thought. *Merryman v. Chicago &c. R. Co.*, 85 Iowa, 634.

A bright boy of twelve caught his foot in a turntable while on it at night. *Carson v. Chicago &c. R. Co.*, 96 Iowa, 583.

A boy of four years left with his sister of five, while his sister of ten went into a store, was run over by a team in the street. This did not show absence of negligence. *Stock v. Wood*, 136 Mass. 353.

Although the degree of care required of a child is different from that required of an adult, the same general principles govern. *Collins v. South Boston &c. R. Co.*, 112 Mass. 301.

*Messenger v. Dennie*, 137 Mass. 197.

Boy of thirteen rode on a bicycle headlong into a train at a crossing without looking. *Sewell v. New York &c. R. Co.*, 171 Mass. 302.

A boy of twelve years was presumed to know the peril of riding in front of an engine. *Ecliff v. Wabash &c. R. Co.*, 64 Mich. 196.

*Chicago &c. R. Co. v. Smith*, 46 Mich. 504.

Boy of ten years was injured on a turn table of which he had been warned. *Twist v. Wynona &c. R. Co.*, 39 Minn. 164.

*Murray v. Richmond &c. R. Co.*, 93 N. C. 92; *Brown v. European &c. R. Co.*, 58 Me. 384; *Ludwig v. Pillsbury*, 35 Minn. 256; *Gillespie v. McGowan*, 100 Pa. St. 144.

A youth old enough to appreciate the approach of danger. *Dowling v. Allen*, 88 Mo. 293.

*McMahon v. North Cent. R. Co.*, 39 Md. 438; *Fryers' Case*, 30 id. 47.

An intelligent boy of twelve, heedless of warning, went into a quarry and burned his feet. *Butz v. Caranagh*, 131 Mo. 503.

Boy of eleven got caught in machinery while obeying his guardian's directions, both being trespassers. *O'Leary v. Brooks Elevator Co.*, 7 N. Dak. 544; s. c., 41 L. R. A. 617.

Trespassing child of six while picking up coal in coal yard, stepped on hot ashes. *Feehan v. Dobson*, 10 Pa. Super. Ct. 6.

There is a strong presumption that a child of fourteen years has discretion. *Nagel v. Alleghany &c. Co.*, 88 Pa. St. 35.

Boy of fifteen, who could not swim, waded in a river with knowledge of deep holes therein. *Hunt v. Graham*, 15 Pa. Super. Ct. 42.

A boy of sixteen, frightened by a train, which he had neglected to look for, coming suddenly up behind him while walking beside the track, jumped against a switch stand and was thrown under the train. Judgment in his favor was reversed. *Texas &c. R. Co. v. Walker*, (Tex. Civ. App.) 49 S. W. Rep. 642.

*Whether he was negligent or not was left to the jury in view of his age in the following instances:*

A bright child of six, in crossing a track, failed to look and listen, and turned in obedience to warnings by another too late. *Finu v. Delaware &c. R. Co.*, 42 App. Div. 524.

In a boy of ten, in entering street cars at invitation of motorman. *Little Rock T. &c. Co. v. Nelson*, 66 Ark. 494.

Whether plaintiff, a girl of ten, was negligent in standing near a pile of stones; where one was shaken down upon her by a passing team. *Mahar v. Steuer*, 170 Mass. 454.

Child of eleven lying down on a railroad track. *St. Louis &c. R. Co. v. Shifflet*, (Tex. Civ. App.) 56 S. W. Rep. 697.

The sight and noise of an engine blowing off steam distracted the attention of a boy of fourteen from the danger of a train approaching on opposite side of crossing. *Atchison &c. R. Co. v. Hardy*, 94 Fed. Rep. 294.

Boy of nearly ten and a half drove upon a crossing without stopping and looking. *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370.

## VII Contributory Negligence of Third Person.

The responsibility of a person, injured while riding, through the negligence of the driver, is measured by his relation to the driver, and his opportunity to guard against the result of such negligence. If the driver is a servant of the injured person, the latter is responsible for his negligence; in other

\* NOTE. See also "Crossings," *post*, p. 733.



cases the person injured is not relieved from the watchfulness and care that a person of ordinary prudence would use under the circumstances to discover danger and avert the consequences thereof by warning or remonstrating with the driver, or by other means.

This action was brought to recover for injuries sustained by plaintiff by a collision of defendant's cars with a stage coach, in which she was a passenger. The stage was a public one plying between two villages. The collision occurred at the crossing over a street, at a point of much travel and in a densely built portion of a village.

The court was held to have properly charged the jury that the negligence of the driver must be regarded as the negligence of the plaintiff; that he represented her, and she could not recover in this action if his negligence contributed to produce the injury. *Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 591, aff'g judg't for pl'ff.

**From opinion.**—"Since the trial of the action, the decisions of this court, in *Chapman v. The New Haven R. R. Co.*, 19 N. Y. 341, and *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492, have been published. In the former of these cases, this court held, that a passenger by railroad is not so identified with the proprietors of the train conveying him or their servants, as to be responsible for negligence on their part, and could recover for personal injuries from a collision through negligence of the defendant, although there was such negligence contributing to the collision on the part of the train, conveying him, as would have defeated an action by its owners; and in the latter case, it was held, that the injured passenger could maintain his action against the proprietors of both on the ground of their concurrent negligence. I do not perceive why these cases do not dispose of the question of negligence of the driver in this case. The plaintiff was a passenger in a public stage. *She had no control of its management or direction; and occupied no relation to the driver different from that which passengers occupy to any public carrier of persons.* In principle, there is no difference whatever between her relation to the carrier and that of a passenger on a train of railroad cars. The difference is one of fact merely, growing out of the difference of motive power and the corresponding necessity for more stringent rules and greater vigilance in one case than in the other. But a majority of the judges are of the opinion that the true rule, in a case of this kind, was laid down at the circuit."

The negligence of defendant, whereby plaintiff was injured, being established by evidence and there being no pretense, that plaintiff was guilty of any personal negligence, the negligence of a third party, contributing to the injuries, furnishes no excuse for the negligence of defendant, and no reason why he should not respond in damages. Hence, in such case, the refusal of the judge to charge, that, if the jury should find that the injuries were in part caused by the negligence of a third party, the plaintiff could not recover from defendant, was not error. *Webster v. Hudson R. Co.*, 38 N. Y. 260, aff'g judg't for pl'ff.

See *Platz v. The City of Cohoes*, 89 N. Y. 224-5.

A person was riding with a driver, who had knowledge of the proximity of the track, which they approached rapidly, with the top up and without notice. Within ten feet of the track the driver struck his horses and went on at a gallop. Contributory negligence. *McCall v. N. Y. C. & H. R. R. Co.*, 54 N. Y. 642.

A female who has accepted an invitation to take a ride with a person in every way competent, and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defense to an action by her against a railroad corporation for injuries resulting from a collision.

Accordingly, held, that a charge in such an action, that, if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, was proper. *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11, aff'g judgt for pl'ff.

Distinguishing *Beck v. East River F. Co.*, 6 Robt. 82; and limiting *Brown v. N. Y. C. R. Co.*, 32 N. Y. 507.

The plaintiff, not himself negligent, riding gratuitously with another, whom he could not control, and who was not claimed to be an incompetent driver, may recover for injury at a crossing caused partly by the defendant's negligence. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

The injury was caused by the wheels of the wagon, in which plaintiff was riding, running into a hole in the street. The court after it had charged, in substance, that plaintiff could not recover, if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. Held, no error. *Minick v. The City of Troy*, 83 N. Y. 514, aff'g 19 Hun, 253, and judgt for pl'ff.

The plaintiff's intestate, by invitation of the driver, was riding on a highway crossed by defendant's tracks: the wheel went into a hole between the tracks, and the testator was jolted off and killed. The court charged that if there was nothing to indicate that the driver was not a proper man to ride with, the plaintiff would not be affected by the driver's contributory negligence, and, in the absence of such indication, only a wrongful or willful act could affect the recovery. Defendant's counsel requested a charge "that if the driver's negligence was the proximate

cause of the jar the plaintiff cannot recover." The court properly refused to alter its charge. *Masterson v. N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 247, aff'g judg't for pl'ff.

Distinguishing *Cosgrove v. N. Y. C. & H. R. R. R. Co.*, 13 Hun, 329; *Barringer v. N. Y. Central & C. R. Co.*, 18 id. 398.

The plaintiff's intestate and her husband were driving over the crossing and were both killed. The husband's negligence in driving in front of the train, which they both saw, did not constitute contributory negligence on her part. She had a right to suppose that her husband would stop and not cross; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might not have had time or might have been paralyzed from fright, and the question was one of fact for a jury. *Hoag v. N. Y. C. & H. R. R. R. Co.*, 111 N. Y. 199, rev'g nonsuit.

It appeared that the plaintiff was riding in a buggy, seated by the side of the driver, who had been hired to carry him; that an approaching train could be seen for some distance from the crossing, the location of which was well known to both; but that neither made any effort, by looking or listening, to discover such approach after they came within two hundred feet of the crossing, held, that plaintiff was properly nonsuited.

The rule requiring a traveler on a highway, on approaching a railroad crossing, to have senses alert to discover and avoid danger from an approaching train, is not relaxed in favor of one, who is being carried in a vehicle owned and driven by another; it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable.

The rule that the negligence of the driver of a vehicle may not be imputed to a passenger in an action to recover damages for injuries alleged to have been occasioned by defendant's negligence, is *only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from him by an inclosure and is without opportunity to discover danger and to inform the driver of it.* *Brickell v. N. Y. C. & H. R. R. R. Co.*, 120 N. Y. 290, aff'g judg't for def't.

Plaintiff was not bound by the acts of a driver of a coach which he and others had hired from a liveryman. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 30 App. Div. 410.

**From opinion.**—"The plaintiff in the case at bar did not hire or pay the driver or attendant, and had no voice in the selection of either, which was an important element in determining the relation between them. The fact that the

driver may have received from the plaintiff or his associates orders when to go forward and stop, did not make the plaintiff the servant of the defendant. *Johnson v. N. A. S. N. Co.*, 132 N. Y. 576." \* \* \* " *Murray v. Dwight*, 161 N. Y. 301. It is manifest that under the principles established by the decisions of this court the relation of master and servant did not exist between the plaintiff and the driver or helper or either of them."

Wife riding with her husband. *Platz v. Cohoes*, 24 Hun, 101; s. c. aff'd, 89 N. Y. 219.

*Perry v. Lansing*, 17 Hun, 34; *Metcalf v. Baker*, 11 Abb. (N. S.) 431, affirmed 57 N. Y. 662; *Shaw v. Craft*, 37 Fed. Rep. 317; *Louisville & C. R. Co. v. Creek*, 29 N. E. (Ind.) 481; *Miller v. R. Co.*, 27 id. 339; *Knightstown v. Musgrove*, 116 Ind. 121; *Pittsburg & C. R. Co. v. Spencer*, 98 id. 186; *Little v. Hackett*, 116 U. S. 366; *Street R. Co. v. Eadie*, 43 Oh. St. 91; *Battishill v. Humphrey*, 31 N. W. Rep. (Mich.) 894; *Shellfield v. Central Union & C. Co.*, 36 Fed. Rep. 164; *Contra, Carlisle v. Sheldon*, 38 Vt. 440.

A mother and four children were in hired coach, which stopped on the signal of the flagman at the crossing, on account of an approaching train. The flagman then signaled the train to come on, and the driver whipped up the horses and went to the track, and they were struck by the train. Held, that the driver was under the control of the mother, and the children, one of whom was killed, were in joint enterprise with her, and her negligence was theirs. *Callahan v. Sharp*, 27 Hun, 85; s. c. aff'd, 95 N. Y. 672.

**From opinion.**—"There are cases when one travels in a vehicle over which he has no control, in which he is not responsible for the negligence of the driver. *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Robinson v. N. Y. C. & H. R. R. Co.*, 84 id. 247. But these cases proceed on the ground that the plaintiff had no control of the vehicle or the driver, and had no authority to give directions for their movements.

So it was held that a passenger by railroad has no identity with the proprietors of the train conveying him, sufficient to prevent a recovery against the proprietors of another train for damages resulting from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners (*Chapman v. New Haven R. R. Co.*, 19 N. Y. 341), but this is on the ground that the plaintiff had no control over the train on which he was riding. *Webster v. Hudson R. R. Co.*, 38 N. Y. 262; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492. These authorities have no application to the present case.

It may be stated for a general rule that where the relation of superior and subordinate exists, the maxim *respondent superior* has application co-extensive with the relation. 'Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts, committed during such temporary employment by another.' (Moak's *Underhill on Torts*, 42)."

Where a mother controlled the driver, his negligence is imputable to her, and her negligence is that of her child of thirteen. *Callahan v. Sharp*, 27 Hun, 85; s. c. aff'd, 95 N. Y. 672.

Whether a boy of ten years of age, crossing a track in a sleigh with his mother and another, and a driver, who was killed, was guilty of contributory negligence in the matter of looking, was for the jury. The action was by his administrator, and the question of the mother's negligence or that of the driver, was not raised. Case reversed on error in charge. *Jones v. U. B. R. R. Co.*, 36 Hun, 115, rev'g judg't for pl'ff.

Plaintiff got into a wagon to ride with a person intoxicated and reckless, who drove upon the track negligently. The court charged that, if the driver was driving towards the crossing at apparently dangerous speed, and it occurred to the plaintiff's mind that it was so, and yet he assented to it, he was a party to it. Error. If the driving was so heedless and careless that the plaintiff, with ordinary care, would perceive it and he failed to do so, he was guilty of negligence. *Smith v. N. Y. C. & H. R. Co.*, 38 Hun, 33.

Plaintiff's intestate, riding in a horse car over the defendant's railway, was killed by defendant's train. Held,

1. Car driver's negligence was not that of plaintiff;
2. No duty on the part of the passenger to look or listen;
3. One sound of the whistle on leaving last station not in compliance with statute.

The point was taken at the close of the trial, that the intestate himself was bound to stop, look or listen for an approaching train, but no obligation of that description was imposed upon him by law. He was a passenger, and as such could reasonably assume that proper care and attention would be devoted to the crossing by those in charge of the car, before an attempt was made to go over it. It was not for him to stop, look or listen, but for the persons who had charge of the vehicle in which he was being carried, and if they failed to do that, as due care requires them to do it, and by reason of that failure and the carelessness of the persons in charge of the engine the accident happened, the defendant itself may be held liable for the consequences. *McCallum v. Long Island R. Co.*, 38 Hun, 569.

The plaintiff and his companions approached a railroad, with music and singing, and he was thereby prevented from hearing the bell, if it was rung. It was the duty of the plaintiff, familiar with the situation and dangers, knowing that the train was due, that it could not be seen and that the only safeguard was the sense of hearing, to refuse to go upon the crossing and, if necessary, to escape from the threatened danger, which he could have done easily. *Kochler v. Rochester & L. O. R. Co.*, 66 Hun, 566.

A person riding in a vehicle with another should, by looking and suggestion, take extraordinary pains to prevent a collision on a four track railway. *Sauerborn v. Hudson R. Co.*, 69 Hun, 429; aff'd, 141 N. Y. 553. (See cases cited.)

The plaintiff was responsible only for her own neglect and the right of recovery cannot be defeated by the negligence of her husband who was driving. *Hennessey v. Brooklyn City R. Co.*, 13 Hun, 569.

Plaintiff asked her son, who owned a team of horses, to drive her to visit relatives. His negligence contributing to the accident did not debar her recovery. *Weldon v. Third Ave. R. Co.*, 3 App. Div. 370.

Plaintiff was invited to go to a picnic with others, who borrowed the horses and wagons, selecting one of their number to drive. Driver's negligence was not imputed to plaintiff. *Kessler v. Brooklyn &c. R. Co.*, 3 App. Div. 426.

But the contributory negligence of a servant driver is imputed to the master. *Smith v. New York &c. R. Co.*, 4 App. Div. 493.

Plaintiff, having been invited with her daughters to ride with another, was the latter's guest, and was not chargeable with his negligence. *Strauss v. Newburgh &c. R. Co.*, 6 App. Div. 264.

Plaintiff, a child of four and a half, and *non sui juris*, was riding in a delivery wagon with the consent of two young men driving it. Latter's negligence was imputed to the child. *Metcalf v. Rochester R. Co.*, 12 App. Div. 147.

**From opinion.**—"The learned counsel, for the plaintiff insists that the negligence of a driver, not being imputable to an adult, possessed with judgment, and the right of self control, who is riding with the driver it is illogical to impute the negligence of the driver to an infant without judgment and incapable of self control. In reply it may be said this opinion is founded upon precedents and does not assume to discuss the principles on which the precedents are supposed to rest. If the question which seems to be settled in this state, is to be re-examined and the precedents overruled, it should be done, by the court of last resort." (Precedents discussed).

That the deceased and the driver were fellow servants of an ice company, did not prevent recovery for the driver's negligence. *McCormack v. Nassau Electric R. Co.*, 18 App. Div. 333.

See, also, "Master and Servant," *post*, p. 1386.

Where two policemen are sent with an ambulance to bring in a prisoner, the negligence of the one detailed to drive was not imputed to the other in an action for injuries at a crossing. *Bailey v. Jourdan*, 18 App. Div. 387.

Negligence of a driver was chargeable to another riding with him, where they were jointly transacting the business in which they were engaged. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

See, also, *Schron v. Staten Island &c. R. Co.*, 16 App. Div. 111.

Negligence of a driver of a street car, run into by a truck, was not imputed to the conductor. *Hobson v. New York Condensed Milk Co.*, 25 App. Div. 111.

One invited to ride, perceiving that driver is drunk and driving heedlessly without taking any steps to protect himself, is chargeable with the driver's contributory negligence. *Meenagh v. Buckmaster*, 26 App. Div. 451.

Deceased was injured while his host's wagon was crossing defendant's track. Though a guest, he gave the host, who was unfamiliar with the route, frequent directions. No recovery. *Zimmerman v. Union R. Co.*, 28 App. Div. 445.

Plaintiff, a guest of the driver, seeing a car coming admonished him to "ride slow." The words conveyed merely a warning and not an intention to assume control of the driver. *Bergold v. Nassau Electric R. Co.*, 30 App. Div. 438.

Young lady riding with a young gentleman at the latter's invitation, was not precluded from recovery by reason of his negligence. *Schermerhorn v. New York &c. R. Co.*, 33 App. Div. 17.

Contributory negligence of driver not under plaintiff's control or subject to her direction, was not imputed to her. *Kleiner v. Third Ave. R. Co.*, 36 App. Div. 191; *Fisher v. Mt. Vernon*, 41 App. Div. 293.

Plaintiff conducted a school, and to take pupils to and from it, ran a bus, hiring a horse and driver from a liveryman. She was not allowed to recover for a collision with a street car to which driver's negligence contributed. *Reed v. Metropolitan Street R. Co.*, 58 App. Div. 87.

Where deceased was riding with his father in the latter's carriage, he was not chargeable with negligence of latter's driver; having no control over him. *Morris v. Metropolitan Street R. Co.*, 63 App. Div. 78.

While a guest of driver may not be chargeable with the latter's negligence at a railroad crossing, he must use reasonable care for his own protection. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

See, also, *Anderson v. Metropolitan Street R. Co.*, 30 Misc. Rep. 104; *Ulrich v. Toledo &c. Street R. Co.*, 10 Oh. C. C. 635.

Negligence of driver of hose cart was not imputed to a fireman riding thereon. *Birmingham &c. R. Co. v. Baker*, (Ala.) 31 South. Rep. 618.

Negligence of father, driving, is imputable to child of nine. *Kyne v. Wilmington &c. R. Co.*, 13 Cent. (Del.) 391.

Guest, having no control over the driver, was not charged with the latter's negligence. *Farley v. Wilmington &c. R. Co.*, (Del.) 52 Atl. Rep. 543.

Where driver is a servant, his negligence is imputed to the master. *Read v. City &c. R. Co.*, 115 Ga. 366.

Where it does not appear that plaintiff did otherwise than acquiesce in driver's act, such act is held to be his own and he cannot recover. *Brannen v. Kokomo &c. Co.*, 115 Ind. 115.

*Haff v. Minneapolis &c. R. Co.*, 14 Fed. Rep. 558; *Allan v. R. Co.*, 105 Mass. 79.

Driver's negligence was not imputed to his guest, having no control, and reasonably believing him to be competent. *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 649; *Leavenworth v. Hatch*, 57 Kan. 57; *Noonan v. Consolidated T. R. Co.*, 64 N. J. L. 579; *Ouverson v. Grafton*, 5 N. D. 281.

But where a guest had equal knowledge with the driver that they were going at reckless speed in the dark, and had equal means of discovering the danger, he was equally negligent. *Vincennes v. Thuis*, 28 Ind. App. 523.

Husband, not being under control of wife, his negligence did not prevent her recovery. *Reading v. Telfer*, 57 Kan. 798.

Where driver was competent and plaintiff rode at his invitation. *Cahill v. Cincinnati &c. R. Co.*, 13 Ky. L. R. 714.

*Bennett v. Transportation Co.*, 36 N. J. L. 225; *New York &c. Co. v. Steinbrenner*, 47 id. 161; *State v. Boston &c. R. Co.*, 38 Alb. L. J. (Me.) 269; *Mann v. Weiland*, 81 Penn. St. 243; *Transfer Co. v. Kelly*, 36 Oh. St. 86; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364; *Danville Turnpike Co. v. Stewart*, 2 Mete. (Ky.) 119; *R. Co. v. Case*, 9 Bush (Ky.) 728; *Hillman v. Newington*, 23 Alb. L. J. (Cal.) 294; *Tompkins v. R. Co.*, 66 Cal. 163; *Noyes v. Boskawen*, 64 N. H. 361; *Follman v. Mankato*, 35 Minn. 522; *Flaherty v. Northern Pac. R. Co.*, 39 id. 328; *Cuddy v. Horn*, 46 Mich. 596; *R. Co. v. Hogeland*, 66 Md. 149; *Beck v. East &c. Co.*, 6 Robt. (N. Y.) 82; *Galveston &c. R. Co. v. Kutaek*, 72 Tex. 643; *Nesbit v. Garner*, 75 Iowa, 314; see, however, *McCaffrey v. Delaware &c. Canal Co.*, 16 N. Y. Supp. 495; *Bennett v. N. Y. &c. R. Co.*, 40 N. Y. S. R. 948; *Michigan City v. Boeckling*, 122 Ind. 39. *Contra*, *Thorogood v. Bryan*, 8 C. B. 113; *House v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Pt.* 43 id. 513; *Otis v. Janesville*, 47 id. 422; *Payne v. R. Co.*, 39 La. 523; *Yahn v. Ottuma*, 60 Iowa 429; *Stafford v. Oskaloosa*, 57 id. 749.

Negligence of a third party, contributing with defendant's, adds a remedy; it takes none away. *Whitman &c. Co. v. Wurm*, (Ky.) 66 S. W. Rep. 609; *West Chicago Street R. Co. v. Piper*, 165 Ill. 325; *O'Rourke v. Lindell R. Co.*, 142 Mo. 342.

Negligence of driver employed by stable keeper is not imputable to passenger who hires a hack of the stable keeper and does not control the driver. *Randolph v. O'Riorden*, 155 Mass. 331.

*Noyes v. Boskawen*, 64 N. H. 361; see, *Plumber v. Ossipee*, 59 id. 55; *Elyton Land Co. v. Mingea*, 89 Ala. 521; *Otis v. Thom*, 23 id. 469; *Georgia &c. R. Co. v. Hughes*, 87 id. 610; *Missouri Pac. R. Co. v. Tex. Pac. R. Co.*, 41 Fed. R. 316; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544; *Hunt v. R. Co.*, 14 Mo. App. 160; *Keitel v. R. Co.*, 28 id. 657; *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491; *East Tennessee &c. R. Co. v. Markens*, 14 Law. Rep. Annot. 281; *Bunting v. Hogsett*, 139 Penn. St. 353; *Carlisle v. Brisbane*, 113 id. 544; see, *Dean v. Penn. R. Co.*, 129 id. 514; *Nesbit v. Garner*, 75 Iowa, 315; *Larkin v. Burlington &c. R. Co.*, 52 N. W. (Iowa) 480; *Brannen v. Kokomo &c. R. Co.*, 115 Ind. 115; *Terre Haute &c. R. Co. v. McMurray*, 98 id. 358; *Albion v. Hetrick*, 90 id. 545.



Plaintiff was riding in a funeral procession with her daughter-in-law. Was not charged with her contributory negligence. *Johnson v. St. Paul &c. R. Co.*, 67 Minn. 260; s. c., 36 L. R. A. 586.

Boys furnished the stage and the girls the lunches for a picnic. The wagon upset on a defective street. Negligence of a boy driving, was not imputed to one of the girls injured. *Koplitz v. St. Paul*, (Minn.) 90 N. W. Rep. 794.

Negligence of husband in not looking at a crossing, not imputed to wife, riding at his invitation. *Finley v. Chicago &c. R. Co.*, 71 Minn. 471.

See, also, *Munger v. Sedalia*, 66 Mo. App. 628; *Ulrich v. Toledo &c. Street R. Co.*, 10 Oh. C. C. 635.

Hirer of a carriage acquiesced in driver's act of negligence. No recovery was allowed. *Illinois C. R. Co. v. McLeod*, 78 Miss. 334.

Negligence of a driver, leaving his wagon on a street car track while he went back to find a lost wheel nut, was not imputed to his nineteen-year-old daughter, asleep in the wagon. *Consolidated T. Co. v. Behr*, 59 N. J. L. 477.

Boy stealing a ride without the driver's knowledge was not chargeable with the latter's negligence. *Cincinnati Street R. Co. v. Wright*, 54 Oh. St. 181; s. c., 32 L. R. A. 340.

See, also, *New York &c. R. Co. v. Kistler*, 16 Oh. C. C. 316; *Wheeling &c. R. Co. v. Suhrivier*, 22 id. 560.

Negligence of driver was not imputable to the father of children riding with him without his consent, express or implied. *Faust v. Philadelphia &c. R. Co.*, 191 Pa. St. 420.

Negligence of a driver was chargeable to his guest, who knew of the danger of the road and acquiesced in driving that way. *Lohman v. McManus*, 9 Pa. Dist. 223.

Mother was not chargeable with her son's negligence in driving an unroadworthy colt without a good harness or brake. *Beardslee v. Columbia*, 5 Lack. Leg. N. 290.

When traveler takes passage with driver known to be drunk, no recovery for injuries is allowed. *Hershey v. Mill Creek*, 8 Cent. (Pa.) 252.

Where plaintiff is a guest of the driver and has no control over his driving, the latter's negligence is not charged to him. *Hydes Ferry &c. Co. v. Yates*, (Tenn.) 67 S. W. Rep. 69; *Missouri &c. R. Co. v. Rogers*, 91 Tex. 52; *Bryant v. International &c. R. Co.*, 19 Tex. Civ. App. 88; *Pyle v. Clark*, 75 Fed. Rep. 644; *Evans v. Lake Erie &c. R. Co.*, 78 Fed. Rep. 782; *Atlantic &c. R. Co. v. Ironmonger*, 95 Va. 625.

Knowledge of the husband as to viciousness of horse is knowledge of his

wife, and she cannot recover if he is negligent. *Huntoon v. Trumbull*, 2 McCrary, (U. S.) 314.

A passenger in a hack exercising no control over conduct of driver, is not affected with his contributory negligence. *Little v. Hockett*, 116 U. S. 366; *Baltimore &c. R. Co. v. Adams*, 10 App. D. C. 97; *Carnie v. Ervin*, 59 Ill. App. 555; *Bradley v. Ohio River R. Co.*, 126 N. C. 735; *Crampton v. Ive*, id. 894.

Where brother was driving sister, both being of mature age, there was no imputed negligence, but latter cannot recover, if she failed to exercise her faculties. *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172.

*Chicago &c. R. Co. v. Bentz*, 38 Ill. App. 485.

Negligence of a father driving was not attributable to a minor child. *Kowalski v. Chicago &c. R. Co.*, 84 Fed. Rep. 586.

The exercise of diligence by a driver does not inure to the benefit of a guest who was negligent. *Johnson v. Superior &c. R. Co.*, 91 Wis. 233.

Negligence of driver, imputed to one voluntarily riding with him by invitation. *Ritjer v. Milwaukee*, 99 Wis. 190.

Citing *Prideau v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 id. 422.

## CROSSINGS (Railway).

- I. PRINCIPLES GOVERNING.
- II. DUTY, AND DEGREE OF CARE REQUIRED.
  - (a) In general.
  - (b) On the part of the railroad company.
  - (c) On the part of the traveler.
- III. SPEED OF TRAINS.
  - (a) Negligence.
  - (b) Contributory negligence.
- IV. SIGNALS.
  - (a) Negligence.
  - (b) Contributory negligence.
  - (c) What signals should be given.
  - (d) When signals should not be given.
  - (e) Sign boards.
  - (f) What further care required.
- V. RUNNING SWITCHES.
- VI. GATES.
  - (a) Negligence.
  - (b) Contributory negligence.
- VII. FLAGMAN.
  - (a) Negligence.
  - (b) Contributory negligence.
- VIII. CUSTOMARY AND PRIVATE WAYS.
- IX. CONSTRUCTION AND REPAIR OF CROSSINGS.
  - (a) Negligence.
  - (b) Contributory negligence.

### I. Principles Governing.

The right of a train to pass a highway crossing is paramount, yet the company must use care, not necessarily, nor usually the highest degree, but such measure of care as a man of ordinary prudence would use under the circumstances.

Such care may be in the way of slackened speed, signals, lights, warnings from the train, signal bells, flagmen, gates, sign boards at the crossing, or other devices, the choice of which, in the absence of special statutory or municipal directions, is left to the company.

Particularly must they, at the peril of being adjudged *per se* negligent, give such warnings, by whistle, bell, signal post, or otherwise, as the law requires, although even such warning may not fully discharge the company's duty under particular circumstances.

The care due from the company is increased, as the probability of accident increases, as by the location of the crossing in a frequented street, by the presence of obstructions, other trains, noises, wind, storm, darkness, or other condition in the neighborhood of the crossing calculated to divert attention from, obscure or conceal the danger, and of which the company or its servants should have notice.

This consideration, also, includes any peculiarity in operation, as backing trains, the absence of headlights, kicking or switching cars, etc.

It is not negligent to omit to post a flagman or to place gates at a crossing and a jury cannot predicate negligence on the omission of gates or flagmen, or on mere speed of the train, but they may, in a case properly submitted to them, consider the *locus in quo* and all the surroundings, as they existed, the speed and conduct of the train, any ordinances regulating the same appropriate to the occasion, and then determine whether the precautions taken were sufficient.

If the company do employ such agencies, the same care must be taken to so use or operate them, as not to injure or mislead a traveler to his injury, as, for example, by such words or acts of the flagman or gateman, or by such opening or leaving open of the gates, or such absence of the customary flagman, as would be calculated to induce a man of ordinary prudence to believe that it was safe to go upon the track.

Even when the track crosses a walk, road, pathway, not a highway, where people, by the license or acquiescence of the company, are accustomed to go, the company must use the care that ordinary prudence would dictate.

## II. Duty and Degree of Care Required.

The defendant need not use the highest and utmost diligence when its trains approach a crossing. The general rule is that the care of a railroad company, in the operation of its trains, must be proportioned to the danger of accidents, and that when there is great danger there must be corresponding degree of care. In some cases, and under some circumstances, ordinary care may demand a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible. *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451, rev'g judg't for pl'ff, distinguishing and limiting *Johnson v. Hudson R. R. Co.*, 20 N. Y. 65; *Cook v. N. Y. C. R. Co.*, 1 Abb. Ct. of Appeals Cases, 432; *Fero v. Buff. & S. L. Co.*, 22 N. Y. 209; *Maginnis v. N. Y. C. & H. R. R. Co.*, 52 id. 215. *Cont., &c. Co. v. Stead*, 95 U. S. R. 161; *Fleckenstein v. Dry Dock &c. R. Co.*, 105 N. Y. 655; *Hennessey v. Brooklyn City R. Co.*, 73 Hun, 569.

### (a). IN GENERAL.

A traveler and railway have not equal rights to pass a crossing; the railway company has the paramount but not the exclusive right. *Warner v. N. Y. C. & H. R. R. Co.*, 41 N. Y. 465.

When the circumstances attending the killing of a person at a crossing denote neither contributory negligence nor the absence thereof, there can be no recovery. Freedom from negligence must be proved.

The only witness called by plaintiff, who saw the accident was the

engineer of the train, who testified that he saw the deceased two steps from the south rail of the track and saw him step twice, the second step taking him just over the rail, that he then gave a signal and the engine struck the deceased, that deceased was looking easterly away from the approaching train, and when witness first saw him he was 150 feet distant.

Held, that the evidence not only failed to show due care, but established contributory negligence. *Cordell v. N. Y. C. & H. R. R. Co.*, 15 N. Y. 330, rev'g judg't for plff.

Plaintiff was negligent, where, having broken down upon the track at about the time he knew a train to be due, he did not look and listen for it or get out of the way, though it could have been seen or heard for about half a mile, but went about deliberately to repair his damage. *Belch v. New York &c. R. Co.*, 90 Hun. 417.

See, also, *Elgin &c. R. Co. v. Duffy*, 191 Ill. 489.

"The law does not exact of an engineer an impossibility. It holds him to this degree of care which I have already defined; that he must exercise that degree of care which a person of ordinary prudence in his calling would exercise under like conditions. The more dangerous the indications the more prudence he must exercise. When the indications are very slight, why then the degree of care may not be so high, but when the indications become a manifestation of approaching danger of collision, his prudence must rise up to that." *Stewart v. Long Island R. Co.*, 54 App. Div. 623.

On a conflict of evidence as to the condition of the crossing, speed of train, giving of signals and range of vision of traveler, the case is for the jury. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

See, also, *Chesapeake &c. R. Co. v. Dupree*, (Ky.) 67 S. W. Rep. 15.

As to the relative duties of railroad companies whose tracks intersect in a highway, see, *New York &c. R. Co. v. Luebeck*, 157 Ill. 595; in joint use of tracks, *Chicago &c. R. Co. v. Martin*, 59 Kan. 137.

Duties of company and traveler are mutual; train has right of way, but same degree of care is required of both. *Indianapolis &c. R. Co. v. McClinn*, 82 Ind. 435.

*Continental &c. Co. v. Stead*, 95 U. S. 161; *H. & T. &c. R. Co. v. Wilson*, 60 Tex. 142; *Rockford &c. R. Co. v. Hillmer*, 72 Ill. 235; *Texas &c. R. Co. v. Cody*, 166 U. S. 606.

Train has no priority over traveler at a crossing, when it is not moving rapidly but standing still near a crossing. *Allen v. Boston &c. R. Co.*, 94 Me. 402.

Engineer must use ordinary care to discover danger and avoid injury. If he fail in either respect, the company is liable. *Watson v. Erie R. Co.*, 10 Oh. Dec. 454; *Chicago &c. R. Co. v. Pearson*, 82 Ill. App. 605.

Unless the traveler is guilty of negligence. *Texas &c. R. Co. v. Tidwell*, (Tex. Civ. App.) 49 S. W. Rep. 641.

Or trespassing. *Robards v. Wabash R. Co.*, 84 Ill. App. 477.

But the fact that a traveler is negligent or trespassing, does not relieve the railroad company of all duty towards him. It is liable, if, after discovering his danger, it fails to use ordinary care to prevent injury. *International &c. R. Co. v. Dalwigh*, (Tex. Civ. App.) 48 S. W. Rep. 527.

See, also, *Galveston &c. R. Co. v. Eaton*, 44 id. 562; *Dlaühi v. St. Louis &c. R. Co.*, 139 Mo. 291; *Fletcher v. South Carolina &c. R. Co.*, 57 S. C. 205; *Jones v. Probasco*, 18 Tex. Civ. App. 699.

Or ordinary care fails to avoid a danger originally produced by its negligence. *Folsom v. Concord &c. R. Co.*, 68 N. H. 454.

Or, if, though unaware of his danger, the character of its act shows reckless or wanton disregard of the consequences. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489; *Memphis &c. R. Co. v. Martin*, (Ala.) 36 South. Rep. 827.

Such as running a train at high speed without signal around a sharp curve over a concealed crossing. *Elgin &c. R. Co. v. Duffy*, 191 Ill. 489; aff'g s. c., 93 Ill. App. 463.

See, also, *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434.

But a traveler, himself grossly negligent, cannot complain of the gross negligence of the railroad company. *Redson v. Michigan &c. R. Co.*, 120 Mich. 671.

*Carr v. Missouri P. R. Co.*, 58 Kan. 814.

Nor can he recover, if, after discovering result of defendant's negligence, he could have avoided it by exercise of due care. *Briscoe v. Southern R. Co.*, 103 Ga. 224; *Fulcher v. Central &c. R. Co.*, 110 id. 327.

The degree of care, vigilance and foresight required by "ordinary care" is commensurate with the danger. *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123.

*Chicago &c. R. Co. v. Pounds*, (Ind. Terr. App.) 35 S. W. Rep. 249; *R. Co. v. Butler*, 1 West. (Ind.) 110; *Brown v. Milwaukee &c. R. Co.*, 22 Minn. 165; *St. Louis &c. R. Co. v. Knowles*, 6 Kan. App. 790.

It requires more care in the city than in the country. *Koltz v. Winona &c. R. Co.*, 68 Minn. 341.

See, also, *English v. Southern P. R. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155; *McNab v. United R. Co.*, 94 Md. 719; *Chesapeake &c. R. Co. v. Davis*, (Ky.) 60 S. W. Rep. 14; *Lake Shore &c. R. Co. v. Schade*, 15 Oh. C. C. 424.

At an obscured or obstructed crossing, than at a clear one. *Petrie v. New York &c. R. Co.*, 63 App. Div. 473; s. c. aff'd, 171 N. Y. 638.

See, also, *San Antonio &c. R. Co. v. Stollers*, (Tex. Civ. App.) 49 S. W. Rep.

679; *Demaine v. Washington &c. R. Co.*, (Va.) 27 S. E. Rep. 437; *Louisville &c. R. Co. v. Breeden*, (Ky.) 64 S. W. Rep. 667; *id. v. Clark*, 49 *id.* 329.

To the aged and infirm, when their condition is known, than to the strong and healthy. *Green v. Southern P. R. Co.*, 122 Cal. 563.

The private rules of a railroad company are not the measure of ordinary care due travelers on the highway. *Smithson v. Chicago &c. R. Co.*, 11 Minn. 216.

Good faith does not lessen the degree of care required. *Highland Avenue &c. R. Co. v. Swope*, 115 Ala. 287.

See, also, *Weil v. St. Louis &c. R. Co.*, 64 Ark. 535.

Affliction with a disease which would have caused death anyway shortly, affects the question of damages, and not the degree of care due. *Schaidler v. Chicago &c. R. Co.*, 102 Wis. 564.

A concurring cause does not prevent liability for a result to which negligence has contributed. *Louisville &c. R. Co. v. Clark*, 105 Ky. 571.

See, also, *Pratt v. Chicago &c. R. Co.*, 107 Iowa, 287.

Jury decides whether engineer kept a proper lookout for obstructions. *East Tennessee &c. R. Co. v. Bayliss*, 74 Ala. 150.

*Cook v. Central R. Co.*, 67 Ala. 533; see, also, *Montgomery v. Wright*, 72 Ala. 411.

The same care is required in passing places of business which front on a track as though it were a public crossing. *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 47 S. W. Rep. 59.

If plaintiff's negligence were the proximate cause of the injury, defendant's negligence would not excuse it; as where train was running at forbidden speed. *Wabash &c. R. Co. v. Weisbeck*, 14 Ill. App. 525.

Or company was inexcusably negligent in backing a train toward a person traveling on the track. *Chicago &c. R. Co. v. Olson*, 12 Ill. App. 245.

What was reasonable under the circumstances. *Chicago &c. R. Co. v. Hutchinson*, 120 Ill. 587.

*Chicago &c. R. Co. v. Dimick*, 96 Ill. 42; *St. Louis &c. R. Co. v. Manly*, 58 *id.* 390; *Illinois Central R. Co. v. Goddard*, 72 *id.* 568; *Chicago &c. R. Co. v. Damerell*, 81 *id.* 450; *Chicago &c. R. Co. v. Hatch*, 79 *id.* 137, case of an infant; *Chicago &c. R. Co. v. Becker*, 84 *id.* 483; *Dimick v. Chicago &c. R. Co.*, 80 *id.* 338; *Chicago &c. R. Co. v. Bell*, 70 *id.* 102; *Chicago &c. R. Co. v. Gretzner*, 46 *id.* 82; *Lake Shore &c. R. Co. v. Sunderland*, 2 Bradw. (Ill.) 397; *Chicago &c. R. Co. v. Gertsen*, 15 Ill. App. 614; *Garland v. Chicago &c. R. Co.*, 8 *id.* 571; *Lewis v. Long Island R. Co.*, 162 N. Y. 52; *rev'g s. c.*, 32 App. Div. 627; *Judson v. Central &c. R. Co.*, 158 N. Y. 597; *rev'g s. c.*, 91 Hun. 1; *Chicago &c. R. Co. v. Weeks*, 99 Ill. App. 518; *Lorenz v. Burlington &c. R. Co.*, (Ia.) 88 N. W. Rep. 835; *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323; *Chicago &c. R. Co. v. Pollard*, 53 Neb. 730; *Davis v. Concord &c. R. Co.*, 68 N. H. 247; *Watson v. Erie R. Co.*, 10

Oh. S. & C. P. Dec. 454; *Rangeley v. Southern R. Co.*, 95 Va. 715; *Atlantic &c. R. Co. v. Rieger*, id. 418; *Brown v. Chicago &c. R. Co.*, 109 Wis. 384.

(b). ON THE PART OF THE RAILROAD COMPANY.\*

1. OBSTRUCTED SIGHT AND HEARING.
2. FRIGHTENING ANIMALS.
3. KNOWLEDGE OF DANGER.
4. AGED, INFANT AND INFIRM.
5. STATUTES.

1. OBSTRUCTED SIGHT AND HEARING.

If the defendant, by piling wood, obstructs the view, so that the approaching train cannot be seen, until the traveler is on the track, and he approaches with due care, and looks for the train as soon as looking would be serviceable, there is no contributory negligence, even though he did not stop his team. In this case the question of the defendant's negligence seemed to be conceded on appeal. *Mackay v. N. Y. C. R. Co.*, 35 N. Y. 75, aff'g judg't for pl'ff.

A railway company may use its land for any lawful purpose, in the prosecution of its business, and, although it may obstruct the view of one approaching the crossing, such obstruction cannot be an independent ground of recovery. Such obstruction may, however, affect the question of negligence and contributory negligence, and statutory signals may not always be enough. *Cordell v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 119; s. c., 64 N. Y. 535; 6 Hun. 461.

It is not necessarily the duty of a railroad company to maintain a flagman at crossings nor to remove obstructions to observation, although the absence of the former and the presence of the latter may always be proved upon the trial of an action brought to recover damages resulting from injuries sustained by reason of a collision with a train. *Vanderwater v. N. Y. &c. R. Co.*, 74 Hun. 32.

The railroad company is not, *per se* obliged to prevent or remove obstructions to sight or hearing. *Galveston &c. R. Co. v. Michalke*, 90 Tex. 276.

See, also, *Chicago &c. R. Co. v. Pearson*, 184 Ill. 386; *Chicago &c. R. Co. v. Nelson*, 59 Ill. App. 308; *Missouri &c. R. Co. v. Rogers*, 91 Tex. 52.

Especially where temporary obstruction becomes a practical necessity. *Chicago &c. R. Co. v. Body*, 85 Ill. App. 133.

See, also, *Chicago &c. R. Co. v. Johnson*, 61 Ill. App. 464; *Chicago &c. R. Co. v. Williams*, 56 Kan. 533; *Chicago &c. R. Co. v. Kenyon*, 70 Ill. App. 567; *Eads v. Louisville &c. R. Co.*, (Ky.) 42 S. W. Rep. 1135.

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\*NOTE. As to the bearing of speed, signals, gates and flagmen on the degree of care required, see those headings, *post*.



But the degree of care required may be largely affected by the existence of such obstructions. *Chicago &c. R. Co. v. Hines*, 56 Kan. 758.

See, also, *Grenell v. Michigan C. R. Co.*, 124 Mich. 141; *Ellis v. Erie R. Co.*, 66 N. J. L. 451; s. c. aff'd, 51 Atl. Rep. 1109; *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16; *San Antonio &c. R. Co. v. Stollers*, (Tex. Civ. App.) 49 S. W. Rep. 679; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418.

Such as permitting weeds to grow up at a crossing. *Rose v. McCook*, 70 Mo. App. 183.

See, also, *St. Louis &c. R. Co. v. Rawley*, 90 Ill. App. 653.

Approaching, without signals or warning, a crossing, obscured by houses and standing cars. *Houston &c. R. Co. v. Byrd*, (Tex. Civ. App.) 61 S. W. Rep. 147.

Backing rapidly over a frequented crossing when sight and sound are obscured by the smoke and noise of another train. *Chicago &c. R. Co. v. Woolridge*, 72 Ill. App. 551.

Obstruction to view of engineer, from natural causes, as rain, relieves from liability. *L. & N. R. Co. v. Melton*, 2 Lea. (Tenn.) 262.

## 2. FRIGHTENING ANIMALS.

It is not an act of negligence at a crossing to make sounds incident to the operation of a railroad, necessary and reasonable in extent. Such as blowing off steam. *Illinois C. R. Co. v. Klein*, 95 Ill. App. 220.

See, also, *Philadelphia &c. R. Co. v. Burkhart*, 83 Md. 516; *Riley v. New York &c. R. Co.*, 90 id. 53; *Miller v. Railroad*, 128 N. C. 26; *Galveston &c. R. Co. v. Simson*, (Tex. Civ. App.) 54 S. W. Rep. 309; *Beaumont Pasture Co. v. Sabine &c. R. Co.*, 41 id. 190; *O'Dair v. Missouri &c. R. Co.*, 14 Tex. Civ. App. 539; *San Antonio &c. R. Co. v. Peterson*, 20 id. 495; *Lake Shore &c. R. Co. v. Butts*, (Ind. App.) 62 N. E. Rep. 647; *Favor v. Railway Co.*, 114 Mass. 350; *Dewey v. Chicago &c. R. Co.*, 99 Wis. 455; *Walters v. Chicago &c. R. Co.*, 104 id. 251.

But it may become negligent when done unnecessarily and to an unusual extent. *Boothby v. Boston &c. R. Co.*, 90 Me. 313.

See, also, *Chicago &c. R. Co. v. Cummings*, 24 Ind. App. 192; *Texas &c. R. Co. v. Cardwell*, (Tex. Civ. App.) 67 S. W. Rep. 157.

Or while unnecessarily near to the crossing. *Dunn v. Wilmington &c. R. Co.*, 124 N. C. 252.

If there is reasonable ground to apprehend that a team will be frightened by it, ordinary care must be used to prevent it. *Louisville &c. R. Co. v. Penrod*, (Ky.) 66 S. W. Rep. 1013, 1042.

See, also, *Missouri &c. R. Co. v. Cloninger*, (Tex. Civ. App.) 42 S. W. Rep. 632; *Huston &c. R. Co. v. Carruth*, 50 id. 1036; *Folsom v. Concord &c. R. Co.*, 168 N. H. 454.

As where the gauge indicates that steam is excessive and about to escape. *Louisville &c. R. Co. v. Schmidt*, 147 Ind. 638.

But it has been held that it is not necessary to inject water into the boiler to reduce pressure to prevent escape of steam from safety valve. *Wilson v. New York &c. R. Co.*, 41 App. Div. 36.

Conductor signaled a traveler to cross where the engine was near the crossing. As the conductor did not have charge of the engine, defendant was not liable for the consequences of the escape of steam therefrom. *Lindem v. Northern P. R. Co.*, 85 Minn. 391.

No liability attaches for fright from necessarily blowing whistle of locomotive. *Phila. R. Co. v. Slinger*, 18 Penn. St. 219; *Phillips v. N. Y. C. &c. R. Co.*, 84 Hun. 412; but see in connection with last case Penn. R. Co. v. Barnett, 59 Penn. St. 259; *Hall v. Brown*, 54 N. H. 495; *Chicago &c. R. Co. v. Dunn*, 61 Ill. 385; *Farley v. Harris*, 186 Pa. St. 440; *Phila. R. Co. v. Stinger*, 18 Penn. St. 219, yet it must not be done negligently and wantonly.

See Wharton on Negligence, 836.

Nor when it would be apparent to a reasonable person that injury would result. *Penn. R. Co. v. Barnett*, 59 Penn. St. 259; *Hill v. Railroad Co.*, 55 Me. 438; *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298; *Sneesby v. Railroad Co.*, 9 Q. B. 263; *L. R.*, 1 Q. B. D. 42; *Ind. &c. R. Co. v. McBrown*, 46 Ind. 229; *Massoth v. D. & H. C. Co.*, 64 N. Y. 524; 6 Hun. 314.

Whistle blown, without necessity to frighten horses imposes no liability on defendant company. But, when done pursuant to a duty, though with a malicious purpose, the liability is established. *International &c. R. Co. v. Yarbrough*, (Tex. Civ. App.) 39 S. W. Rep. 1096.

Or where, seeing plaintiff in close proximity to the train, several sharp blasts are given though without the intention of frightening the horses. *Texas &c. R. Co. v. Moseley*, (Tex. Civ. App.) 58 S. W. Rep. 48.

Or where it could have known by the exercise of reasonable care that it would frighten them. *Gulf &c. R. Co. v. Singer*, (Tex. Civ. App.) 40 S. W. Rep. 1004; *Houston &c. R. Co. v. Abrahams*, id. 1034; *Chicago &c. R. Co. v. Yorty*, 158 Ill. 321.

A railroad company has been held liable for leaving cars within the limits of a crossing where they may be reasonably calculated to frighten ordinarily gentle horses. *Missouri &c. R. Co. v. Jones*, 13 Tex. Civ. App. 376.

See, also, *Galveston v. Michalke*, 90 Tex. 276; *Sherman v. Bridges*, 16 Tex. Civ. App. 61; *San Antonio &c. R. Co. v. Peterson*, 20 id. 495; *Atchison &c. R. Co. v. Morrow*, 4 Kan. App. 199; *Missouri &c. R. Co. v. Clark*, 6 id. 922.

Though it is not a regular public crossing. *Texas &c. R. Co. v. McMann*, 15 Tex. Civ. App. 122.

And for making no effort to stop, upon seeing that a hand car causes fright. *Lake Erie &c. R. Co. v. Juday*, 19 Ind. App. 436.

But not where horses took fright at the body of an animal at a crossing, killed two hours before. *Chicago &c. R. Co. v. Scranton*, 95 Ill. App. 619.

Plaintiff allowed to recover for injuries caused by his horse, frightened by the necessary escape of steam, coming in collision with a car negligently left on a crossing. *Galveston &c. R. Co. v. Simon*, (Tex. Civ. App.) 54 S. W. Rep. 309.

Prohibited operation of a train at a given point, held proximate cause of injury received in attempting to stop horses frightened thereby. *Pittsburg &c. R. Co. v. Hood*, 94 Fed. Rep. 618.

### 3. KNOWLEDGE OF DANGER.

Held, error to charge that, if the engineer, after seeing horses suddenly come upon the track, omitted to do anything which might have averted accident, he was negligent; as it precluded the consideration of the question of the reasonableness of his acts in the view of the sudden emergency and the excitement consequent thereon. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 30 App. Div. 410.

It was held proper to charge that "if the engineer saw the deceased was in danger of being run into when he reached the crossing, provided the speed of his engine was not checked, it was his duty to do all reasonably within his power to prevent the disaster by proper efforts to stop his train as soon as he could." *Bump v. New York &c. R. Co.*, 38 App. Div. 60.

Engineer may presume that traveler will use care. *Ohio &c. R. Co. v. Walker*, 113 Ind. 196.

*Cincinnati &c. R. Co. v. Long*, 112 Ind. 166; *Indiana &c. R. Co. v. Hammock*, 113 id. 11; *Palmer v. Chicago &c. R. Co.*, 112 id. 250; *Indianapolis &c. R. Co. v. Pitzer*, 109 id. 179; *Terre Haute &c. R. Co. v. Graham*, 46 id. 239; 95 id. 286; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *St. Louis &c. R. Co. v. Manly*, 58 Ill. 300; *Chicago &c. R. Co. v. Lee*, 68 id. 576; *Toledo &c. R. Co. v. Jones*, 76 id. 311; *Chicago &c. R. Co. v. Damerell*, 81 id. 450; *Frazer v. South. &c. R. Co.*, 81 Ala. 185; *M. &c. R. Co. v. Blakely*, 59 id. 471.

Engineer not bound to stop train or check its speed because driver of approaching team is reclining. *Indiana &c. R. Co. v. Wheeler*, 115 Ind. 253.

But, where plaintiff's danger is known, though produced by his own negligence, defendant is liable if it fails to use ordinary care to avoid injury. *Cleveland &c. R. Co. v. Klee*, 154 Ind. 430.

See, also, *Pittsburg &c. R. Co. v. Lewis*, (Ky.) 38 S. W. Rep. 482; *Memphis &c. R. Co. v. Lyon*, 62 Ala. 71; *Tanner v. Louisville &c. R. Co.*, 60 Ala. 621.

*Contra*, L. & N. R. Co. v. Milam, 9 Lea, (Tenn.) 223; Cleveland &c. R. Co. v. Miller, 149 Ind. 490; Ardenbury v. Southern R. Co., 103 Tenn. 266.

Ordinary care, however, is the measure of defendant's duty. *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386.

See, also, Baltimore &c. R. Co. v. Few, 94 Va. 82.

As a matter of law it is not negligent if an engineer, seeing danger four hundred feet ahead, and doing all in his power, is not able to check his train. *Ex parte Stell*, 4 Hugh. C. C. (U. S.) 157.

Railroad company was held liable, where engineer saw a traveler when within 100 to 200 feet of the crossing and did not look again till within 50 to 70 feet thereof. He could have stopped within 75. *Edwards v. Chicago &c. R. Co.*, (Mo. App.) 67 S. W. Rep. 950.

So, where defendant knew that people were actually engaged in climbing behind the cars, blocking the crossing, though it did not see the plaintiff in particular. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

But it was not liable, where engineer saw deceased, but he would have cleared the crossing in ample time, had not his horse balked. *Glockner v. Wabash R. Co.*, 95 Ill. App. 550.

Conductor held not grossly or willfully negligent in suddenly starting a train after obstructing the highway for some 20 minutes, where he does not know that anyone is crossing between the cars; though he might have, by looking, found out. *Chicago &c. R. Co. v. Surouwieski*, 67 Ill. App. 682.

#### 4. AGED, INFANT AND INFIRM.

Jury decides on negligence where train could have been stopped before striking a child, by exercise of all possible means. *Little Rock &c. R. Co. v. Barker*, 39 Ark. 491.

Memphis &c. R. Co. v. Sanders, 43 Ark. 225.

Railroad is not bound to adopt precautions to prevent children from climbing upon its cars while at crossings. *Haberlau v. Lake Shore &c. R. Co.*, 73 Ill. App. 261.

See, also, Cleveland &c. R. Co. v. Klee, 154 Ind. 430.

Engineer was not negligent in keeping his speed, where a boy of about nine was six or eight feet from the track giving no sign of any intention to cross until the train was almost upon him, the gates being down and the bell ringing. *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208.

Defendant was negligent in backing an engine against cars and sending them over a crossing which it knew school children were at the time accustomed to use. *Gulf &c. R. Co. v. West*, (Tex. Civ. App.) 36 S. W. Rep. 101.

See, also, *St. Louis &c. R. Co. v. Denty*, 63 Ark. 177; *Mason v. Southern R. Co.*, 58 S. C. 70; *Jones v. Harris*, 186 Pa. St. 469.

Where the danger was very slight and the boy was 13 years old, laborers pushing a car were not negligent in assuming that he would get out of the way without warning. *Galveston &c. R. Co. v. Kieff*, (Tex. Civ. App.) 60 S. W. Rep. 543.

See, also, *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73.

Where defendant was not aware of plaintiff's deafness it was not bound to assume that he would not heed its warnings. *Piskorowski v. Detroit &c. R. Co.*, 121 Mich. 498.

## 5. STATUTES.

While allowing an engine to remain within the limits of a crossing, but not so as to interfere with its use, is not a violation of a statute forbidding obstruction. *Illinois C. R. Co. v. People*, 59 Ill. App. 256; leaving it therein so as to frighten horses, is. *Baltimore &c. R. Co. v. Faith*, 71 Ill. App. 59.

Aside from the statute, willful obstruction for unreasonable time is actionable. *Illinois C. R. Co. v. Commonwealth*, (Ky.) 45 S. W. Rep. 367.

Violation of the statute is *prima facie* negligence. *Todd v. Philadelphia &c. R. Co.*, 201 Pa. St. 558.

But it must be shown that the damage resulted therefrom. *Wabash R. Co. v. Coker*, 81 Ill. App. 660.

Due care is no excuse for violation of a statute. *Chattanooga &c. R. Co. v. Walton*, 105 Tenn. 415.

See, also, *Missouri &c. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; *San Antonio &c. R. Co. v. Bowles*, 88 Tex. 634.

Ordinance requiring lights at city crossings held reasonable. *Cincinnati &c. R. Co. v. Bowling Green*, 57 Oh. St. 336; s. c., 41 L. R. A. 422.

See, also, *Cleveland &c. R. Co. v. Bernard*, 15 Oh. C. C. 588.

Ordinance requiring constant ringing of bell and reduction of speed within city limits held reasonable, though the state statute happens to be less onerous. *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297; *Washington &c. R. Co. v. Lacey*, 94 Va. 460.

## (c). ON THE PART OF THE TRAVELLER.\*

1. DUTY TO LOOK AND LISTEN.
2. PLACE TO LOOK AND LISTEN.
3. NECESSITY OF STOPPING.

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\* NOTE.—As to the bearing of speed, signals and flagmen on the degree of care required, see those headings, *post*.

4. OBSTRUCTED SIGHT AND HEARING.
5. CARE WHILE CROSSING.
6. OBSTRUCTED CROSSING.
7. CARE OF ANIMALS.
8. KNOWLEDGE OF DANGER.
9. AGED, INFANT AND INFIRM.
10. ACTING IN AN EMERGENCY.

# 1. DUTY TO LOOK AND LISTEN.

A traveler, before crossing a railroad track, must use the care that a man of ordinary prudence would employ under the circumstances, and especially must he, with vigilance, look in both directions and listen, to discover the approach of a train. Nothing will modify an active and vigorous observance of this rule unless, (1) the traveler be assured a safe crossing by some act of the railway company or its servant, or (2) the obstructions be such as to render looking useless, or (3) the traveler's capacity to use such means of discovering the danger be impaired or destroyed by the circumstances that surround him, or (4) the mental or physical incapacity of the traveler to use the full requisite care, as in the case of infants and defective and aged people, permit a lower degree of vigilance.

Where the evidence necessitates the inference that the traveler, *by the use of the care due from him*, must or should have discovered an approaching train had he actually used such care, he will be deemed to have been negligent.

One driving in a highway across a railroad is guilty of negligence fatal to an action, if he does so without looking for a train which he would have seen, or listening for signals of its approach which he would have heard, in time to have avoided a collision, had he used proper care.

It is also such negligence in one knowing the position of the railroad and the frequent passage of trains, to approach the crossing at such speed, as to be unable to stop his horses before actually getting upon the track. It is error to refuse so to charge, without the qualification, that the defendant must have used proper precautions to notify travelers of the approach of a train. *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, rev'g judg't for pl'ff.

Where deceased was killed in attempting to cross the railroad track within the limits of the public highway, and at a public crossing, if it appear, that deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it will be presumed, that he did not look; and, by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery. Nonsuit should have been granted. *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358, rev'g judg't for pl'ff.

If the injured party, by looking up the track, in the direction of the approaching train, could have seen it, in time to avoid the injury, his omission to do so was negligence, and the refusal of the court thus to instruct the jury was error. *Grippen v. N. Y. C. R. Co.*, 40 N. Y. 34, rev'g judg't for pl'ff.

The caution required of a traveler approaching a crossing is proportioned to the known danger and limited, in a measure, by usual and ordinary signals and evidences of danger. He must look in every direction from which danger may be apprehended and listen for signals of approaching trains. *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451; s. c., 61 id. 587.

A servant, riding with his master, was killed at a crossing. The master testified that he (master) looked both ways and saw no train and the view of the track was intercepted. The defendant gave evidence to the effect that 160 feet from the track the train could be seen for some distance. Contributory negligence was for the jury. It does not necessarily follow that, because a skilled civil engineer can show that the train could be seen from a certain point, that the plaintiff was negligent in not seeing it. *Mossoth v. D. & H. C. Co.*, 61 N. Y. 524, aff'g 6 Hun. 314, and judg't for pl'ff.

There were obstacles intercepting the view of the track from the highway, upon which the deceased was approaching the crossing; and "S.," the employer of the deceased, who was in the wagon with him and was driving, testified that he looked in both directions and did not see the approaching train, which was moving very rapidly. Defendant's testimony tended to show, that from a point on the highway, 150 or 160 feet from the track, a train could have been seen for some distance.

Defendant's counsel requested the court to charge that there being no evidence affirmatively showing that the deceased either looked or listened or did anything to guard against the dangers of the crossing, it was to be presumed that he did not look and was negligent. The request was refused. Held, no error; that the presumption was simply one of fact, and that the question of contributory negligence was properly left to the jury. *Massoth v. Prest. D. & H. Co.*, 64 N. Y. 524, aff'g judg't for pl'ff.

If one injured at a crossing had full chance to see and did not, he is guilty of contributory negligence. *Mitchell v. N. Y. C. & H. R. R. Co.*, 64 N. Y. 655; affirming 2 Hun. 535.

The rule that a traveler must look and listen at a crossing is not inflexibly applied in all cases, regardless of age or other circumstances.

Held, that it was for the jury to determine, whether it was negligent to back an engine, with a tank so piled with coal as to obstruct the

engineer's view, over a busy and dangerous crossing; and whether the flagman was negligent in not giving warning; that a boy of eight years was not *per se* negligent in not looking towards the approaching engine. *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417.

Plaintiff's testimony was to the effect that the deceased approached the crossing, sitting sideways on his load at a slow trot until within twenty-five or thirty feet, when apparently hearing some noise, he looked northerly along the tracks and then turned and looked southerly from which direction the train was approaching, then tried to stop his team and jumped from his load, was struck by the train and killed. The rumbling of the train was distinctly to be heard from a point 1,200 feet distant. The day was cold, and the ears of the deceased were covered up. The train, which was a regular one, was behind time.

Deceased was careless in not seeing or hearing, and stopping until it passed, or he saw it, and instead of stopping, tried to pass in front of it. In either contingency, he was guilty of negligence. No recovery. *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 213, rev'g 13 Hun. 187, and judg't for pl'ff; s. c., 59 N. Y. 631.

The plaintiff, driving with the top of his wagon up, stopped his horses at or near a signboard to look for a train and saw nothing. He could see fifty rods to the east; he went on, still looking and listening. There was no train due and he was familiar with the railway's operation. He was struck by a train.

The failure of the plaintiff to let down his buggy top when he started up, was not, as matter of law, negligent. For the jury. *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; reversing 7 Hun. 559, and nonsuit; distinguishing *McCall v. N. Y. C. & H. R. Co.*, 54 N. Y. 642.

The court charged that the plaintiff was not bound to see a train approaching a crossing, but was bound to make all reasonable effort to see, that a careful and prudent man would make, and it declined to charge that, if the plaintiff could have seen the cars, his failure to do so was negligent. No error. *Shaw v. Jewett*, 86 N. Y. 616.

If a traveler, without fault, does not hear a train, and a proper signal is not given, the defendant is liable although a horse does hear the train and gets beyond the driver's control, and, through fright, carries him on the track. *Cosgrove v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 88; reversing 13 Hun. 329, and nonsuit.

In the absence of evidence the jury can only conclude, that the traveler, approaching a crossing, did not look and listen, when he might have seen and heard the train had he done so.

"S." plaintiff's intestate, was seen going westward toward the defendant's track, upon a street which was crossed by said track. It was a very dark night,



a train having no headlights was approaching from the north on a down grade, without steam and making but little noise; the bell was not rung nor the whistle sounded. Another train was approaching the crossing from the south on another track west of the defendant's; it had a bright headlight, its whistle was sounded and its bell rung, and as it was upon an up grade, the exhaust of the engine made a great noise. Defendant's engine first reached the crossing; a witness standing on the street west of the defendant's track testified that by the aid of the light of a lamp reflected along the street, he saw the form of a man approaching the track, who turned toward the south as he came near the track, when the view was cut off by the approaching train. "S." was found after the trains passed, lying near defendant's track, a few feet south of the line of the street, with a wound on the left side of his head which caused his death.

The evidence authorized the submission to the jury of the question of negligence on defendant's part, and contributory negligence on the part of "S."; the evidence did not show conclusively that "S." was south of the southerly line of the street when struck by the engine; it was not to be assumed that he did not look or listen for a train on defendant's road, as the evidence tended to show that he could neither have seen nor heard the train approaching thereon, and that his attention was necessarily given to the other train. *Smedis v. B'klyn & R. B. R. Co.*, 88 N. Y. 13; affirming 23 Hun. 279, and judg't for pl'ff.

A person, before crossing a railway at dusk, would, had he looked, have seen the train that injured him, although it had no headlight; hence, he was guilty of negligence in not looking. The evidence was, at least as consistent with negligence as care, and said to be, almost, if not quite conclusive of plaintiff's negligence. *Becht v. Corbin*, 92 N. Y. 658.

Lack of contributory negligence may be inferred from the surrounding circumstances, indicating that an accident might have occurred without negligence of the injured one; but, if the cause of the accident is not consistent with the existence of proper care by the plaintiff, there can be no recovery. A person, on a dark and misty night, was killed at a crossing, where there was nothing to prevent the timely discovery of the headlight of an approaching train, and no recovery was allowed. *Tolman v. S. B. & C. R. R. Co.*, 98 N. Y. 198, reversing 31 Hun. 397.

While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. Whether the deceased looked just at the right moment was for the jury. *Greany v. The L. I. R. Co.*, 101 N. Y. 419.

The plaintiff approached the crossing at the rate of ten miles per hour. There was a strong wind and the snow was falling fast. The plaintiff was acquainted with the crossing and the frequency of the

trains. The plaintiff was negligent. *Powell v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 613; affirming 22 Hun, 56.

Inference that a person killed at a crossing was not negligent does not arise from the presumption, that a person exposed to danger will use care and prudence. Where the circumstances point as much to the negligence of the deceased as to its absence, a nonsuit should be granted. (*Cordell v. N. Y. C. & H. R. Co.*, 75 N. Y. 330; *Hoag v. N. Y. C. & H. R. Co.*, 111 id. 199; *Bond v. Smith*, 113 id. 318.) The fact that another person in company with the deceased looked and listened but did not hear or see the approaching train does not establish that the deceased would also have failed to hear it, had he looked and listened.

The first track, to which the deceased came, was twenty feet from the street and obstructed by standing cars, but such track was fifty feet distant from one on which the accident occurred, and the track for such a distance could be seen a long distance away. The night was dark and lights were burning in the caboose by which he was struck. The deceased was negligent. *Wiwrowski v. L. S. & M. S. R. Co.*, 124 N. Y. 420, reversing 58 Hun, 40.

The deceased was approaching a double track railroad, and was familiar with the location. A train was passing from the south as he approached, and the flagman shouted to him that one was coming from the north, but, being deaf, he did not hear. The locomotive from the north either had no lighted headlight, or it was practically invisible, but if "D." had looked to the north after crossing the track he would have seen the approaching engine, which struck him.

There was no inference that the absence of the headlight contributed to the accident. The absence of contributory negligence was not shown. *Daniels v. S. I. R. T. R. Co.*, 125 N. Y. 407.

A pedestrian before crossing a railroad track, must, in the absence of circumstances excusing it, look in each direction, and he may not omit this in reliance upon the duty of the railroad company to give reasonable notice of the approach of the train. If the evidence justify opposing inferences respecting the traveler's negligence, the question is for the jury. If the traveler did look for trains, he is not necessarily remediless, because he did not look at the most advantageous time and place. The presence of other dangers, as the raising of the gates at the crossing, giving the assurance that the crossing is safe, and similar circumstances, may be considered in determining whether the traveler discharged his duty. Where a traveler was killed, the rules of law governing recovery are not changed, but slighter evidence of compliance with the duty placed upon a traveler may be sufficient to uphold recovery. *Codrian v. N. Y. & H. R. Co.*, 125 N. Y. 526; rev'g judgment for pl'ff.

"R.," acquainted with the railway crossing, approached with a small shawl tied or bound over her head and ears. The evidence was that, she appeared to be looking directly in front of her, and there was no evidence that she looked or listened, and the track was free from obstruction for seven hundred feet from a point eight feet from the track where she was killed.

Although "R.'s" attention may have been attracted by a freight train going in the opposite direction, she should have looked both ways before going upon the track. *Codrian v. N. Y., N. H. & H. R. Co.*, 125 N. Y. 526, rev'g judg't for pl'ff.

The plaintiff turned down a lane leading from his premises to the railroad track and trotted his horses to and upon the track where he was struck by a train. The day was clear, and at any point within twenty-five feet of the track he could have seen the train for one-half mile away.

The plaintiff was guilty of contributory negligence. *Cash v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 115, rev'g judg't for pl'ff.

The omission to look both up and down a railroad track before attempting to cross it, is such negligence as prevents a recovery against the railroad company in case of accident.

It is no excuse if the precaution is neglected until too late to avoid an approaching train.

The time was near at hand for the passing of this train, and the plaintiff might have seen it, if she had looked before going on the track. This would have been in season to avert the disaster; and as she failed to take this necessary precaution, but one conclusion can be drawn, and that is, that negligence is established. *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 37. That the plaintiff neither saw nor heard the train is inexplicable. *Haight v. N. Y. Central R. Co.*, 1 Lansing, 11.

Where a healthy milkman in a covered wagon was crossing defendant's railway at 6:30 A. M. in January, at a familiar point, free from obstruction, and was struck by a train, whose approach could be seen, and was heard by others, there was no proof of absence of contributory negligence. *Glendening v. Sharp*, 22 Hun, 18.

Twenty-six feet away from the crossing, plaintiff could have seen defendant's train one hundred and thirty to one hundred and seventy feet away which struck his horse just as he was going on the track.

Plaintiff was negligent. *Bombay v. N. Y. C. & H. R. R. Co.*, 41 Hun, 425, rev'g judg't for pl'ff.

Where the demonstration cannot be made absolutely certain, that a traveler approaching a crossing would have seen a train had he looked for the same, but is based upon calculations of the speed of the train and the estimated speed of the decedent's team, when approaching the point

of collision, the question of contributory negligence should not be withdrawn from the jury. *Puff v. Lehigh Valley R. Co.*, 71 Hun, 577.

The plaintiff, driving an uncovered buggy, while some distance from a railroad crossing observed two freight trains upon the track furthest from her. She stopped between 150 and 250 feet from the nearest track. After the freight trains went by on the furthest track, the plaintiff testified that everything was all clear as far as she could see; that she listened for a minute or two, and looked both ways to see if any trains were coming. There was no sound given, no bell rung or whistle blown. She started up her horse, which was going on a slow walk, and under her control. While she was approaching the first track she looked up and down and did not hear any warning, and was struck and injured by a train which was going at the rate of forty miles an hour.

It was also shown upon the trial that, sitting in a buggy twenty-five feet from the railroad crossing, the tracks could be seen 1,100 feet; fifty feet away they could be seen for a distance of 1,300 feet, and at a distance of 100 feet from the tracks they could be seen for a distance of 180 feet, and that standing on the crossing the tracks were clear to the eye-sight to a whistling post, 1,300 feet away.

Nonsuit was improperly denied. *Stopp v. Fitchburg R. Co.*, 80 Hun, 118.

Where a person was driving very fast and was injured by a train at a street crossing, a nonsuit was affirmed. *Crandall v. Lehigh Valley R. Co.*, 72 Hun, 431; aff'g nonsuit; s. c. aff'd, 151 N. Y. 642.

Citing *Powell v. N. Y. C. & E. R. R. Co.*, 109 N. Y. 613; *Martin v. N. Y. C. & E. R. R. Co.*, 50 N. Y. S. Repr. 553.

Where a train was in plain sight and a person attempted to cross the track, although it appear that such person apparently looked but did not see the train, although he could have seen and avoided it had he used his eyes, it was held that he did not do what he appeared to do, as there must be some evidence tending to show that the deceased not only turned his head to look, but used his eyes for that purpose. A charge which casts the burden upon the defendant of showing that the injured person did not look is error, and hence a charge "that unless they find that the deceased did not look for the train, the plaintiff is entitled to recover" is erroneous. *Burke v. N. Y. Cent. & E. R. Co.*, 73 Hun, 32, rev'g judgt for pl'ff.

When a man in broad daylight gets in front of a train of cars, whose approach is visible to him from several points upon the highway over which he approached the railroad, and is run over and killed, the conclusion, in the absence of explanatory evidence, is irresistible that his being run over and killed were the result of gross carelessness upon his

part. *Von Ritzinger v. The N. Y. C. & H. R. R. Co.*, 83 Hun, 120.

That driver looks and listens does not absolve the party himself from so doing. *Durkee v. Delaware &c. R. Co.*, 88 Hun, 411.

Where there is no evidence to contradict deceased's statement that she looked both ways before crossing, the question of contributory negligence in failing to see it, was for the jury. *Seeley v. New York &c. R. Co.*, 8 App. Div. 402.

A railway crossing, in itself a warning of danger, charges the traveler with the duty of looking and listening and he is presumed to know what the exercise of ordinary care in that respect would have discovered. *Comby v. New York &c. R. Co.*, 25 App. Div. 309; *Hennessey v. Northern C. R. Co.*, 11 id. 162; *Bremiller v. Buffalo &c. R. Co.*, 90 Hun, 226.

See, also, *Spradley v. Alabama M. R. Co.*, 110 Ala. 687; *Central &c. R. Co. v. Foshee*, 125 id. 199; *Gothard v. Alabama R. Co.*, 67 id. 114; *Highland &c. R. Co. v. Feunnell*, 111 Ala. 356; *Martin v. Little Rock &c. R. Co.*, 62 Ark. 156; *Little Rock &c. R. Co. v. Blewitt*, 65 id. 235; *Glascock v. Central P. R. Co.*, 73 Cal. 137; *Herbert v. Southern P. R. Co.*, 121 id. 227; *Peck v. New York &c. R. Co.*, 50 Conn. 379; *Knopp v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Cowen v. Merriman*, 17 App. D. C. 186; *Chicago &c. R. Co. v. Bell*, 70 Ill. 102; *Illinois C. R. Co. v. Borders*, 61 Ill. App. 55; *Chicago &c. R. Co. v. Reoth*, 65 id. 461; id. v. *Fell*, 71 id. 89; id. v. *Patrick*, id. 632; *Pennsylvania Co. v. Reidy*, 72 id. 343; *Lake Shore &c. R. Co. v. Foster*, 74 id. 387; *Theobald v. Chicago &c. R. Co.*, 75 id. 208; *Illinois C. R. Co. v. Batson*, 81 id. 142; *Cleveland &c. R. Co. v. Oliver*, 83 id. 64; *Wabash R. Co. v. Jenkins*, 84 id. 511; *Illinois C. R. Co. v. Farrell*, 86 id. 436; *Wabash R. Co. v. Smillie*, 97 id. 7; *Cleveland &c. R. Co. v. Miller*, 149 Ind. 490; *Pittsburg &c. R. Co. v. Frazee*, 150 id. 576; *Chicago &c. R. Co. v. Thomas*, 155 id. 634; *Morford v. Chicago &c. R. Co.*, (Ind.) 63 N. E. Rep. 837; *Chicago &c. R. Co. v. Reed*, id. 878; *Cleveland &c. R. Co. v. Coffman*, 64 id. 233; *Ring v. Chicago &c. R. Co.*, (Iowa) 75 N. W. Rep. 192; *Crawford v. Chicago &c. R. Co.*, 109 Iowa, 433; *Lawrence v. Atchison &c. R. Co.*, 57 Kan. 585; *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323; *State v. Boston &c. R. Co.*, 80 Me. 45; *State v. Maine &c. R. Co.*, 76 id. 357; *Baltimore R. Co. v. State*, 54 Md. 648; *State v. Baltimore R. Co.*, 58 id. 482; *Tully v. Fitchburg R. Co.*, 134 Mass. 40; *Walsh v. Boston &c. R. Co.*, 171 id. 52; *Emery v. Boston &c. R. Co.*, 173 id. 136; *Haas v. Grand Rapids R. Co.*, 47 Mich. 401; *Wyoming v. Detroit R. Co.*, 64 id. 93; *Bannister v. Lake Shore &c. R. Co.*, 113 id. 530; *Bond v. id.* 117 id. 652; *Stewart v. Michigan &c. R. Co.*, 119 id. 91; *Smith v. Minneapolis &c. R. Co.*, 26 Minn. 419; *Judson v. Great Northern R. Co.*, 63 id. 248; *Buran v. Great Northern R. Co.*, 67 id. 434; *Purl v. St. Louis &c. R. Co.*, 72 Mo. 168; *Kelley v. Hannibal &c. R. Co.*, 75 id. 138; *Powell v. Missouri P. R. Co.*, 76 id. 80; *Taylor v. Missouri R. Co.*, 86 id. 457; *Lien v. Chicago &c. R. Co.*, 79 Mo. App. 475; *Omaha &c. R. Co. v. Talbot*, 48 Neb. 627; *Chicago &c. R. Co. v. Featherly*, (Neb.) 89 N. W. Rep. 792; *Gahagan v. Boston &c. R. Co.*, 70 N. H. 441; s. c., 55 L. R. A. 426; *Waldron v. Boston &c. R. Co.*, (N. H.) 52 Atl. 433; *Dotty v. Atlantic City R. Co.*, 64 N. J. L. 710; *Lake Shore &c. R. Co. v. Reynolds*, 23 Oh. C. C. 199; *Baltimore &c. R. Co. v. Stoltz*, 18 id. 93; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *Gleim v. Harris*, 181 id. 587; *Hess v. Williamsport &c. R. Co.*, 181 id.

492; *Fox v. Pennsylvania R. Co.*, 195 id. 538; *Baker v. id.* 182 id. 336; *Born v. Philadelphia &c. R. Co.*, 198 id. 409; *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 47 S. W. Rep. 59; *id. v. Knipstein*, 55 id. 754; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Gulf &c. R. Co. v. Merchand*, 24 id. 47; *Schofield v. Chicago &c. R. Co.*, 2 McCrary, 268; *Mobile &c. R. Co. v. Coever*, 112 Fed. Rep. 489; *Kallmerton v. Cowen*, 111 id. 297; *McVey v. Chesapeake &c. R. Co.*, 46 W. Va. 111; *Steinhofel v. Chicago &c. R. Co.*, 92 Wis. 123; *Groesbeck v. Chicago &c. R. Co.*, 93 id. 505; *Lenz v. Whitcomb*, 96 id. 310; *White v. Chicago &c. R. Co.*, 102 id. 489; *Walters v. Chicago &c. R. Co.*, 104 id. 251; *Brown v. Chicago &c. R. Co.*, 109 id. 384.

Ordinary care is all that is required. *Wiedman v. Erie R. Co.*, 66 App. Div. 341.

See, also, *Baker v. Kansas City &c. R. Co.*, 147 Mo. 140.

Where one sense is defective or obscured, more care must be exercised with the other. *Chicago &c. R. Co. v. Pounds*, 82 Fed. Rep. 217.

See, also, *Atchison &c. R. Co. v. Willey*, 60 Kan. 819; *Phillip v. Detroit &c. R. Co.*, 111 Mich. 274; *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; *Gunn v. Wisconsin &c. R. Co.*, 70 Wis. 203; *Seefeld v. Chicago &c. R. Co.*, id. 216; *Houston &c. R. Co. v. Richards*, 59 Tex. 373.

A traveler may not assume that no train will follow another within the margin of a minute. *Baltimore &c. R. Co. v. Talmage*, 15 Ind. App. 203.

Traveler is not warranted in relying on the fact that by schedule time the train should have passed, as trains may be late. *Tucker v. Chicago &c. R. Co.*, 122 Mich. 149.

See *Payne v. Chicago N. W. R. Co.*, 108 Iowa, 188; *Vincent v. Morgan's &c. R. Co.*, 48 La. Ann. 933; *Guhl v. Whitcomb*, 109 Wis. 69.

Plaintiff need not look out for hand cars at night, which were generally prohibited, where he uses due care in looking for trains. *Mott v. Detroit &c. R. Co.*, 120 Mich. 121.

Plaintiff was not negligent in failing to stop, look and listen where he relies on the rule of the company that a train shall stop before reaching a station at which another is standing receiving and discharging passengers. *Betts v. Lehigh Valley R. Co.*, 191 Pa. St. 515; s. c., 45 L. R. A. 261.

Or on the customary permission of a conductor to allow him to cross after the train passed and before it repassed. *Bradley v. Ohio &c. R. Co.*, 126 N. C. 735.

As to reliance on a custom as well as the rules of a company not to make flying switches, see *International &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 996.

As to defendant's failure to follow a custom of having a flagman precede a backing train. *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370.

A footman is not bound to stop, look and listen as persons in wagons

are bound to do. *Zimmerman v. Hannibal &c. R. Co.*, 71 Mo. 476; *Drain v. St. Louis &c. R. Co.*, 10 Mo. App. 531; *Henz v. R. Co.*, 71 Mo. 636; *Turner v. R. Co.*, 74 id. 602; *Hixon v. St. Louis &c. R. Co.*, 80 id. 335.

One cannot rely on the driver's looking and listening. *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640.

See, also, *Smith v. Maine C. R. Co.*, 87 Me. 339; *Toledo &c. R. Co. v. Estherton*, 22 Oh. C. C. 297.

But where the driver stops the passenger may assume that he will exercise ordinary care in that respect and is not chargeable with his negligence. *Pyle v. Clark*, 75 Fed. Rep. 644.\*

Plaintiff failed to see a train approaching in the night and during a storm of rain and sleet, though on a clear day it could have been clearly seen. His negligence was for the jury. *Pennsylvania R. Co. v. Miller*, 99 Fed. Rep. 529.

Although defendant be negligent, traveler must look, otherwise no recovery. *Schofield v. Chicago &c. R. Co.*, 114 U. S. 615.

*R. Co. v. Houston*, 95 U. S. 697; *Pence v. Chicago &c. R. Co.*, 63 Iowa 746; *Schaefer v. Chicago &c. R. Co.*, 62 id. 624; *Laverenz v. Chicago &c. R. Co.*, 56 id. 689; *Artz v. Chicago &c. R. Co.*, 34 id. 276; *Dodge v. B. C. &c. R. Co.*, id. 276; *Union Pac. R. Co. v. Adams*, 33 Kas. 427; *Lesah v. Maine &c. R. Co.*, 77 Me. 85; *State v. Maine &c. R. Co.*, 76 id. 357; *Grows v. Maine &c. R. Co.*, 67 id. 104; *Ayers v. Norfolk &c. Co.*, (Va.) 27 S. E. Rep. 582; *Mesic v. Atlantic &c. R. Co.*, 120 N. C. 489.

## 2. PLACE TO LOOK AND LISTEN.

To cross a track, after reaching it, without looking, is contributory negligence, and it is error to charge the jury to that effect, but with the qualification that, if the deceased acted with ordinary prudence and due care, there being but four seconds of time to cross, the jury might find for the plaintiff. *Hewett v. N. Y. C. R. R. Co.*, 3 Lansing, 83.

*Grippen v. N. Y. Central R. Co.*, 40 N. Y. 37.

The defendant's counsel requested the court to charge, "that a person, who attempts to cross a railroad track, is required to make vigilant use of his eyes and ears in looking and listening to ascertain whether a train is approaching, and if he does not do so, he is guilty of negligence." The court declined so to charge, and charged instead, "that the omission to use eyes and ears is negligence." Held, that it was error to refuse to charge as requested, (*Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451); that the refusal to charge, that the plaintiff was bound to make a "vigilant" use of his senses, to ascertain if there were any signs of the approaching train, was calculated to mislead the jury into the belief that no special vigilance was required.

\* NOTE.—See, also, "Contributory Negligence," *ante*, p. 656.

The defendant's counsel also requested the court to charge, that if the plaintiff was guilty of any fault or negligence whatever, which in any manner contributed to his injury, he could not recover. The court refused so to charge, but charged that, if the plaintiff was guilty of negligence he could not recover. Held, that the refusal to charge as requested was error: that the refusal might induce the jury to believe, that although the plaintiff had been guilty of a "fault," which immediately conduced to the injury, yet, if the fault did not consist of mere negligence, then the plaintiff would be entitled to recover. *Bunn v. D., L. & W. R. Co.*, 6 Hun, 303.

The fact that one can testify that he saw the deceased look both ways and listen, before attempting to cross the railroad tracks on which she was killed, does not necessarily show that she did not do her duty in that regard, and if the facts and surrounding circumstances shown are such as to reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of the deceased, the question of contributory negligence is to be determined by the jury, although there were no eye witnesses to the accident.

It cannot be said, as a matter of law, at what particular point before reaching the railroad tracks the deceased should have looked for an approaching train. *Pitts v. N. Y., L. E. & W. R. Co.*, 79 Hun, 546: s. c. aff'd, 152 N. Y. 623.

The duty of looking and listening when one approaches a crossing of many railroad tracks is not adequately discharged by merely looking as the dangerous point is approached, and then, when it is absolutely reached, going blindly forward. *Fowler v. N. Y. Cent. & H. R. R. Co.*, 74 Hun, 141: s. c. aff'd, 147 N. Y. 717.

Deceased was negligent in crossing without looking where he could have seen the train anywhere within the last 45 feet of his approach to the track. *Collins v. New York &c. R. Co.*, 92 Hun, 563: s. c. aff'd, 154 N. Y. 570.

Deceased's failure to look for the approach of a train during his approach of 22 feet, was negligence. *Henarie v. New York &c. R. Co.*, 10 App. Div. 61.

The traveler must look and listen at such a distance from the crossing as will enable him to cross in reasonable safety before a train at ordinary speed can reach the crossing or traverse the distance commanded by his view. *New York &c. R. Co. v. Kissler*, (Oh. St.) 64 N. E. Rep. 130.

See, also, *Stoliz v. Baltimore &c. R. Co.*, 7 Oh. Dec. 435.

He is not bound to look where it would be useless to do so. *Goodell v. New York &c. R. Co.*, 67 App. Div. 271.

See, also, *Haupt v. New York &c. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594;



Chicago &c. R. Co. v. Hansen, 166 Ill. 623; Cleveland &c. R. Co. v. Bruce, 63 Ill. App. 233; Louisville &c. R. Co. v. Patchen, 66 id. 206; Atchison &c. R. Co. v. Powers, 58 Kan. 544; Dalwigh v. International &c. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 1009; Southern R. Co. v. Bryant, 95 Va. 212.

But he must use ordinary care to take advantage of an opportunity to look, where it will be reasonably effective. *Conckling v. Erie R. Co.*, 63 N. J. L. 338.

See, also, *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308; *Winter v. New York &c. R. Co.*, 66 N. J. L. 677; *Nelson v. St. Paul &c. R. Co.*, 76 Minn. 189; *Sandberg v. St. Paul &c. R. Co.*, 80 id. 442; *Nolan v. Central R. &c. Co.*, 67 N. J. L. 124; *Scott v. Wilmington R. Co.*, 96 N. C. 428; *Hecker v. Oregon R. Co.*, (Or.) 66 Pac. Rep. 270.

And looking once, at a distance from the crossing, will not excuse him from using ordinary care to look again before crossing, if opportunity offers. *Atchison &c. R. Co. v. Holland*, 60 Kan. 209.

As where the view is clear within 25 to 50 feet of the crossing. *Tucker v. Chicago &c. R. Co.*, 122 Mich. 149.

See, also, *Engler v. Ohio &c. R. Co.*, 142 Ind. 618; *Aurelius v. Lake Erie &c. R. Co.*, 19 Ind. App. 584; *Louisville &c. R. Co. v. Survant*, (Ky.) 44 S. W. Rep. 88; *Brandy v. Detroit &c. R. Co.*, 107 Mich. 100; *Vreeland v. Cincinnati &c. R. Co.*, 69 id. 585; *Huggard v. Missouri P. R. Co.*, 134 Mo. 673; *Jones v. Barnard*, 63 Mo. App. 501; *Hunter v. Montana &c. R. Co.*, 22 Mont. 525; *Cantrell v. Erie R. Co.*, 64 N. J. L. 277; *Baltimore &c. R. Co. v. McPeck*, 16 Oh. C. C. 87; *Koester v. Toledo &c. R. Co.*, 20 id. 475; *Hartman v. Harris*, 182 Pa. St. 172; *Mann v. Philadelphia &c. R. Co.*, 1 Daulph. Co. Rep. (Pa.) 51; *McCanna v. New England R. Co.*, 20 R. I. 439; *Gulf &c. R. Co. v. Younger*, (Tex. Civ. App.) 40 S. W. Rep. 423; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Pyle v. Clark*, 75 Fed. Rep. 644; *Chicago &c. R. Co. v. Pounds*, 82 id. 217; *Gilbert v. Erie R. Co.*, 97 id. 747; *Neninger v. Cowan*, 101 id. 787; *Washington &c. R. Co. v. Lacey*, 94 Va. 460; *Koester v. Chicago &c. R. Co.*, 106 Wis. 460.

A pedestrian was not *per se* negligent in failing to look again in a direction in which he had looked when three feet from the track and from which point he could see 105 feet. *Manley v. New York &c. R. Co.*, 18 Misc. 502.

Traveler's negligence was for the jury where he trotted his team to within a rod of the track without stopping or listening. *Eilert v. Green Bay &c. R. Co.*, 48 Wis. 606.

*Urbanek v. Chicago &c. R. Co.*, 47 Wis. 59; *Bohan v. Milwaukee &c. R. Co.*, 58 id. 30; *Hoey v. C. R. Co.*, 67 id. 1; *Roberts v. Chicago &c. R. Co.*, 35 id. 679.

### 3. NECESSITY OF STOPPING.

A traveler upon the highway, in approaching a railroad crossing, is required to make a vigilant use of his eyes and ears, to ascertain if there is an approaching train; and if by such use of these faculties, while approaching, the vicinity of such train may be discovered in time to avoid

a collision, the omission to exercise them is such contributory negligence as will bar a recovery for an injury sustained by a collision.

This rule does not require the traveler to stop, or if he is with a team, to get out and leave his vehicle and go to the track, or stand up and go upon the track in that position, in order to obtain a better view. For jury. *Davis v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 400, rev'g nonsuit.

Failure to stop before crossing a track is not negligence as matter of law, but is a fact for the consideration of the jury. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 32 App. Div. 627.

See, also, *Judson v. Central & E. R. Co.*, 158 N. Y. 597; *Neudoeffer v. Brooklyn & E. R. Co.*, 9 App. Div. 66; rev'g s. c., 91 Hun, 1; *Malott v. Hawkins*, (Ind.) 62 N. W. Rep. 308; *Illinois C. R. Co. v. Mizell*, 100 Ky. 235; *Cincinnati & E. R. Co. v. Wright*, (Ky.) 34 S. W. Rep. 526; *Maryland & E. R. Co. v. Newbner*, 62 Md. 391; *Bunting v. Central & E. R. Co.*, 14 Nev. 351; *Galveston & E. R. Co. v. Huebner*, (Tex. Civ. App.) 42 S. W. Rep. 1021; *Manley v. Delaware & E. Canal Co.*, 69 Vt. 101.

Failure to stop was not negligence, where it did not appear but that a pedestrian would have had ample time to cross if he had not caught his foot. *Baltimore & E. R. Co. v. Keck*, 185 Ill. 400; aff'g s. c., 84 Ill. App. 159.

Or where, though he did not stop or look a second time, he continued to listen attentively. *Moore v. Chicago & E. R. Co.*, 102 Iowa, 595.

It was for the jury to say whether boy should have left his horse to go to track and look for approaching train. *Huckshold v. St. Louis & E. R. Co.*, 90 Mo. 548.

*Vickey v. Missouri & E. R. Co.*, 7 Mo. App. 150; *Kennedy v. North Missouri & E. R. Co.*, 36 Mo. 351; *Petty v. Hannibal & E. R. Co.*, 88 id. 306; *Pittsburg & E. R. Co. v. Wright*, 80 Ind. 236. See, however, *Penn. R. Co. v. Beale*, 73 Penn. St. 504.

But in some jurisdictions, failure to stop, look and listen is negligence *per se*. *Reading & E. R. Co. v. Ritchie*, 102 Pa. St. 425.

*Central R. Co. v. Feller*, 84 Pa. St. 226; *Penn. R. Co. v. Weber*, 76 id. 157; *Gerety v. Philadelphia & E. R. Co.*, 81 id. 274; *Penn. R. Co. v. Beale*, 73 id. 504; *Allen v. Penn. R. Co.*, 11 Cent. (Pa.) 207; *Seamans v. Delaware & E. R. Co.*, 174 Pa. St. 421; *Sullivan v. New York & E. R. Co.*, 175 Pa. St. 361; *Decker v. Lehigh Valley R. Co.*, 181 Pa. St. 465; *Coppuck v. Philadelphia & E. R. Co.*, 191 Pa. St. 172; *Wojochoski v. Central R. Co.*, 10 Pa. Super. Ct. 469.

And this duty is not discharged by circling around on a bicycle instead of dismounting. *Robertson v. Pennsylvania R. Co.*, 180 Pa. St. 43.

Nor by stopping twice, when the train could have been seen by stopping a third time within a few feet of the track. *Baker v. Pennsylvania R. Co.*, 15 Lane. L. Rev. (Pa.) 35.

## 4. OBSTRUCTED SIGHT AND HEARING.

If the view be interrupted to one approaching the track, there is greater reason for care on his part. If, in trying to pass before a train, he tries the question of speed with the train, he does so at his peril.

"W." drove his horses upon a railroad, where it crossed a street, without giving any heed to the signals made, or to the track, until he came very near it, and then seeing a train approaching, he attempted to cross the track in front of the engine, whipping his horses for that purpose, which became restive and uncontrollable, and a collision ensued, by which "W." was killed.

No action lay against the company. (*Spencer v. Utica & Schenectady R. Co.*, 5 Barb. 331; *Stevens v. Oswego & Syracuse R. Co.*, 18 N. Y. 422.) *Wilds v. H. R. R. Co.*, 29 N. Y. 315, aff'g nonsuit.

A girl of sixteen years was crossing the tracks, and had crossed the second and stood between the second and third tracks, waiting for a train to pass in front of her; an engine came on the second track, without warning and struck her. Contributory negligence was for the jury. *Hagercroft v. L. S. & M. S. R. Co.*, 64 N. Y. 636; affirming 2 Hun, 489.

It is not *per se* negligent for a traveler, when the view of the track is interrupted, not to stop his horses and go forward and look, but it is a question for the jury.

Plaintiff and others, who were riding upon a truck with him, looked and listened for the usual signals and evidences of danger, as they approached the crossing, but neither saw nor heard any; obstructions by buildings and cars standing on tracks, before reaching the one on which the colliding train was approaching prevented plaintiff from seeing it, and other noises prevented hearing it; they looked for the flagman usually stationed at the crossing, but he was absent, and no signal indicated an approaching train. *Dolan v. Prest. &c. D. & H. C. Co.*, 71 N. Y. 285, aff'g judg't for pl'ff.

The deceased approached a double track on which trains from both directions were due. The view to the south was interrupted. The deceased was seen a moment before he was struck looking to the north, from whence the wind was blowing. He was struck by a rapidly moving train from the south.

The railroad track runs north and south, the highway east and west; at the crossing and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track, seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. "C." approached the crossing from the east, in a one-horse wagon. He was driving at a very slow trot with one hand, holding a pail in the other;

the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff showed, without ringing a bell. "C." was familiar with the crossing, and with the running of trains; he approached the crossing about the time trains were due both ways; the wind at the time was blowing from the north; "C." was seen a moment before he was struck by the engine looking towards the north.

Negligence of the defendant and contributory negligence of "C." were for the jury. *Kellogg v. N. Y. C. & H. R. R. Co.*, 19 N. Y. 12, ordering judg't for pl'ff.

A young woman approaching a double track, waited for the passage of a train towards the west on the nearest track, and then after looking both ways, proceeded on to the second track, where she was killed by an engine running backwards at a high rate of speed. There was a curve just west of the crossing preventing a full view of the tracks in that direction. There was no bell or whistle, and the usual flagman was absent. One "M." testified that notwithstanding the smoke from the passing train, he saw an engine approaching, but it was held that the testimony of "M." was not conclusive evidence, that the deceased could also see and hear, and also that she had a right to rely upon the absence of the usual flagman to warn her of danger, and to assume that proper signals would be given, and that engines would not be moved at such a place at such an unusual rate of speed. *McNamara v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 650, aff'g judg't for pl'ff, distinguishing *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

The plaintiff, a girl of fifteen, testified that before stepping upon the track she looked to the west, and no train was in sight from that direction, and then looking to the east, she saw the train about to start from the station, and that waiting for a moment for the train from that direction to pass, she again started to cross, and was struck by a train from the other direction, which, according to the evidence of the other witness, was running at a high rate of speed. She was unfamiliar with the locality, and presumptively in regard to the time of the arrival and departure of trains. Her attention was attracted by the passing train from the east, and her opportunities to see and hear the train from the west were obstructed by the smoke and noise of the bell and engine starting out; under the circumstances the court declined to hold, as matter of law, that she neglected to exercise that degree of care and caution required of a person of her age, situated as she was. *Swift v. S. I. R. T. R. Co.*, 123 N. Y. 645, aff'g judg't for pl'ff.

Upon the trial of this action, brought to recover damages for the negligent killing of the plaintiff's intestate, while crossing the defendant's tracks, the defendant's counsel excepted to so much of the charge as stated

that the deceased "was not bound to look, when looking or gazing would only show him the small amount of seventy feet of the track." To this the court remarked: "I will say he was not bound, as matter of law, to look, unless you find by looking he could have seen the train or heard it or known of its approach." No error. *Cranston v. N. Y. C. & H. R. Co.*, 39 Hun, 308, aff'g judg't for pl'ff.

*Smedes v. Brooklyn &c. R. Co.*, 88 N. Y. 13.

Plaintiff, familiar with *locus in quo*, approached a railway consisting of four tracks and a switch at about ten o'clock at night: he stopped about twenty feet from the first track for a train to go west on the second track, and then went on the first track, and was struck by an east-bound train, carrying a headlight, and going at the rate of twelve miles an hour. From a point within twenty feet, from where he was struck, the view was unobstructed for from three hundred and sixty-five feet to two miles, but the night was dark and hazy and an engine with a headlight stood near the crossing and there were several switch lights in the vicinity. The train just passed was making considerable noise, and there were several lights in the rear of the caboose. The evidence was conflicting, as to whether a signal was given by the east-bound train. Nonsuit was properly denied. A person with the plaintiff in the above action was killed in the same accident. There was no evidence, as to whether the deceased looked and listened, and his brother, the person described above, looked both ways and said to the decedent "come on," and they went across.

Contributory negligence was for the jury. *Beckwith v. N. Y. C. & H. R. R. Co.*, 54 Hun, 446; s. c. aff'd, 125 N. Y. 159.

Although a traveler cannot, by reason of intervening embankments, see an approaching train before reaching the tracks, yet he is bound, when in a position to see, to look up and down as far as he is able: otherwise he would be negligent. Because a person occasionally sees a flagman at a crossing he may not assume that his absence denotes safety. *Whalen v. N. Y. C. & H. R. R. Co.*, 58 Hun, 431, aff'g nonsuit, distinguishing *Kellogg v. N. Y. Central &c. R. Co.*, 79 N. Y. 12.

The smoke from tugs in a river, near a railroad crossing, so obstructed the view that a traveler did not see an approaching train by which he was injured.

He was negligent in not waiting until the smoke lifted. *Foran v. N. Y. C. & H. R. R. Co.*, 64 Hun, 510; s. c. aff'd, 147 N. Y. 118, citing *Heaney v. Long Island R. Co.*, 112 N. Y. 122.

Where there is a conflict of evidence, as to whether the view of a person crossing a track was obstructed, the question is for the jury. *Petrie v. N. Y. C. & H. R. R. Co.*, 66 Hun, 282.

The driver of a wagon and horses approaching a railroad crossing in

a narrow city street, where the corner buildings came within a few feet of the tracks, must affirmatively establish, that he was alert and vigilant in the use of his eyes and ears, and displayed the prudence required by the situation. *Hoffman v. Fitchburg R. Co.*, 67 Hun. 581, citing *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

A pedestrian not on a highway, but a way commonly used, looked towards the east and saw no train coming: in fact one was coming but was hidden by a sign board with two sides at right angles, each arm being twelve or thirteen feet long.

Defendant's negligence and plaintiff's negligence were for jury. *Austin v. L. I. R. Co.*, 69 Hun. 67; s. c. aff'd, 140 N. Y. 639.

Contributory negligence does not arise from the mere fact, that a traveler attempted to cross a railroad track soon after the passage of a train, which obstructed another train, when such person waited until the first train had so far passed, as to leave tracks unobstructed for a sufficient distance to authorize the jury to find that a person of reasonable caution might believe that the tracks were free. *Puiff v. Lehigh Valley R. Co.*, 71 Hun. 577, distinguishing *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

A person who attempts to cross the tracks of a steam railway, although he observes smoke upon the tracks left by a locomotive which has just passed over the same which prevents him from observing an approaching train, is guilty of such contributory negligence as to preclude a recovery of damages from his death: it is the duty of a person in such a case to await the disappearance of the smoke before attempting to cross the tracks. *Cort v. The N. Y. C. & H. R. R. Co.*, 83 Hun. 271.

Plaintiff was negligent in walking along a high wagon, backed to within three feet of the track so as to obstruct his view, and onto the track in front of an approaching engine. *Kilbride v. New York &c. R. Co.*, 17 App. Div. 177.

Where one's view at a crossing is temporarily obstructed by smoke from a passing train, it becomes his duty to wait till it has cleared away. *Manley v. New York &c. R. Co.*, 18 App. Div. 420.

Looking under such circumstances without so waiting, especially at night does not show diligence. *Fahue v. New York &c. R. Co.*, 18 App. Div. 452.

Plaintiff, who was sitting on the back seat of a wagon upon approaching a crossing at a sharp angle with a child in her arms, looked toward the direction in which the train was coming several times within the 50 or 75 feet, within which the view was unobstructed, and told her husband, who was a competent driver, to look out. She was not *per se* negligent in failing to turn all the way to look, though had she done so she

would have seen the train. *Lewin v. Lehigh Valley R. Co.*, 41 App. Div. 89.

Ordinary care requires greater vigilance at a crossing when sight or hearing is obstructed, as by adjacent structures. *Memphis &c. R. Co. v. Martin*, 117 Ala. 367.

See, also, *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; *Robinette v. Alabama &c. R. Co.*, (Ala.) 31 South. Rep. 18; *Bond v. Lake Shore &c. R. Co.*, 117 Mich. 652; *Baltimore &c. R. Co. v. Stolz*, 18 Oh. C. C. 93; *Blackburn v. Southern R. Co.*, 34 Or. 215.

Or smoke. *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405; s. c., 32 L. R. A. 149; *Hoyenden v. Pennsylvania R. Co.*, 180 Pa. St. 244.

Or a cloud of dust. *Chicago &c. R. Co. v. Pounds*, 82 Fed. Rep. 217.

Or the glare of the sun. *Osborn v. Detroit &c. R. Co.*, 115 Mich. 102.

Or the noise of neighboring machinery. *Chicago &c. R. Co.*, (Kan.) 60 Pac. Rep. 736; *Vogge v. Missouri P. R. Co.*, 138 Mo. 172.

Especially when a train is known to be due. *Mixsell v. New York &c. R. Co.*, 22 Misc. 73.

See, also, *Chicago &c. R. Co. v. Hansen*, 166 Ill. 623; *Hinken v. Iowa &c. R. Co.*, 97 Iowa, 603; *Green v. Erie R. Co.*, 65 N. J. L. 301; *Grand Trunk R. Co. v. Colleigh*, 78 Fed. Rep. 784; rev'g s. c., 75 id. 247.

When one sense is obstructed, more vigilance is required with the other. *Chicago &c. R. Co. v. Williams*, 59 Kan. 700; *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88; *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

And, if necessary to be reasonably certain of safety, the traveler must stop to look and listen. *Cincinnati &c. R. Co. v. Duncan*, 143 Ind. 524.

See, also, *Osborn v. Detroit &c. R. Co.*, 115 Mich. 102; *Lan v. Lake Shore &c. R. Co.*, 120 id. 115; *Bond v. Lake Shore &c. R. Co.*, 117 id. 652; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Keyley v. Central R. &c.*, 64 N. J. L. 355; *Dalwigh v. International &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1009; *Schneider v. Chicago &c. R. Co.*, 99 Wis. 378; *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

In a case of obstructed view, where there are complicating circumstances calculated to deceive a person, a traveler is not negligent *per se*. *Artz v. Chicago &c. R. Co.*, 34 Iowa, 153.

*Indianapolis &c. R. Co. v. Keeley*, 23 Ind. 133; *Chicago &c. R. Co. v. Hedges*, 105 id. 398; *Evansville &c. R. Co. v. Lawdenwick*, 15 id. 120; *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *Penn. R. Co. v. Marshall*, 119 id. 399; *Tabor v. Missouri &c. R. Co.*, 46 Mo. 353; *Petty v. Hannibal &c. R. Co.*, 88 id. 306; *Kennayde v. Pacific R. Co.*, 45 id. 255; *Milwaukee &c. R. Co. v. Hunter*, 11 Wis. 160; *Paine v. Grand Trunk R. Co.*, 63 N. H. 623; *Abbott v. Chicago &c. R. Co.*, 30 Minn. 482; *Chicago &c. R. Co. v. Miller*, 46 Mich. 532; *Pittsburg &c. R. Co. v. Burton*, 139 Ind. 380; *Gividen v. Louisville &c. R. Co.*, (Ky.) 32 S. W. Rep. 612; *Tilton v. Boston &c.*

R. Co., 169 Mass. 253; *Willet v. Michigan C. R. Co.*, 114 Mich. 411; *Klotz v. Winona &c. R. Co.*, 68 Minn. 341; *Philadelphia &c. R. Co. v. Carr*, 99 Pa. St. 505; *Selum v. Pennsylvania R. Co.*, 107 id. 8; *Philpott v. id.* 175 id. 570; *Davidson v. Lake Shore &c. R. Co.*, 179 id. 227; *Knox v. Philadelphia &c. R. Co.*, (Pa.) 52 Atl. Rep. 90; *International &c. R. Co. v. Starling*, 16 Tex. Civ. App. 365; *St. Louis v. Barker*, 77 Fed. Rep. 810; *Pennsylvania R. Co. v. Miller*, 99 id. 529; *New York &c. R. Co. v. Moore*, 105 id. 725; *Hemingway v. Illinois C. R. Co.*, 114 id. 843; *Peck v. Oregon &c. R. Co.*, (Utah) 69 Pac. Rep. 153.

Where one stopped at the only eligible place to see and hear, although forty to fifty feet from the track, he was not negligent *per se*. *Cook v. Missouri &c. R. Co.*, 12 Mo. App. 32.

See, also, *Cookson v. Pittsburg &c. R. Co.*, 179 Pa. St. 184.

When obstruction is temporary and traveler is acquainted with the location, he should wait until obstruction is removed. *McCreery v. Chicago &c. R. Co.*, 31 Fed. Rep. 531.

*Merkle v. N. Y. &c. R. Co.*, 49 N. J. L. 473; see, however, *Jewett v. Klein*, 27 N. J. Eq. 550; *Central R. of N. J. v. Feller*, 84 Pa. St. 226.

Where he cannot see without getting out and going ahead he is bound to do so. *Chicago &c. R. Co. v. Thomas*, 155 Ind. 634.

Driver could not see that cars standing near the crossing had an engine attached to them; he was not negligent *per se* in attempting to cross. *Atchison &c. R. Co. v. Shaw*, 56 Kan. 519.

##### 5. CARE WHILE CROSSING.

A person, knowing that the south track was for eastern trains, and the north track for western trains, when about to cross the south track, looked west. He was negligent in not looking east. The fact that the brakeman of a train, divided and standing at the crossing, gave no signal, was immaterial on the question of the plaintiff's negligence. If train at crossing to some extent obstructed his view upon the north track, there was so much greater reason for him to take an observation the moment he had crossed the south track, so as to see whether he could cross the north track with safety, and for not doing so he was chargeable with contributory negligence, which bars his recovery. (*Cordell v. N. Y. C. & H. R. R. Co.*, 15 N. Y. 330; *Woodard v. N. Y., L. E. & W. R. Co.*, 106 id. 369; *Davey v. London & S. W. R. Co.*, [L. R.] 11 Q. B. Div. 213; s. c. affirmed in court of appeals, 49 L. T. Rep. [N. S.] 739.) *Young v. N. Y., L. E. & W. R. R. Co.*, 101 N. Y. 505, rev'g judgt for pl'ff.

See, also, *Burke v. Central R. &c.*, 64 N. J. L. 576.

The plaintiff, before stepping upon the first track, looked both ways, but without further looking toward the west, from which direction he knew a train was due, crossed the first and second tracks and walked be-



tween the second and third tracks so near the middle that he was struck by said train, the rumble of which was distinctly heard by others in the vicinity.

The plaintiff was negligent and the defendant was not liable. *Scott v. Penn. &c. R. Co.*, 130 N. Y. 679.

A woman on a dark night, in a locality unknown to her, had crossed twenty-four tracks of four railroads, when she saw a train of cars and the headlight of a locomotive proceeding apparently westerly; in fact, but not to her knowledge, it came rapidly towards her and struck her. There was evidence that an approaching train could be seen for a long distance. Question of contributory negligence was for the jury. *Doyle v. Penn. & N. Y. Canal &c. R. Co.*, 139 N. Y. 637.

A traveler able to see track for distance of 200 to 300 feet, with but two box cars between him and a train, backing slowly towards him was killed by the train backing against a car between which and another car he attempted to pass. Contributory negligence. *Krauss v. Wallkill Valley R. Co.*, 69 Hun. 482.

Where plaintiff was not warned that a detached car was following and his attention was diverted to the fireman of the engine as it passed, he was not *per se* negligent in crossing, without looking for anything following it. *Rowen v. New York &c. R. Co.*, 89 Hun. 594.

While plaintiff was waiting for a train obstructing the crossing to pass, another came up between him, obstructing the passage back. While so caught on the track between the two, a third train came along thereon, to avoid which plaintiff attempted to pass between the cars of the train at his back, and was injured by their sudden starting. He was held not to have been negligent *per se* in so doing. *Wall v. New York &c. R. Co.*, 56 App. Div. 599.

Stopping on a crossing to converse, converts one into a trespasser so as to make him guilty of contributory negligence; his right being only for immediate passage. *Tennessee &c. R. Co. v. Hansford*, 125 Ala. 349.

But see *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; s. c. aff'd, 180 Ill. 453.

A person is none the less a trespasser because he is at a crossing, where he sits down upon a track and goes to sleep. *Lyons v. Illinois C. R. Co.*, (Ky.) 59 S. W. Rep. 507.

That a traveler intended to trespass on the railroad's private property after going over the crossing, does not alter its duty to him while on the crossing. *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356.

The care required applies both while approaching and while crossing. *Wabash &c. R. Co. v. Jensen*, 99 Ill. App. 312.

See, also, *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Bonnell v. Delaware &c.*

R. Co., 39 N. J. L. 189; *Kansas &c. R. Co. v. Twombly*, 3 Colo. 125; *Martin v. Pennsylvania &c. R. Co.*, 176 Pa. St. 444.

Contributory negligence was for the jury where the traveler did not look at the instant of stepping on the track. *Plummer v. Eastern R. Co.*, 73 Me. 591.

See, also, *Chicago &c. R. Co. v. Pearson*, 184 Ill. 386; aff'g s. c., 82 Ill. App. 605; *Hoopes v. West Jersey &c. R. Co.*, 65 N. J. L. 89; *Brenninger v. Pennsylvania R. Co.*, 9 Pa. Super. Ct. 461.

But he was held negligent *per se*, where he deliberately stepped between two passing trains in a space 20 inches wide. *McCann v. Chicago &c. R. Co.*, 105 Fed. Rep. 480.

And where he passed lowered gates and stood upon the tracks without looking. *Buckeley v. Flint &c. R. Co.*, 119 Mich. 583.

And where he crossed immediately behind a passing train without waiting and looking to see if the track was otherwise clear. *Central R. &c. v. Smalley*, 61 N. J. L. 277.

See, also, *Hughes v. Delaware &c. Canal Co.*, 176 Pa. St. 254; *Stowell v. Erie R. Co.*, 98 Fed. Rep. 520.

Even though he followed in a covered wagon immediately behind another team that had crossed safely. *Work v. Chicago &c. R. Co.*, 105 Fed. Rep. 874.

Traveler may assume that more care will be used by company where standing cars are near crossing. *Thomas v. Delaware &c. R. Co.*, 19 Blatchf. 533.

A person has not the unqualified right to act on the presumption, that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. *Wabash &c. R. Co. v. Central Trust Co.*, 23 Fed. R. 738.

#### 6. OBSTRUCTED CROSSING.

The plaintiff, after dark, waited for a train to pass on the east track, then, starting his horse upon the tracks, he was struck by a train from the west. It was doubtful from his examination whether he looked towards the west. For the jury. *Carr v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 633.

Plaintiff was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station: its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded: she stopped again as she reached the north track: just then the car started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step

or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. Plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This, there was testimony tending to show, was running at a dangerous rate of speed.

Held, that the question of contributory negligence was properly submitted to the jury. *Greany v. L. I. R. Co.*, 101 N. Y. 419, aff'g judgt for pl'ff.

It is usually negligent to attempt to cross over a freight train standing on a highway crossing; and even if the highway is improperly constructed, prudence would require one to wait a reasonable time for the train to pass on; but it cannot be said as a matter of law that he should remain indefinitely on the highway along which he is journeying, or that he is bound to turn back and seek some other highway crossing.

Where a traveler on a highway applies to a brakeman to learn how long a train standing across the highway is to remain on the crossing, and is told to climb "right across the train," it is for the jury, to determine whether he was guilty of negligence in attempting to cross between the cars and whether the defendant was guilty of negligence in starting the train without first looking to see if any traveler on the highway, whom it had put to an extraordinary and unusual means of crossing the tracks by reason of the long obstruction of the highway, would be in danger.

A brakeman on a railroad train has not necessarily the power to inform the public and bind the railroad company as to the movements of its trains, and it is error for a trial court to charge that if a brakeman, or one operating a train, tells a person that he can safely cross the train, the railroad company is liable for the damages he may sustain while crossing such train, through the sudden movement thereof. *Phillips v. The N. Y. & N. E. R. R. Co.*, 80 Hun. 101.

It was for the jury to say whether plaintiff was negligent in driving into a space between the tracks of two railroads, the farther of which was obstructed by a freight train standing thereon and waiting there for 20 minutes, the horse being gentle and held by the head by the driver. *Laible v. New York &c. R. Co.*, 13 App. Div. 574.

A bright girl of twelve was negligent, where, finding her passage at a crossing obstructed by a freight train, she ran around in front of the locomotive and on across without looking, though she was accustomed to the crossing and the train which struck her was the regular one due at that time. *Leary v. Fitchburg R. Co.*, 53 App. Div. 52.

It was for the jury to say whether danger of passing between stationary cars would have been obvious to one of common prudence. *Baltimore &c. R. Co. v. Shipley*, 31 Md. 368; *R. Co. v. Fitzpatrick*, 35 id. 32.

A traveler is not a trespasser nor negligent *per se* in going beyond the limits of a crossing to pass around cars obstructing it. *Mayer v. Chicago &c. R. Co.*, 63 Ill. App. 309.

See, also, *St. Louis &c. R. Co. v. Taylor*, 64 Ark. 364; *Brown v. Hannibal &c. R. Co.*, 50 Mo. 461; *Morrissey v. Wiggins Ferry Co.*, 43 id. 380; *International &c. R. Co. v. Locke*, (Tex. Civ. App.) 67 S. W. Rep. 1082.

Nor in passing through an opening in a divided train. *Chicago &c. R. Co. v. Filler*, 195 Ill. 9; *International &c. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Unless he failed to take precaution to ascertain whether a train is about to pass on the other side. *Keppleman v. Philadelphia &c. R. Co.*, 190 Pa. St. 333.

But a traveler who climbs between the cars of a train obstructing a crossing has been held to be a trespasser. *Littlejohn v. Richmond &c. R. Co.*, 49 S. C. 12.

See, also, *McCullum v. Cleveland &c. R. Co.*, 154 Ind. 97; *Kriuwinski v. Pennsylvania R. Co.*, 65 N. J. L. 392; *Barr v. Southern R. Co.*, 105 Tenn. 544; *Wherry v. Duluth &c. R. Co.*, 64 Minn. 415.

But see *Scott v. St. Louis &c. R. Co.*, 112 Iowa, 54; *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5; *Irvin v. Gulf &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 661.

Direction of a brakeman to a person to pass between the cars of a train standing on a highway, will not justify him if the danger is obvious. *Lake Shore &c. R. Co. v. Pinchin*, 112 Ind. 592.

*Jefferson R. Co. v. Swift*, 26 Ind. 459; *Penn. R. Co. v. Hoagland*, 78 id. 203; *Lake Erie &c. R. Co. v. Fix*, 88 id. 381; *Terre Haute &c. R. Co. v. Buck*, 96 id. 346; *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519; *Fowler v. Baltimore &c. R. Co.*, 18 W. Va. 579; *Hickey v. Boston &c. R. Co.*, 14 Allen, 429; *R. Co. v. Aspell*, 23 Pa. St. 147; *Philadelphia &c. R. Co. v. Boyer*, 97 id. 91; *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291; *St. Louis &c. R. Co. v. Person*, 4 S. W. R. 755; see, however, *Hanson v. Mansfield &c. R. Co.*, 38 La. Ann. 111.

## 1. CARE OF ANIMALS.

Where a team, driven by a person along a highway, becomes unmanageable or the driver loses control over them, and in consequence they enter upon the tracks of a steam railroad company at a highway crossing,

against the will of a driver, and are run down by a passing railroad train, and the driver killed, the driver is not chargeable with negligence contributing to the accident. *Miller v. The N. Y. C. & H. R. R. Co.*, 81 Hun, 152.

Deceased was negligent in failing to look before getting within a dangerous proximity to the tracks, with his horse, where the train could have been seen when it was a half mile away. *Allen v. New York & C. R. Co.*, 92 Hun, 589.

A traveler with a spirited team was charged with negligence in approaching a crossing without taking the precaution to stop, look and listen. *Towers v. Lake Erie & C. R. Co.*, 18 Ind. App. 684.

See, also, *Gulf & C. R. Co. v. Younger*, (Tex. Civ. App.) 40 S. W. Rep. 423.

Or in going within frightening distance. *Boothby v. Boston & C. R. Co.*, 90 Me. 313.

See, also, *Whitney v. Maine & C. R. Co.*, 69 Me. 208; *Pittsburg & C. R. Co. v. Tayler*, 104 Penn. St. 306; *Louisville & C. R. Co. v. Schmidt*, 81 Ind. 264; *St. Louis & C. R. Co. v. Paine*, 29 Kas. 166; *Lake Shore & C. R. Co. v. Butts*, 28 Ind. App. 289; *Miller v. Wellington & C. R. Co.*, 128 N. C. 26; *San Antonio & C. R. Co. v. Belt*, (Tex. Civ. App.) 59 S. W. Rep. 607; *Texas & C. R. Co. v. Cardwell*, 67 id. 157.

Or in leaving a team unhitched in an adjacent street. *Weingartner v. Louisville & C. R. Co.*, (Ky.) 42 S. W. Rep. 839.

See, also, *Western R. Co. v. Strickland*, 114 Ga. 133; *Silcock v. Rio Grande & C. R. Co.*, 22 Utah, 179.

But negligence was for the jury, where a horse, accustomed to the cars and supposed to be gentle, was driven near them. *Lynch v. Northern P. R. Co.*, 69 Fed. Rep. 86; *Hynes v. San Francisco & C. R. Co.*, 65 Cal. 316.

See, also, *Rusterholtz v. New York & C. R. Co.*, 191 Pa. St. 390; *Tankard v. Roanoke & C. R. Co.*, 117 N. C. 558; *Sherman & C. R. Co. v. Bridges*, 16 Tex. Civ. App. 64.

So, where plaintiff's horses had run away before, and plaintiff had had time to avoid danger, but did not apprehend any. *Turner v. Bachman*, 82 Ind. 141.

It is often negligence to drive a horse, if known to be frightened by steam cars, near them. *Phil. & C. R. Co. v. Slinger*, 18 Pa. St. 219; but this does not apply to factories when whistling is not necessary. *Knight v. Goodyears' Co.*, 38 Conn. 141.

Negligence in driving a horse into close proximity to the locomotive did not prevent recovery, where the engineer intentionally threw steam upon it. *Texas & C. R. Co. v. Syfan*, 91 Tex. 562.

#### S. KNOWLEDGE OF DANGER.

The court improperly refused to charge that "if the jury believed

that the deceased, before she reached the track, saw the train approaching, and, notwithstanding this, went upon the track where she was hit by a car, she was negligent." *Madden v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 665.

The plaintiff's intestate, fifty feet from the track, could see the train for a mile. He was on the north of four tracks before he apparently saw the train, then whipped up his horses to pass and was hit on the south track. It was contributory negligence. This was simply disputing speed with the train. *Connelly v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 346.

Deceased, familiar with a crossing, and driving a gentle horse, seeing a train coming 200 feet distant when he was six feet from the track, whipped up his horse to cross instead of stopping and waiting. There was not such an emergency or excitement as to justify submitting his negligence to the jury, to say whether his judgment was reasonable under the circumstance. *Getman v. Delaware &c. R. Co.*, 162 N. Y. 21; rev'g s. c., 37 App. Div. 630.

Plaintiff and his employer were approaching a crossing, while a train was also approaching, the latter pulled up the horses, but it being apparently too late, both urged them forward. Contributory negligence for the jury. *Smith v. New York &c. R. Co.*, 4 App. Div. 493.

Deceased, having suddenly appeared on the track in front of an approaching engine, the latter was slowed down. Upon seeing deceased step out of the way, the engineer started ahead. Deceased then stepped back in front of it. Verdict for plaintiff was set aside. *Ryan v. New York &c. R. Co.*, 30 App. Div. 153.

Deceased was negligent in taking his chances in getting over a track ahead of an approaching train. *Henarie v. New York &c. R. Co.*, 44 App. Div. 611.

Where a motorman noticed a train standing within 315 feet of a crossing, his failure to slacken the speed of his car running at 13 miles per hour, until it is too late to avoid collision, was negligence *per se*. *Einsfeld v. Niagara Junction R. Co.*, 49 App. Div. 470.

Whether an attempt to cross in front of a train is negligent, depends upon the speed of the train and the condition of person. *State v. Baltimore &c. R. Co.*, 69 Md. 339.

*Artz v. Chicago &c. R. Co.*, 44 Iowa, 284; *Baldwin v. St. Louis &c. R. Co.*, 63 id. 210; *Greenleaf v. Dubuque &c. R. Co.*, 33 id. 52; *Louisville &c. R. Co. v. Goetz*, 79 Ky. 442; *Lehigh &c. R. Co. v. Brandtmaier*, 113 Penn. St. 610; *Philadelphia &c. R. Co. v. Carr*, 99 id. 505; *Baltimore &c. R. Co. v. Owings*, 65 Md. 502; *T. & P. R. Co. v. Chapman*, 57 Tex. 75; *Houston &c. R. Co. v. Waller*, 56 id. 331; *Faber v. St. Paul &c. R. Co.*, 29 id. 465; *Terre Haute &c. R. Co. v. Clark*, 73 Ind. 168; *Toledo &c. R. Co. v. Schuckman*, 50 id. 42; *Louisville &c. R. Co. v. Cooper*, (Ky.) 65 S. W. Rep. 795; *Nohrden v. Northeastern R. Co.*, 59 S. C. 87.

But the traveler must not indulge in nice calculations and chances. It is negligent to hurry to cross ahead of an approaching train without reasonable certainty that it can be done in safety. *Mott v. Detroit &c. R. Co.*, 120 Mich. 127.

See, also, *Herbert v. Southern P. R. Co.*, 121 Cal. 227; *Hopkins v. Southern R. Co.*, 110 Ga. 85; *Southern R. Co. v. Blake*, 101 id. 217; *Chicago &c. R. Co. v. McElhaney*, 87 Ill. App. 420; *Chicago &c. R. Co. v. Williams*, id. 511; *Chicago &c. R. Co. v. Nelson*, 59 id. 308; *Cones v. Cincinnati &c. R. Co.*, 114 Ind. 328; *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295; *Griffin v. Chicago &c. R. Co.*, 68 Iowa, 638; *Louisville &c. R. Co. v. Penrod*, (Ky.) 56 S. W. Rep. 1; *Grows v. Maine &c. R. Co.*, 69 Me. 412; *McNab v. United R. Co.*, 94 Md. 719; *Mahlen v. Lake Shore &c. R. Co.*, 49 Mich. 585; *Rogstad v. St. Paul &c. R. Co.*, 31 Minn. 208; *Olson v. Northern P. R. Co.*, 84 id. 258; *Brinker v. Michigan &c. R. Co.*, 121 id. 283; *Kelly v. Hannibal &c. R. Co.*, 75 Mo. 138; *Drain v. St. Louis &c. R. Co.*, 10 Mo. App. 531; *Burnett v. Easton &c. R. Co.*, 61 N. J. L. 373; *Texas &c. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Galveston &c. R. Co. v. Haas*, 19 id. 645; *Gulf &c. R. Co. v. Abendroth*, (Tex. Civ. App.) 55 S. W. Rep. 1122; *Gulf &c. R. Co. v. Wilson*, 59 id. 589; *Washington &c. R. Co. v. Hickey*, 166 U. S. 521; *Holland v. Chicago &c. R. Co.*, 18 Fed. Rep. 243; *McCadden v. Abbott*, 92 Wis. 551.

Plaintiff was negligent, where, seeing a freight train 500 feet away, he waited for another train to pass and then crossed without again looking at the freight train. *Illinois C. R. Co. v. James*, 67 Ill. App. 649.

Plaintiff started to cross, relying on engineer's promise to wait for her. Engineer broke his promise and plaintiff hurried and fell. She was not negligent *per se*. *Plaut v. Railway &c. Co.*, (Minn.) 91 N. W. Rep. 19.

#### 9. AGED, INFANT AND INFIRM.\*

An intelligent boy of thirteen years was last seen one hundred feet from a two-track railroad. He was conversant with the road, trains, &c. He was found in a cattle guard after two trains had passed each other. The evidence did not warrant the finding that the plaintiff was free from negligence, as he could have seen the train by which he was killed 150 feet away, when ten feet from the crossing. *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; reversing 2 N. Y. S. C. (T. & C.) 644.

Although the defendant was guilty of negligence in approaching the crossing, yet, as the traveler did not look and listen he could not recover, as the plaintiff's case must show affirmatively that the injured person did his duty, or prove facts from which the same may be inferred. The question at what age an infant is responsible for negligence is one of law.

A boy of twelve years, in the absence of other evidence, would be deemed *sui juris*. A boy, about to cross the four tracks of the defendant, on a day windy and snowy, but not enough to obstruct his view, stopped

\* NOTE.— See, also, "Contributory Negligence — Infants," *ante*, p. 704.

on a switch track, down which he could have seen 186 feet, and changed his school bag from one shoulder to the other, and then started on, having an uninterrupted view for two streets. He did not look and was killed. He was guilty of contributory negligence. *Tucker v. N. Y. C. & N. H. R. R. Co.*, 124 N. Y. 308.

A boy of ten, after two locomotives had passed in one direction, looked both ways and started to cross, though the view in one direction was obstructed by standing cars. The question of his negligence was left to the jury; he was not bound to keep looking at every instant of his progress. *Zwack v. New York &c. R. Co.*, 160 N. Y. 362; aff'g s. c., 8 App. Div. 483.

Train was going west over crossing; after it passed, a girl aged nine years, stepped on the track and was killed by an engine going east. Flagman stood by with flag, but did not signal the approach of the engine from the east.

Jury should have been instructed, that if the flagman knew of the approach of the east engine, as he did, he should have signaled to the traveler on the street. A child of nine years of age is not required to use eyes and ears according to general rule. Jury should say whether the ringing of a bell is sufficient. Should have allowed jury to pass on speed, although within allowance of ordinance. *Finklestein v. N. Y. C. & H. R. R. Co.*, 41 Hun. 34.

The general duty of looking and listening is to be imposed upon a girl of 14. *Cox v. New York &c. R. Co.*, 69 App. Div. 451.

The negligence of a child depends upon its age, discretion and ability to comprehend the danger. *Weldon v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 1.

See, also, *Chicago &c. R. Co. v. Body*, 85 Ill. App. 133; *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73; *San Antonio &c. R. Co. v. Beysland*, 12 Tex. Civ. App. 97.

Childish instincts and propensities are an element of consideration and the same degree of care is not exacted of a child as of an adult. *Thompson v. Missouri &c. R. Co.*, (Mo.) 67 S. W. Rep. 693.

Children from nine to sixteen have been held negligent in passing over a crossing without looking and listening. *Spillane v. Missouri &c. R. Co.*, 135 Mo. 414.

See, also, *Chicago &c. R. Co. v. Thorson*, 68 Ill. App. 288; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Bess v. Atchison &c. R. Co.*, 62 Kan. 299; *Chicago &c. R. Co. v. Kennedy*, 2 Kan. App. 693; *Sewell v. New York &c. R. Co.*, 171 Mass. 302; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562.

In passing through space, between cars of a train, being closed. *Wallace v. New York &c. R. Co.*, 165 Mass. 236.

See, also, *Studer v. Southern P. R. Co.*, 121 Cal. 400.



In climbing between cars of a train obstructing a crossing. *Missouri P. R. Co. v. Cooper*, 51 Kan. 185.

And in using the crossing as a playground and standing upon the tracks instead of at the side of the crossing for trains to pass. *Cleveland &c. R. Co. v. Heinman*, 16 Oh. C. C. 481.

But such children have been held not negligent *per se*, where their attention is diverted by other objects, such as another engine. *Atchison &c. R. Co. v. Hardy*, 94 Fed. Rep. 294; *Goodrich v. Burlington &c. R. Co.*, 103 Iowa, 412.

Or where the view is obstructed. *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370; *Steele v. Northern P. R. Co.*, 21 Wash. 287.

Or where they followed the example of their elders. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; *Carmer v. Chicago &c. R. Co.*, 95 Wis. 513.

Or where the crossing was 15 to 20 feet, and the train a quarter of a mile, distant, when the attempt to cross was made. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159.

Or where an attempt was made to pass through a narrow gap in a train with apparently no engine attached. *Lehman v. Eureka Iron Works*, 114 Mich. 260.

Plaintiff was not permitted to recover where, owing to his state of intoxication, he was incapable of exercising reasonable care. *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16.

See also, *Johnson v. Illinois C. L. Co.*, 61 Ill. App. 522; *Lane v. Missouri &c. R. Co.*, 132 Mo. 4.

No recovery allowed, where a blind man knew cars were approaching, and that signal sounds from the different engines were misleading to the sense of hearing. *Florida &c. R. Co. v. Williams*, 37 Fla. 406.

Contributory negligence was left to the jury, where deaf, old man suddenly saw cars and thought he could control his horses. *Chicago &c. R. Co. v. Miller*, 46 Mich. 532.

A boy of seven and one-half sat on a track at a public crossing, and went to sleep. Verdict for plaintiff reversed. *Krenzer v. Pittsburg &c. R. Co.*, 151 Ind. 587, 592.

#### 10. ACTING IN AN EMERGENCY.

The mother of the plaintiff, an infant, approached the crossing with care, leading her child by the hand. The tracks were numerous, and while she was hesitating whether or not to advance, the child broke away from her and hastened to cross the tracks. The mother was not bound to anticipate such movement on the part of the child, and she could not be said to have been negligent.

Even if the child were *sui juris* she was not negligent, as it was a fair

presumption, from the testimony, that her attempt to cross the track was an effort on her part to escape the threatened peril, and though such decision on her part might have been an error, even an adult is not required by law to decide wisely when an occasion calls for instant action. *Wiley v. L. I. R. Co.*, 16 Hun, 29.

The degree of care required of one in sudden peril is that reasonably to be expected of an ordinarily prudent person so placed. *Baker &c. R. Co. v. Kansas &c. R. Co.*, 147 Mo. 140.

See, also, *Stolz v. Baltimore &c. R. Co.*, 7 Oh. Dec. 435.

Even the ordinarily prudent are not capable of deliberate judgment under such circumstances; it has been held not negligence *per se* for a woman with a skittish horse, when confronted with a rapidly advancing train at a crossing with an obstructed view, to attempt to cross, instead of turning down a steep embankment. *Warren v. Southern &c. R. Co.*, (Cal.) 67 Pac. Rep. 1.

Or for one with a runaway team to pay no attention to looking for an advancing train. *Pratt v. Chicago &c. R. Co.*, 98 Iowa, 563.

Or for an old woman with a child, confused by knowledge of an approaching train and a warning of the sudden escape of a bear, to attempt to cross in front of the train. *Alabama &c. R. Co. v. Lowe*, 73 Miss. 203.

Or for a driver, confronted suddenly with a train hidden from view, to stand up in his wagon, where, had he kept his seat, he would not have been injured. *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386.

See, also, *Houston &c. R. Co. v. Pyrd*, (Tex. Civ. App.) 61 S. W. Rep. 117.

Or where a person having looked, saw no train, until his horses' feet were almost on the track, and the train ten feet away, and then he whipped up his horses, and was struck by train. *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526.

The rule does not apply to a trespasser. *Cincinnati &c. R. Co. v. Murphy*, 18 Oh. C. C. 298.

Nor does it apply, where one has made deliberate, though mistaken, calculations to avoid danger. *Sutherland v. Cleveland &c. R. Co.*, 148 Ind. 308.

The danger must be reasonably apparent and not produced by plaintiff's own negligence; no recovery was allowed, where a woman, confused at approach of a train, stepped from a place of safety directly in front of it. *Central &c. R. Co. v. Foshee*, 125 Ala. 199.

See, also, *Hacker v. Chicago &c. R. Co.*, 91 Ill. App. 570.

Or where driver's team, left outside while he went into station, started to run, and he followed them over the crossing without looking for cars. *Collins v. Illinois C. R. Co.*, 77 Miss. 855.

Or where plaintiff's excitement at an approaching train was due to his state of intoxication. *Balser v. Chicago &c. R. Co.*, 7 Oh. N. P. 482.

### III. Speed of Trains.

**Great speed at a crossing is not *per se* negligent, but in connection with other facts may tend to establish negligence.** *Salter v. U. & B. R. Co.*, 88 N. Y. 42.

See "Evidence, Ordinance," *post*. 1166.

#### (a). NEGLIGENCE.

The law not having fixed the rate of speed, at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in each case, whether the actual rate was excessive or dangerous. Whether it is so or not will depend, to some extent, upon the safeguards which are adopted to prevent accidents. *Wilds v. Hudson R. Co.*, 29 N. Y. 315, aff'g nonsuit.

Speed at a crossing is usually for the jury on question of negligence, but not necessarily, if it is the same as that usually employed in crossing a street without producing injury. *Wilds v. Hudson R. Co.*, 29 N. Y. 315.

Negligence at a crossing cannot be inferred from the speed of a train alone. *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465.

Irrespective of any ordinance or law regulating it, excessive rate of speed at a crossing is negligence, and whether it was excessive is for the jury. *Massoth v. D. & H. C. Co.*, 64 N. Y. 524, aff'g judgt for pl'ff.

Ordinance restricting speed at street crossings to six miles an hour held *prima facie* reasonable. *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276.

A jury is warranted in finding that defendant was negligent in running its train past streets in a populous city having no safeguards at 20 miles an hour. *Zwack v. New York &c. R. Co.*, 160 N. Y. 362; aff'g s. c., 8 App. Div. 483.

See, also, *Waddele v. New York &c. R. Co.*, 4 App. Div. 549; *Noble v. New York &c. R. Co.*, 20 id. 40.

It is not negligent to run a train at 40 or 50 miles an hour in the open country, though at night, when the gates of the crossings are not in operation. *Lamb v. New York &c. R. Co.*, 18 App. Div. 579.

Rate of speed in crossing highway in country may be considered in determining defendant's negligence. *Martin v. N. Y. C. & H. R. R. Co.*, 27 Hun. 532, ordering judgt for pl'ff.

**From opinion.**—"The train has the preference and right of way. But it is bound to give due warning of its approach. \* \* \* Such warning must be

reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell. This is the principle which should be applied here. Where there is an excessive rate of speed, that may be considered by the jury, not perhaps as being in itself negligence, but as requiring at a crossing a warning which shall be available, and as tending to make the ordinary warning of no effect."

A train on a steam railroad moving at the time of an accident at a highway crossing, at the rate of from eight to ten miles an hour, and giving the usual warnings of its approach, is not running at an unusual or dangerous rate of speed. *Shires v. Fonda, Johnstown & Gloversville Railroad Co.*, 80 Hun. 92.

Absence of statutory regulation does not excuse reckless speed at a much frequented crossing. *Memphis C. R. Co. v. Martin*, 117 Ala. 367.

To have been reckless and wanton in disregarding the consequences in running at high speed over a much frequented crossing, it is not necessary to have had knowledge of the specific peril. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489.

Violation of ordinance regulating speed at crossings is negligence *per se*. *Central &c. R. Co. v. Bond*, 111 Ga. 13.

See, also, *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208; *Chicago &c. R. Co. v. Winter*, 175 Ill. 293; aff'g s. c., 65 Ill. App. 435; *Chicago &c. R. Co. v. Gunderson*, 65 Ill. App. 638; *Wabash R. Co. v. Zerwick*, 74 id. 670; *Chicago &c. R. Co. v. Fell*, 79 id. 376; *Lake Shore &c. R. Co. v. Elgert*, 19 Oh. C. C. 177; *Cottrell v. Southern R. Co.*, (Miss.) 32 South Rep. 1; *Chicago &c. R. Co. v. Beaver*, 96 Ill. App. 558; *Chicago &c. R. Co. v. Argo*, 82 id. 667; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Dull v. Cleveland &c. R. Co.*, 21 id. 571; *Romeo v. Boston &c. R. Co.*, 87 Me. 540; *Prewitt v. Missouri &c. R. Co.*, 134 Mo. 615; *Driver v. Atchison &c. R. Co.*, 59 Kan. 773; *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60; *Washington &c. R. Co. v. Lacey*, 94 Va. 460; *Brown v. Chicago &c. R. Co.*, 109 Wis. 384.

Prohibited rate of speed held to be the proximate cause of injury, though defendant's gates were lowered and the proper signals given and the electric car in which plaintiff was riding, failed to stop but crashed through the gates and on to the track. *Chicago &c. R. Co. v. Mochell*, 193 Ill. 208; aff'g s. c., 96 Ill. App. 178.

See, also, *Chicago &c. R. Co. v. Hines*, 183 Ill. 482.

Actual collision is not necessary, where the violation of the statutory rate of speed was the proximate cause of the injury. *Illinois C. R. Co. v. Crawford*, 68 Ill. App. 355; s. c. aff'd, 169 Ill. 554.

A statute, regulating speed of freight locomotives and cars, construed

to apply to detached engine. *East St. Louis &c. R. Co. v. Reames*, 113 Ill. 582.

Evidence that a crossing was in a thickly populated portion of the place was admissible on the question of negligence in going at excessive speed. *Overloom v. Chicago &c. R. Co.*, 181 Ill. 323.

But a train is not bound to slacken its speed at a crossing not in a town or a city. *Louisville &c. R. Co. v. Pirschbacher*, 63 Ill. App. 144.

Railroad company was negligent in running its trains over a crossing above 20 miles an hour, where there was a flagman but no gates. *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487.

A speed of twenty-five miles per hour through an unincorporated village is not *per se* negligent. *Garland v. Chicago &c. R. Co.*, 8 Ill. App. 571.

Even an intentional violation of an ordinance as to speed does not constitute willfulness or wantonness. *Jeliuski v. Belt R. Co.*, 86 Ill. App. 535.

A company may be negligent though running at a speed permitted by ordinance. *Chicago &c. R. Co. v. Dougherty*, 12 Ill. App. 181.

*Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35.

Horse frightened by train running at unlawful speed, ran away; recovery allowed. *Chicago &c. R. Co. v. People &c.*, 120 Ill. 667.

Rate of speed should be adapted to danger of crossing. *Chicago &c. R. Co. v. Dillon*, 123 Ill. 570.

*Gugenheim v. Lake Shore &c. R. Co.*, 9 West. R. (Mich.) 903; *Wabash &c. R. Co. v. Hens*, 91 Ill. 406; *Meyer v. Midland &c. R. Co.*, 2 Neb. 319.

In the absence of municipal ordinance there is no regulation as to speed beyond the common law degree of reasonableness. *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616.

Railroad does not *per se* perform its duty where it runs 40 miles an hour, without signal, through a town of 1,100 inhabitants, where the view is partially obstructed. *Pratt v. Chicago &c. R. Co.*, 98 Iowa, 563.

Trains must not run at such a speed as to overcome the effect of its signals as a warning. *Louisville &c. R. Co. v. Clark*, 105 Ky. 571.

That the day is not bright and the wind is high does not require slackening of speed. *Vincent v. Morgau's L. R. &c. Co.*, 48 La. Ann. 933.

It has been held grossly negligent to run an engine at 15 or 16 miles an hour past a city crossing, without keeping a lookout ahead; especially where other trains partially drowned and shut off the noise of its bell. *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434.

Jury decided question of negligence when train ran forty miles an hour. *Marcott v. Marquette &c. R. Co.*, 47 Mich. 1.

Wabash &c. R. Co. v. Hicks, 13 Ill. App. 407; P. D. & E. R. Co. v. Miller, 11 id. 377; Reading &c. R. Co. v. Ritchie, 102 Pa. St. 425.

Aside from statutory or municipal regulation, no rate of speed is negligent *per se*. *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80.

Maher v. R. Co., 64 Mo. 267; Wallace v. R. Co., 74 id. 594; Young v. Hannibal &c. R. Co., 79 id. 336; Frick v. St. Louis &c. R. Co., 75 id. 594; Telfer v. Northern R. Co., 30 N. J. L. 188; L. & N. R. Co. v. Milam, 9 Lea, (Tenn.) 223; McKonkey v. Chicago &c. R. Co., 40 Iowa, 205; Wasson v. McCook, 80 Mo. App. 483.

A requested charge, that the jury should not find for the plaintiff, unless, in addition to its violation of the ordinance as to speed, it found that it could have stopped in time to avoid injury after discovering deceased, had it been going at a proper rate, held correct. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Not liable for damages to boy sucked under train running at prohibited rate of speed, unless reasonably prudent man would have known that that result would follow such violation of the ordinance. *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666.

An ordinance rate of six miles per hour for agricultural districts held unreasonable. *Zumault v. Kansas City &c. Air Line*, 71 Mo. App. 670.

Speed alone not sufficient ground on which to allege negligence. *B. & M. R. Co. v. Wendt*, 12 Neb. 76.

Artz v. Chicago &c. R. Co., 44 Iowa, 284; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168.

No rate is negligence *per se* outside of cities, towns, or villages, however great. *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553; *Omaha &c. R. Co. v. Talbot*, id. 627; *Lake Shore &c. R. Co. v. Schade*, 57 Oh. St. 650.

Instruction that train approaching crossing should be under control, erroneous. *Cohen v. Eureka &c. R. Co.*, 14 Nev. 376.

Telfer v. Northern R. Co., 30 N. J. L. 188; Madison &c. R. Co. v. Taffe, 37 Ind. 365, and also, *Lafayette &c. R. Co. v. Adams*, 26 id. 76; *Chicago &c. R. Co. v. Robinson*, 9 Ill. App. 89.

An instruction stating that the question of negligences depends upon whether a prudent person would have run at the speed complained of, under the circumstances, held proper. *Davis v. Concord &c. R. Co.*, 68 N. H. 247.

Unlawful speed evidence of negligence. *Clark v. Boston &c. R. Co.*, 5 N. Eng. R. (N. H.) 48.

Nutter v. Boston &c. R. Co., 60 N. H. 483.

Held gross negligence *per se* to run 20 miles an hour in violation of an ordinance, without signals, and at a much frequented crossing, where the view is obstructed. *Norton v. North Carolina R. Co.*, 122 N. C. 910.

Where the evidence as to the speed of a train is in conflict, the question of plaintiff's negligence must go to the jury. *Frazier v. Southern R. Co.*, 130 N. C. 355.

An engineer is not bound to anticipate that persons at or near the crossing will attempt to cross in front of him. *New York &c. R. Co. v. Kister*, 16 Oh. C. C. 316.

The rate of speed in approaching a crossing must be such as to keep the train in control and enable it to be stopped within a distance sufficient to avert an accident reasonably to be apprehended. *Ludden v. Columbus &c. R. Co.*, 1 Oh. N. P. 106.

Sixty miles an hour in an open and sparsely settled country is not *per se* negligence. *Eply v. Lehigh Valley R. Co.*, 3 Pa. Super. Ct. 509.

See, also, *Carman v. Central R. &c.*, 10 Kulp, 87.

Excessive speed, when accompanied with proportionate care does not make a case for the jury. *Custer v. Baltimore &c. R. Co.*, 19 Pa. Super. Ct. 365.

Question of negligence in making a flying switch at the speed of twenty miles an hour is for the jury. *Lehigh &c. Co. v. Lear*, 8 Central R. (Pa.) 107.

Whether a given rate of speed is negligent, is for the jury. *Kirby v. Southern R. Co.*, 63 S. C. 494.

A charge that violation of ordinance in respect to speed or signals would be negligence without pointing out, that, to be actionable, it must have caused the injury complained of, held reversible error. *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300.

See, also, *Chicago &c. R. Co. v. Kennedy*, 2 Kan. App. 693; *Pedigo v. Louisville &c. R. Co.*, (Ky.) 68 S. W. Rep. 462; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Evansville &c. R. Co. v. Welch*, 25 Ind. App. 308.

Running flat cars over city street crossing at night, without light, signal, or warning at prohibited speed, held negligence. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 56 S. W. Rep. 248.

As, in the absence of ordinance, the law does not prescribe a particular rate, it was held error to refuse to charge that a certain rate was not negligence *per se*. *Texas &c. R. Co. v. Short*, (Tex. Civ. App.) 58 S. W. Rep. 56.

Speed should not be so great as to render unavailing the warning of whistle and bell. *Continental &c. Co. v. Stead*, 95 U. S. 161.

Forty miles an hour through a thinly settled country beyond the limits of cities or villages was not negligence. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

Ten miles an hour is not negligence, where it was safe and the law permitted fifteen. *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23.

Forty miles an hour at a country crossing is not negligence *per se* in the absence of statutory regulation. *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157.

Intentional violation of speed ordinance is not such willful negligence as to forfeit the defense of contributory negligence. *Brown v. Chicago &c. R. Co.*, 109 Wis. 384.

(b). CONTRIBUTORY NEGLIGENCE.

While a person approaching a crossing is bound to make all reasonable efforts to see that a careful, prudent man would make in like circumstances, *his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal.*

Plaintiff was going south from her home upon the highway, which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station: its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness, not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. Plaintiff testified, that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This, there was testimony tending to show, *was running at a dangerous rate of speed.*

The question of contributory negligence was properly submitted to the jury. *Greany v. L. I. R. Co.*, 101 N. Y. 419, aff'g judg't for plff.

That a train is running at prohibited speed does not absolve a traveler from using proper caution in approaching the place of danger. *Collins v. New York &c. R. Co.*, 92 Hun. 563.

Contributory negligence is a defense in an action for damages due to violation of statute regulating speed. *Jelinski v. Belt R. Co.*, 86 Ill. App. 535.



See, also, *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179; *Reidel v. Philadelphia &c. R. Co.*, 87 Md. 153; *Stahl v. Lake Shore &c. R. Co.*, 117 Mich. 273; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562; *Schneider v. Chicago &c. R. Co.*, 99 Wis. 378.

Excessive speed did not make defendant liable where deceased crossed directly in front of the train without looking. *Theobald v. Chicago &c. R. Co.*, 15 Ill. App. 208.

See, also, *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Chase v. Maine C. R. Co.*, 167 Mass. 383; *Peterson v. St. Louis &c. R. Co.*, 156 Mo. 552; *Pugh v. Illinois C. R. Co.*, (Miss.) 23 South Rep. 356.

Or where plaintiff saw the train in time but deliberately went on in front of it. *Lake Erie &c. R. Co. v. Pence*, 24 Ind. App. 12.

That those in charge of the street car, in which plaintiff was riding were negligent, was no defense to negligence in running at a prohibited rate of speed. *Chicago &c. R. Co. v. Hines*, 82 Ill. App. 488.

A traveler may assume that a train will not run at a forbidden speed. *Hart v. Devereux*, 41 Oh. St. 565.

*Meek v. Penn. Co.*, 38 Ohio St. 632; see, however, *Calligan v. N. Y. &c. R. Co.*, 59 N. Y. 651.

Unlawful speed was no defense to negligence in either failing to keep a lookout for the train or in driving heedlessly in front of it. *Vant v. Chicago &c. R. Co.*, 101 Wis. 363.

#### IV. Signals.

##### (a). NEGLIGENCE.

**It is negligence *per se* to omit signals or other precautions required by statute to be given or employed at the crossing of an authorized public road or street by a railway. In the State of New York the statutory requirement as to signals does not now exist.**

Evidence of the absence of statutory signals at public streets permits the jury to impute negligence, and so the running of an engine across frequented thoroughfares, as the streets of a village, by the fireman alone. *O'Mara v. H. R. R. Co.*, 38 N. Y. 445, affirming 18 Hun, 192, and judg't for pl'ff.

The railway company is bound to give only such signals at a crossing as the statute requires; not to give such signals under such circumstances *that they may be heard*. *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 34.

The duty to give signals when approaching a highway crossing does not extend to *one not on a highway but walking on the track*. The person stepped from one track to another in front of a moving train without looking, and it was then too late for signals. The defendant was not

negligent and the plaintiff was. *Harty v. Central R. Co. of N. J.*, 42 N. Y. 468.

See *People v. N. Y. C. R. R. Co.*, 25 Barb. 199.

It is negligence *per se* to omit statutory signals where railway crosses a traveled public road or a street, but omission to give signals to warn persons *elsewhere* on the track is for the jury. *Cordell v. N. Y. C. & H. R. R. Co.*, 64 N. Y. 535, reversing 6 Hun. 461, and judg't for pl'ff.

*Renwick v. N. Y. Cent. R. Co.*, 36 N. Y. 132; *Gorton v. Erie R. Co.*, 45 id. 660.

Signals are required at crossings not only to protect travelers from collisions, but also from danger arising *from the fright of horses by passing trains*. If the plaintiff, by the defendant's negligence, is placed in danger, she is required to do only the best she can to avoid injury. The rule was applied, where a woman was driving and was injured by the horses becoming scared off the highway three rods from the crossing and turning around. *Vook v. N. Y. C. & H. R. R. Co.*, 15 N. Y. 320.

Under Railway Act, signals are only required to be given at a *public traveled road*, hence they are not required at crossing of *untraveled part of an alley*. *Byrne v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 12, reversing 28 Hun. 438, and judg't for pl'ff; s. c., 14 id. 322.

Where, in an action to recover damages for injuries received at a crossing through a collision with one of defendant's trains, the contention upon the part of defendant was, that the place at which the accident occurred was not a public highway, but a private crossing, to which said provision of the act of 1854 did not apply, and the court, in its charge, assumed, as matter of law, the existence of the duty, and submitted to the jury the question as to its performance, and defendant's counsel, while excepting to the charge, did not present the question as to the repeal of the provision, but conceded it was in force and only denied its application to the case, held, that it could not be presented as a ground of reversal on appeal. *Lewis v. N. Y., L. E. & W. R. Co.*, 123 N. Y. 496, aff'g judg't for pl'ff.

Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on the approaching train, but the ground of liability was the alleged mismanagement of the gates. Before the trial the provision of the act of 1851 (sec. 7, chap. 282, Laws of 1851), requiring the bell to be rung or whistle sounded upon a locomotive, approaching a highway crossing had been repealed. Chap. 593, L. of 1886. Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. Held, no error, as it had no bearing upon the issue. *Kane v. N. H. & H. R. Co.*, 132 N. Y. 160, aff'g judg't for pl'ff.

In the absence of a statute imposing upon a railroad company the duty of giving signals, when approaching a crossing, the failure to do so is not *per se* negligence.

Section 39, chap. 140, Laws 1850; sec. 7, chap. 282, Laws 1854, imposing duty to give signal, when approaching crossing, having been repealed (chap. 593, Laws of 1886), sec. 421 of the Penal Code,\* that the engineer of a locomotive, who fails to ring a bell or sound a whistle eighty yards from the crossing, should be guilty of a misdemeanor imposes no duty upon the company. Nevertheless, the failure to give such signals may be considered upon the question of the defendant's negligence in approaching the crossing, with the care and caution, which a railroad company owes to the public.

A person was killed at a farm crossing. It was claimed that this happened because the defendant did not give its usual signals for the highway crossing beyond, and the court erroneously charged that if the accident arose from failure to give such signals for the highway the defendant was liable. *Vanderwater v. N. Y. C. & H. R. R. Co.*, 135 N. Y. 583, reversing 63 Hun. 186, and judg't for pl'ff.

**From opinion.**—"Of course the companies still owe a duty to the public at such crossings, as elsewhere. That duty is to run their trains with care and caution, and when they cross such roads, it may well be, that the failure to give due warning by whistle or bell, or in some other way, would be held under all the circumstances, to be a failure to manage and run their trains with proper care and caution, for which they would be liable to a party injured, if otherwise entitled to recover. Even when compelled by statute to make such signals, it is not necessarily a defense in all cases to prove that they were made. The making of the signals is the least the company can do, and in a given case it might not be enough. *Harty v. Railroad*, 42 N. Y. 468; *Thompson v. Central Hudson R. R. Co.*, 110 id. 636."

Charge was correct that, although signals for crossing were not given for the whole distance, required by the statute, yet, the defendant was not liable, if they were given for such distance as fully and fairly to give a traveler sufficient warning. *Cook v. N. Y. C. R. Co.*, 5 Lansing, 401.

Citing *Havens v. Erie R. Co.*, 41 N. Y. 296.

Judgment reversed on the ground that the trial judge gave the jury the impression, that more than statutory signals, were required under

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\*NOTE.—*Penal Code*, "Section 421. A person acting as engineer, driving a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities) or to continue the ringing of the bell or sounding such whistle at intervals, until such locomotive and the train to which the locomotive is attached shall have completely crossed such road or street, or any officer or employé of a corporation who shall willfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive or car for a longer period than five consecutive minutes, is guilty of a misdemeanor." (Chap. 358, Laws of N. Y. 1891.)

the circumstances, without instructing the jury as to particular acts that might be required. *Jones v. U. & B. R. R. Co.*, 36 Hun. 115.

Child seventeen months of age on crossing; engineer saw it forty rods away and tried every means to stop without success. The mother, thinking the child would sleep, left it in the house with a chain in front of the door. It escaped during her absence of eight or ten minutes and got on the track. Jury might say that if the signal had been given eighty rods away from the crossing the accident would not have happened, because the mother would have apprised herself of the coming train and saved her child. *Chrystal v. T. & B. R. Co.*, 52 Hun. 55.

The statute of Connecticut requires of the engineer the sounding of a bell or steam whistle of an engine whenever it approaches a highway crossing at grade, and makes the railroad company liable to pay all damages accruing from the omission thereof. The complaint makes no mention of the statute, and only claims a right of recovery because of the negligence of the defendant, and hence the failure to comply with the directions of the statute did not necessarily give a right of recovery.

It was competent to prove the statute, because it was some evidence bearing upon the question of negligence (*Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589), but it was by no means conclusive evidence. *Van Raden v. N. Y., N. E. R. R. Co.*, 56 Hun. 96, rev'g judgt for pl'ff.

Whether the omission to give signals is negligence in any particular case is now a question of fact for the jury. *Sauerborn v. N. Y. C. & H. R. R. Co.*, 69 Hun. 429; aff'd, 141 N. Y. 553.

Sec. 7, ch. 282, L. 1854, making it the duty of railroad companies to ring the bell or sound the whistle at least eighty rods before crossing highway, was repealed by ch. 593, L. 1886, and the saving clause of Sec. 181 of the Gen. Rd. Law of 1890, ch. 565, did not revive Sec. 7, ch. 282, L. 1854, which was repealed by ch. 593, L. 1886. Sec. 421, Penal Code, that an engineer shall be guilty of a misdemeanor, if he fails to ring the bell, &c., does not impose a duty upon the railroad corporation. *Petric v. N. Y. C. & H. R. R. Co.*, 66 Hun. 282.

Notwithstanding repeal of the statute commanding signals, yet it is the duty to approach crossings with care and caution and to give some warning by whistle, bell or otherwise, and the omission to do so may be received in evidence. *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun. 205.

Although a railway company is not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train approaching a crossing, yet it is bound to give notice and warning, and as to what notice and warning is sufficient the jury must determine. The fact that a bell

was rung does not, in itself, establish the fact that the company used reasonable care.

It may be an insufficient defense to such an action to prove compliance with the statutory regulations respecting signals. The giving of such signals does not, under all circumstances, relieve a railroad company from the imputation of negligence. It is bound to use ordinary precautions to avoid collisions.

Upon the trial of such an action proof was given that it was the custom of the railroad company to give warning of trains approaching the crossing, and it could be assumed that the plaintiff's intestate was familiar with such custom.

Held, that evidence that such custom was not followed at the time of the accident was admissible. *Vandewater v. The New York & New England Railroad Company*, 74 Hun. 32.

While there is no longer any statutory requirement that signals by bells or whistle shall be sounded at crossings, railroads are not absolved from all obligation to exercise care and caution at such places and a negligent disregard of that duty may constitute negligence. *Durkee v. Delaware &c. Canal Co.*, 88 Hun. 471.

Where plaintiff's foot was caught in the track so that it could not be gotten out in time, failure to signal train's approach did not permit recovery, as it could not have prevented injury. *Bosco v. Delaware &c. R. Co.*, 91 Hun. 320.

A railroad company is bound to give reasonable warning of the approach of trains to the crossing. *Hickey v. New York &c. R. Co.*, 8 App. Div. 123; *Bailey v. Jourdan*, 18 App. Div. 381.

The warning necessary must be commensurate with the speed, which may be at any rate in the open country, in the absence of special circumstances. *Hunt v. Fitchburg R. Co.*, 22 App. Div. 212.

The question of negligence of an engineer in failing to ring a bell, or whistle, was for the jury, where he knew or ought to have known that the gates remained up when they were usually down. *Edgerley v. Long Island R. Co.*, 46 App. Div. 284.

Negligence and contributory negligence were for the jury where a switching engine suddenly reversed and recrossed a crossing without warning and hit a pedestrian who crossed without looking, after waiting for it to pass. *Berkery v. Erie R. Co.*, 55 App. Div. 489.

Negligence is for the jury where no warning is given at a very dangerous crossing. *Haupt v. New York &c. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594.

Failure to give statutory signals constitutes actionable negligence. *Chicago &c. R. Co. v. Boggs*, 101 Ind. 522.

Pittsburg &c. R. Co. v. Martin, 82 Ind. 476; Cincinnati &c. R. Co. v. Hiltzhauer, 99 id. 486; Penn. R. Co. v. Ogier, 35 Pa. St. 72; H. & T. &c. R. Co. v. Wilson, 60 Tex. 142; R. Co. v. Rice, 10 Kas. 426; R. Co. v. Phillips, 20 id. 12; R. Co. v. Wilson, 28 id. 639. See, however, Galena &c. R. Co. v. Dill, 22 Ill. 264; Bellefontaine R. Co. v. Hunter, 33 Ind. 335; Leavenworth &c. R. Co. v. Rice, 10 Kas. 426; Chicago &c. R. Co. v. Miller, 46 Mich. 532; Bowen v. Gainesville &c. R. Co., 95 Ga. 688; Pittsburg &c. R. Co. v. Shaw, 15 Ind. App. 173; Hunter v. Montana C. R. Co., 22 Mont. 525; Omaha &c. R. Co. v. Kravenbuhl, 48 Neb. 553; Hutto v. South Bound R. Co., 61 S. C. 495; Davis v. Atlanta &c. R. Co., 63 id. 370; Texas &c. R. Co. v. Brown, 11 Tex. Civ. App. 503; Houston &c. R. Co. v. Rogers, 15 Tex. Civ. App. 680; Washington &c. R. Co. v. Lacey, 94 Va. 460; Suburban R. Co. v. Balkwill, 195 Ill. 535; aff'g s. c., 94 Ill. App. 454.

Failure to give customary signals is negligence. *Pittsburg &c. R. Co. v. Yundt*, 78 Ind. 37.

Indianapolis &c. R. Co. v. Hamilton, 44 Ind. 76; Norton v. Eastern R. Co., 113 Mass. 366; Bradley v. Boston &c. R. Co., 2 Cush. 539; Linfield v. Old Colony &c. R. Co., 10 id. 562; Webb v. Portland &c. R. Co., 57 Me. 117; Indianapolis &c. R. Co. v. McLin, 82 Ind. 435; St. Louis &c. R. Co. v. Dunn, 78 Ill. 197.

Although not required by statute, signals should be given at crossings. *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526.

Philadelphia &c. R. Co. v. Stinger, 78 Pa. St. 219; Philadelphia &c. R. Co. v. Hagan, 47 id. 244; L. & N. R. Co. v. Commonwealth, 13 Bush. (Ky.) 388; Roberts v. C. & N. W. R. Co., 35 Wis. 679; Louisville &c. R. Co. v. Ward, (Ky.) 44 S. W. Rep. 1112; Louisville &c. R. Co. v. Lyon, (Ky.) 58 S. W. Rep. 434; Willett v. Michigan C. R. Co., 114 Mich. 411; Croft v. Chicago &c. R. Co., 72 Minn. 47; Chesapeake &c. R. Co. v. Steele, 84 Fed. Rep. 93. See, however, Brown v. Milwaukee &c. R. Co., 22 Minn. 165; Philadelphia &c. R. Co. v. Killips, 88 Pa. St. 405.

Signals which reasonable precaution requires should be given. *Bradley v. Boston &c. R. Co.*, 2 Cush. 539.

McCully v. Clark, 40 Pa. St. 399; Philadelphia &c. R. Co. v. Killips, 88 id. 405; Penn. R. Co. v. Krick, 47 Ind. 368; Aurelius v. Lake Erie &c. R. Co., 19 Ind. App. 584; Missouri P. R. Co. v. Moffat, 56 Kan. 667; Smith v. Maine C. R. Co., 87 Me. 339; Faust v. Philadelphia &c. R. Co., 191 Pa. St. 420; Houston &c. R. Co. v. Pereira, (Tex. Civ. App.) 45 S. W. Rep. 767; Chesapeake &c. R. Co. v. Steele, 84 Fed. Rep. 93.

No liability unless injuries be attributable to failure to give signals. *R. Co. v. Morgan*, 31 Kas. 77.

Chicago &c. R. Co. v. Robinson, 106 Ill. 142; Toledo &c. R. Co. v. Jones, 76 id. 311; Chicago &c. R. Co. v. Harwood, 90 id. 425; Georgia &c. R. Co. v. Cook, 114 Ga. 760; Missouri P. R. Co. v. Geist, 49 Neb. 489; Omaha &c. R. Co. v. Talbot, 48 id. 627; Stolz v. Baltimore &c. R. Co., 7 Oh. Dec. 435; Cincinnati &c. R. Co. v. Murphy, 18 Oh. C. C. 298; Central &c. R. Co. v. Nycimm, (Tex. Civ. App.) 34 S. W. Rep. 160; Houston &c. R. Co. v. Malone, 37 id. 640; Galveston &c. R. Co. v. Dyer, 46 id. 841.

Failure to give statutory signals is negligence *per se* and raises a pre-

sumption that it caused the accident. *Strother v. South Carolina &c. R. Co.*, 41 S. C. 315.

Failure to observe ordinance requiring ringing of bell and stationing a man on top of car, renders company liable for death of child caused by such failure, and negligence of deceased is no excuse. *Bergman v. St. Louis &c. R. Co.*, 4 West. (Mo.) 594; *Eckert v. St. Louis &c. R. Co.*, id. 596; *Donohue v. St. Louis &c. R. Co.*, 6 West. 818; *Karle v. Kansas &c. R. Co.*, 55 Mo. 476; *Meyers v. Chicago &c. R. Co.*, 59 id. 223; *Whalen v. St. Louis &c. R. Co.*, 60 id. 323; *Harlan v. St. Louis &c. R. Co.*, 65 id. 22; *Yarnall v. St. Louis &c. R. Co.*, 15 id. 515; *Duffy v. Mo. Pac. R. Co.*, 19 Mo. App. 380; *Keim v. Union R. Co.*, 90 Mo. 314.

When reasonable and customary signals of its approach are not given by defendant's train, contributory negligence will not avail it. *B. & O. R. Co. v. State &c.*, 33 Md. 542.

*B. & O. R. Co. v. State &c.*, 36 Md. 366; *Richmond &c. R. Co. v. Anderson*, 31 Grattan, (Va.) 812.

Gate was up and the train approached without giving statutory signals. Plaintiff drove down the track to avoid collision. Liability was the same as if the accident had occurred at the crossing. *Bishop v. Southern R. Co.*, 63 S. C. 532.

Omission to give signals in a city is not negligence if the statute exempts cities from such requirement. *Missouri Pac. R. Co. v. Pierce*, 33 Kas. 61.

Statute requiring signals enacted for protection of travelers along a parallel road as well as for those crossing track. *Ranson v. Chicago &c. R. Co.*, 62 Wis. 178.

*People v. N. Y. &c. R. Co.*, 25 Barb. 199; *Wakefield v. C. & P. &c. R. Co.*, 37 Vt. 330; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259. See, however, *East Tennessee &c. R. Co. v. Feathers*, 10 Lea, (Tenn.) 103; *Louisville &c. R. Co. v. Smith*, (Ky.) 53 S. W. Rep. 269.

But not for one using the track as a foot path. *Huff v. Chesapeake &c. R. Co.*, 48 W. Va. 45.

*Louisville &c. R. Co. v. Vittitoe*, (Ky.) 41 S. W. Rep. 269; *Baltimore &c. R. Co. v. Bradford*, 20 Ind. App. 348; *Boyd v. Cross*, 19 Tex. Civ. App. 426; *Schug v. Chicago &c. R. Co.*, 102 Wis. 515.

One on adjacent premises has a right to rely on the usual signals at crossings. *Louisville &c. R. Co. v. Penrod*, (Ky.) 56 S. W. Rep. 1.

One who is driving along parallel to the track held not entitled to rely on statutory signals at crossings. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

Evidence that signals were omitted until immediately before a col-

lision and then given, scaring horses, for the jury. *Philadelphia &c. R. Co. v. Hogeland*, 66 Md. 149.

As to whether violation of a signal ordinance is willful negligence, see *Chicago &c. R. Co. v. Murowski*, 119 Ill. 77; aff'g s. c., 18 Ill. App. 661.

Ordinance requiring constant ringing of bells on moving engines within city limits is valid, notwithstanding the fact that it is more onerous than a state statute on the subject. *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297.

A statute prescribing signals at "at least" 80 rods before reaching a crossing construed not to require them "within" that distance. *Houston &c. R. Co. v. O'Neal*, 91 Tex. 671; rev'g s. c., 45 S. W. Rep. 921; *Texas &c. R. Co. v. Scriviner*, (Tex. Civ. App.) 49 S. W. Rep. 649.

So where the engine starts within that distance. *Houston &c. R. Co. v. Patterson*, 20 Tex. Civ. App. 255.

The statutory requirement for the giving of signals and the maintenance of lookouts applies to trains while going by a station or depot grounds. *Mobile &c. R. Co. v. House*, 96 Tenn. 552.

A statute requiring signals at "any public road or street" construed to cover city street crossings. *International &c. N. R. Co. v. Dalwigh*, (Tex. Civ. App.) 48 S. W. Rep. 527; s. c. rev'd on another point, (Tex.) 51 S. W. Rep. 500.

And *de facto* public road crossings. *Galveston &c. R. Co. v. Eaton*, (Tex. Civ. App.) 44 S. W. Rep. 562.

See, also, *Bradley v. Ohio River &c. R. Co.*, 126 N. C. 735.

But does not include an overhead crossing. *Houston &c. R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107.

See, also, *McElroy v. Georgia &c. R. Co.*, 98 Ga. 257; *Cleveland &c. R. Co. v. Halbert*, 179 Ill. 196; rev'g s. c., 75 Ill. App. 592; *Skinner v. New York &c. R. Co.*, 64 N. Y. St. Rep. 325.

The statutory requirements as to signals are intended for the benefit of cattle as well as travelers. *Graybill v. Chicago &c. R. Co.*, (Iowa) 84 N. W. Rep. 946.

*Houston &c. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

They do not apply, where a horse is 400 feet from the crossing when first seen. *Georgia &c. Co. v. Partee*, 107 Ga. 789.

Nor to animals on a crossing not reached from the highway. *Wasson v. McCook*, 80 Mo. App. 483.

Or on the right of way beyond the crossing. *Mills &c. Lumber Co. v. Chicago &c. R. Co.*, 91 Wis. 336.

Recovery is allowed where signals would have prevented the accident. *Downing v. Missouri &c. R. Co.*, 70 Mo. App. 657.



*Kirkpatrick v. Missouri &c. R. Co.*, 71 Mo. App. 263; *Milliga v. Chicago &c. R. Co.*, 79 id. 393.

Statutory requirement of signals at crossings of "any other road or street" construed not to apply to private roads. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

See, also, *Comer v. Shaw*, 98 Ga. 543.

Under Mill & V. (Tenn.) Code, an engineer is not required to signal at a crossing not designated by a sign erected by the road overseers. *Southern R. Co. v. Elder*, 81 Fed. Rep. 191.

Statutory requirement of continuous ringing of bell within 80 yards of a crossing, construed to apply to moving engines anywhere within that distance. *Herring v. Wabash R. Co.*, 80 Mo. App. 562.

But not in a switch yard, though common law may require it. *Lamb v. Missouri &c. R. Co.*, 147 Mo. 171.

But it applies while "kicking" cars. *Baltimore &c. R. Co. v. Wheeler*, 63 Ill. App. 193.

But not while actually passing a crossing. *Kirkpatrick v. Missouri &c. R. Co.*, 147 Mo. 171.

A statute requiring a train, standing within 100 rods from a crossing, to ring a bell 30 seconds before starting, construed to apply to a train standing over a crossing. *Littlejohn v. Richmond &c. R. Co.*, 45 S. C. 181.

Backing on the wrong track with insufficient light at excessive speed and without lookout was negligence. *Sullivan v. New York &c. R. Co.*, 73 Conn. 203.

See, also, *Stanley v. Durham &c. R. Co.*, 120 N. C. 514; *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1; *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640; *Illinois &c. R. Co. v. Mahan*, (Ky.) 34 S. W. Rep. 16; *Green v. Chicago &c. R. Co.*, 110 Mich. 648; *Rothars v. Illinois C. R. Co.*, (Miss.) 25 South. Rep. 665; *Penny v. Missouri &c. R. Co.*, 71 Mo. App. 577; *Purnell v. Raleigh*, 122 N. C. 832; *Dowl v. Delaware &c. R. Co.*, (Pa.) 52 Atl. Rep. 249; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655; *Malstrom v. Northern P. R. Co.*, 20 Wash. 195; *Steele v. Northern P. R. Co.*, 21 Wash. 287.

Defendant was negligent in backing flat cars at a rapid rate at night over a crossing, without light, signal or warning. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 56 S. W. Rep. 248.

It is negligent to run at night without a headlight. *Baltimore &c. R. Co. v. Alsop*, 11 Ill. App. 54.

A "switched" car is a "running" car within an ordinance requiring a brilliant and conspicuous light on its forward end. *Chicago &c. R. Co. v. O'Neil*, 64 Ill. App. 623.

It is negligent to back a long train over a crossing with only the bell ringing. *Missouri &c. R. Co. v. O'Connell*, (Tex. Civ. App.) 43 S. W. Rep. 66.

See, also, *Demaine v. Washington &c. R. Co.*, (Va.) 27 S. E. Rep. 437.

Defendant's negligence in closing, without warning, an opening between its cars a short distance from the crossing, where the crossing itself had been obstructed for a considerable length of time, was for the jury. *Golden v. Pennsylvania R. Co.*, 187 Pa. St. 635.

Recovery was permitted where deceased's view was obstructed and defendant failed to sound the proper statutory signals. *Simons v. Southern R. Co.*, 96 Va. 152.

Engineer was negligent in failing to signal at a much frequented crossing, where a train has just passed in the opposite direction. *Smeltz v. Pennsylvania R. Co.*, 186 Pa. St. 364.

See, also, *Grenell v. Michigan C. R. Co.*, 124 Mich. 141; *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16.

Warning should be given when a train is backing in the dark, when another train is passing at the same time in the same direction. *Chicago &c. R. Co. v. Walsh*, 157 Ill. 672.

See, also, *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434; *Downing v. Morgan's &c. R. Co.*, 104 La. 508.

The fact that a box car standing by the side of the crossing together with contiguous buildings prevent hearing the statutory signals when the wind is unfavorable, does require additional whistling. *Tessmer v. New York &c. R. Co.*, 72 Conn. 208.

Yelling and whistling from detached cars, to become a substitute for the locomotive signals, must not only be heard but known to be a warning. *Baker v. Kansas City &c. R. Co.*, 147 Mo. 140.

The object of the signal is to prevent teams approaching so near the crossing as to become frightened, as well as to prevent collision thereon. *Missouri &c. R. Co. v. Magee*, 92 Tex. 616; aff'g s. c., 49 S. W. Rep. 156.

A statute, requiring two sharp blasts is not satisfied by one long one. *Simons v. Southern R. Co.*, 96 Va. 152.

Testimony of passenger that he heard no whistle was contradicted by positive testimony of four of the train crew. A direction for defendant was sustained. *Knorr v. Philadelphia &c. R. Co.*, (Pa. St.) 52 Atl. Rep. 90.

Failure to give the statutory signals was not negligence *per se* as to a person on the track 135 yards beyond the crossing. *Georgia R. &c. Co. v. Clary*, 103 Ga. 639.

Defendant was not excused from signaling though the person in danger be a child so young as to be unable to comprehend its meaning. *Palmer v. Missouri P. R. Co.*, 53 Neb. 611.

Miscarriage from fright at the sudden passing of a train, held the natural and probable consequence of failure to give signals. *St. Louis &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 891.

As to whether failure to signal justifies punitive damages, see *Louisville &c. R. Co. v. Cooper*, (Ky.) 65 S. W. Rep. 195.

### (b). CONTRIBUTORY NEGLIGENCE.

Gross negligence in a person injured at a railroad crossing by a passing train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the steam whistle as required by law.

With his sense of hearing unobstructed, the plaintiff might have heard the train long before it approached the crossing, and in abundant season to avoid even the possibility of danger. If, for his own comfort and to protect himself against the cold, he had chosen in any degree to deprive himself of the ability to hear, he should have used his eyes so much the more. *Stevens v. Syracuse R. Co.*, 18 N. Y. 422, aff'g nonsuit.

A train consisting of engine, tender, and nine cars, was backed on a dark night at the speed of four or five miles an hour, and was about to cross a street, used as a thoroughfare in a populous city, and the man in charge knew that there was no flagman at the crossing; the defendant gave evidence, that the bell sounded in the engine all the time and a man in the rear car swung a lantern to warn plaintiff; on the next west parallel track was a train of nine cars extending to the crossing. Plaintiff saw no lights and heard no signals. Judgment for plaintiff reversed on the charge that "considering the nature of the business in which the defendant was engaged and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest and which it was in its power to employ." (*Johnson v. H. R. R. Co.*, 20 N. Y. 65, distinguished and limited.) *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451, rev'g judg't for pl'ff; s. c., 61 N. Y. 587, where judgment for plaintiff was sustained.

If no statutory signals be given at a crossing, the defendant is negligent. If a traveler stop four or five rods from the crossing to look and listen, and, not hearing a train, goes on, he is not *per se* negligent. Negative testimony, as to the hearing of signals may have the force of positive evidence. *Renwick v. N. Y. C. R. R. Co.*, 36 N. Y. 132.

In an action for injuries to the plaintiff, caused by the alleged negligence of the defendant, a railroad company, in running its trains against the plaintiff's wagon at a crossing, a refusal to charge, that the plaintiff was not relieved from the duty of exercising ordinary prudence in approaching the crossing by the omission of the defendants to give the

required signal on approaching such crossing, was error. *Baxter v. Troy & Boston R. Co.*, 41 N. Y. 502, rev'g judg't for pl'ff.

A man driving rapidly, was killed while approaching a crossing in a storm, where he could usually see the train. No signals were given. For the jury. *Rackford v. N. Y. C. & H. R. R. Co.*, 53 N. Y. 654; 6 Lansing, 381.

If a person see an engine and know, in time to avoid it that it is approaching a crossing, the railroad company is not liable for negligence because no signal was given and the usual flagman was absent. The plaintiff, on a dark night, caught his feet between the rail and the planking and the train overtook him. The defendant was held not liable, as a matter of law, but the question of contributory negligence was properly submitted to the jury, who found for plaintiff. *Pakalinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424.

While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. *Greany v. L. I. R. Co.*, 101 N. Y. 419.

The plaintiff's intestate, an old lady, was crossing six tracks, and she had time to see. The nonsuit was reversed on the ground that the number of tracks, noise of wind, smoke, steam, &c., may have confused her. No signals were given. *Sherry v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 652, rev'g nonsuit.

*Wasmer v. Delaware & c. R. Co.*, 80 N. Y. 218; *Beisiegel v. Delaware & c. R. Co.*, 34 id. 622; *Greany v. Long Island R. Co.*, 101 id. 419.

Fact that signal was not given at crossing does not shift burden of proof, so that defendant must disprove that his negligence caused the injury. *Kelsey v. Jewett*, 28 Hun. 51.

Plaintiff, standing on the first track waiting to cross the second track occupied by a train moving away, was struck by a gravel train coming on the first track without signal. Brakeman on the gravel train called to plaintiff to get out of the way, but too late.

Contributory negligence for jury. Witness, who had timed trains, was properly allowed to estimate speed of train. *Northrup v. N. Y., O. & W. R. Co.*, 37 Hun. 295.

*Salter v. Utica & c. R. Co.*, 59 N. Y. 631.

Although the death of the plaintiffs' intestate was caused by a collision with a railway train at a highway crossing, and the defendant was guilty of negligence in failing to give sufficient signals, no inference arises therefrom that the deceased was free from contributory negligence. *Milner v. The New York & c. R. Co.*, 81 Hun. 152.

A bright girl of six crossed a city street crossing without looking; the engine which struck her was approaching without noise and without signal. For the jury. *Finn v. Delaware &c. R. Co.*, 42 App. Div. 524.

While plaintiff, a traveler, is not absolved from all care, she is entitled, where the track is obstructed by the trees and the way is new to her, to be warned of the danger in approaching a crossing. *Henn. v. Long Island R. Co.*, 51 App. Div. 292.

The night was cold and dark and the walk slippery at the crossing. The view in either direction was obstructed by trains on side tracks, one of which was moving with the usual noise incident thereto. The track in the direction from which the express came, without signals, made a sharp turn a short distance above. Plaintiff's negligence was a question for the jury. *Woodworth v. New York &c. R. Co.*, 55 App. Div. 23.

It was for the jury to say, whether plaintiff was negligent, where the view was unobstructed within 25 feet, the night was dark, the automatic gong was still, and the surroundings were noisy and no signals given. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

The fact that a traveler was not aware of the vicinity of an approaching train and that no signal was given, does not assure a safe crossing nor excuse him from using the care and vigilance otherwise due from him:

*Steves v. Oswego & S. R. Co.*, 18 N. Y. 42; *Wilds v. Hudson River Co.*, 24 id. 430; *Wilcox v. Rome & W. R. Co.*, 39 id. 358; *Beisiegel v. N. Y. C. & H. R. R. Co.*, 40 id. 9; *Baxter v. Troy & Boston R. Co.*, 41 id. 501; *Havens v. Erie R. Co.*, id. 296. The contrary was held in *Beisiegel v. N. Y. C. & H. R. R. Co.*, 34 id. 622; *Ernst v. Hudson R. Co.*, 35 id. 9; but see, s. c., 39 id. 66; *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576; *Watson v. Erie R. Co.*, 8 Oh. N. P. 18; *Miller v. Terre Haute &c. R. Co.*, 144 Ind. 323; *Chicago &c. R. Co. v. Reed*, (Ind. App.) 63 N. E. Rep. 878; *Western &c. R. Co. v. Kehoe*, 83 Md. 434; *Edwards v. Southern R. Co.*, 63 S. C. 271; *Chicago &c. R. Co. v. Pearson*, 82 Ill. App. 605; *Chicago &c. R. Co. v. Nichols*, 74 Ill. App. 197; *Cleveland &c. R. Co. v. Heine*, (Ind. App.) 62 N. E. Rep. 455; *Brinker v. Michigan &c. R. Co.*, 121 Mich. 283; *Gahagan v. Boston &c. R. Co.*, 70 N. H. 441; s. c., 55 L. R. A. 426; *Conkling v. Erie R. Co.*, 63 N. J. L. 338; *Phelps v. New England R. Co.*, 172 Mass. 98; *Judson v. Great Northern R. Co.*, 63 Minn. 248; *McManamee v. Missouri P. R. Co.*, 135 Mo. 440; *Hunter v. Montana C. R. Co.*, 22 Mont. 525; *Swanson v. Central R. &c.*, 63 N. J. L. 605; *Severy v. Chicago &c. R. Co.*, 6 Okla. 153; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; *Berkeley v. Chesapeake &c. R. Co.*, 43 W. Va. 11; *Comer v. Shaw*, 98 Ga. 543; *Payne v. Chicago &c. R. Co.*, 108 Iowa, 188; *Walker v. Mercer*, 61 Kan. 736; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Hern v. New York &c. R. Co.*, 89 Md. 762; *Gilbertson v. Bangor &c. R. Co.*, 89 Me. 337; *Illinois C. R. Co. v. McLeod*, 78 Miss. 334; *Balser v. Chicago &c. R. Co.*, 7 Oh. N. P. 482; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Faust v. Philadelphia &c. R. Co.*, 191 Pa. St. 420; *Griffith v. Pennsylvania R. Co.*, 13 Lane. L. Rev. 193; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Walters v. Chicago &c. R. Co.*, 104 Wis. 251.

Traveler may assume that no train is near, if he did not see, nor hear

one, nor hear the sound of a bell. *Donohue v. St. Louis &c. R. Co.*, 91 Mo. 357.

See, also, *Baltimore &c. R. Co. v. Conoyer*, 149 Ind. 524; *St. Louis &c. R. Co. v. Dawson*, (Kan.) 67 Pac. Rep. 521; *Hicks v. New York*, 164 Mass. 424; *Cleveland &c. R. Co. v. Halbert*, 75 Ill. App. 592; *Case v. Chicago &c. R. Co.*, 100 Iowa, 487; *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; *Kimball v. Friend*, 95 Va. 125; *Rangeley v. Southern R. Co.*, 95 Va. 715; *Pittsburg &c. R. Co. v. Lewis*, (Ky.) 38 S. W. Rep. 482; *Cleveland &c. R. Co. v. Heine*, (Ind. App.) 62 N. E. Rep. 455; *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308.

Traveler may assume that usual and proper signals will be given by the railroad company. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.

See, also, *Harper v. Barnard*, 99 Iowa, 159; *Texas &c. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576; *Kansas City &c. R. Co.*, (Miss.) 32 South. Rep. 3; *Baltimore &c. R. Co. v. Wetmore*, 65 Ill. App. 292; *Hicks v. New York &c. R. Co.*, 164 Mass. 424; *Mayes v. Southern R. Co.*, 119 N. C. 758; *Russell v. Carolina C. R. Co.*, 118 N. C. 1098.

A traveler disregards a warning that a train is approaching at his own risk. *Granger v. Boston*, 146 Mass. 216.

*Wright v. Boston &c. R. Co.*, 129 Mass. 440; *Allyn v. Boston &c. R. Co.*, 105 id. 77; *Butterfield v. Western R. Co.*, 10 Allen 532; *Bancroft v. Boston &c. R. Co.*, 97 Mass. 275; *Burns v. Boston &c. R. Co.*, 101 id. 150; *Hinckley v. Cape May R. Co.*, 120 id. 257; *Shaw v. Boston &c. R. Co.*, 8 Gray 73; *Warren v. Fitchburgh R. Co.*, 8 Allen 227; *Commonwealth v. Fitchburg R. Co.*, 10 id. 189; *Hanson v. Pennsylvania R. Co.*, 62 N. J. L. 391; *Pennsylvania &c. R. Co. v. Morel*, 40 Oh. St. 338; *Galveston &c. R. Co. v. Haas*, 19 Tex. Civ. App. 645; *Gulf &c. R. Co. v. Abenroth*, (Tex. Civ. App.) 55 S. W. Rep. 1122; *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Herbert v. Southern P. Co.*, 121 Cal. 227; *Louisville &c. R. Co. v. Pirschbacker*, 63 Ill. App. 144; *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295; *Pinney v. Missouri &c. R. Co.*, 71 Mo. App. 577; *Douglass v. Chicago &c. R. Co.*, 100 Wis. 405; *Comer v. Barfield*, 102 Ga. 485.

Plaintiff was allowed to recover, where, after listening, his view being obstructed, he started to cross but suddenly met cars backing without signal over the crossing and was injured in his attempt to escape by quickly driving around them. *Houston &c. R. Co. v. Pereira*, (Tex. Civ. App.) 45 S. W. Rep. 767.

Judgment reversed for admission of evidence of failure to signal, where plaintiff saw the train and the signal would not have attracted her attention sooner if it had been given. *Ohio Valley R. Co. v. Young*, (Ky.) 39 S. W. Rep. 415.

### (c). WHAT SIGNALS SHOULD BE GIVEN.

Ringin bell is not a compliance with a statutory duty to keep look-out on rear of cars while switching. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Statute requiring one or two signals is satisfied if either is given. *St. Louis &c. R. Co. v. Pflugmacher*, 9 Ill. App. 300.

*I. C. R. Co. v. Burton*, 69 Ill. 174; *Hover v. Kansas City &c. R. Co.*, 69 Mo. App. 557.

Where the statute requires that a bell be rung or a whistle sounded as a signal, a bell must be substituted for the whistle upon seeing that the former is frightening horses. *Louisville &c. R. Co. v. Smith*, (Ky.) 53 S. W. Rep. 269.

Where a statute requires ringing of bell or sounding of whistle, defendant should have given both signals. *Cathcart v. Hannibal &c. R. Co.*, 19 Mo. App. 113.

*Turner v. Railroad Co.*, 78 Mo. 578; *Van Note v. Hannibal &c. R. Co.*, 70 Mo. 641.

Whether a signal by bell without a whistle is sufficient is for the jury to decide. *Longemecker v. Pennsylvania R. Co.*, 105 Pa. St. 328.

*Railroad Co. v. Stinger*, 28 P. F. Smith (Pa.) 219; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430.

#### (d). WHEN SIGNALS SHOULD NOT BE GIVEN.

Although the required signals might scare a team on track, they should be given. *Schaefer v. Chicago &c. R. Co.*, 62 Iowa. 624.

When an animal is in a dangerous situation and liable to injury from fright from a train, company should use care. *Newman v. V. &c. R. Co.*, 64 Miss. 115.

See, also, *Ocheltree v. Chicago &c. R. Co.*, 96 Iowa. 246; *Ward v. Chicago &c. R. Co.*, 97 id. 50; *Pratt v. Chicago &c. R. Co.*, 107 id. 287; *Gulf &c. R. Co. v. Milner*, (Tex. Civ. App.) 66 S. W. Rep. 574; *Southern R. Co. v. Cooper*, 98 Va. 299.

An engineer was negligent in blowing his whistle beneath a highway bridge in constant use. *Mitchell v. Nashville &c. R. Co.*, 100 Tenn. 329; s. c., 40 L. R. A. 426.

Unnecessary and extraordinary use of whistle is negligence. *Philadelphia &c. R. Co. v. Killips*, 88 Pa. St. 405.

*Penn. R. Co. v. Barnett*, 9 P. F. Smith (Pa.) 239; *R. Co. v. Stinger*, 28 id. 219; *Gibbs v. Chicago &c. R. Co.*, 26 Minn. 427; *Billman v. Indianapolis &c. R. Co.*, 76 Ind. 166; *People v. N. Y. &c. R. Co.*, 25 Barb. 199; *Culp v. Atchison &c. R. Co.*, 17 Kas. 475; *Petersburgh &c. R. Co. v. Hite*, 81 Va. 767; *Rogers v. Baltimore &c. R. Co.*, 150 Ind. 397; *Chicago &c. R. Co. v. Parks*, 59 Kan. 709; *Louisville &c. R. Co. v. Shearer*, (Ky.) 59 S. W. Rep. 330; *Everett v. Richmond &c. R. Co.*, 121 N. C. 519; *Southern R. Co. v. Torian*, 95 Va. 453;

That a signal was required by statute did not excuse making it unnecessarily loud. *Beopple v. Illinois C. R. Co.*, 104 Tenn. 420.

That the unnecessary blowing was unintentional was no justification. *Weil v. St. Louis &c. R. Co.*, 64 Ark. 535.

Or that the necessity is one created by the rule of the company and not by statute. *Flynn v. Boston &c. R. Co.*, 169 Mass. 305.

#### (e). SIGN BOARDS.

Every railroad corporation shall cause boards to be placed, well supported and constantly maintained across each traveled public road or street, where the same is crossed by its road at grade. They shall be elevated so as not to obstruct travel, and to be easily seen by travelers; and on each side shall be painted in capital letters, each at least nine inches in length and of suitable width, the words "Railroad crossing; look out for the cars." But such boards need not be put up in cities and villages, unless required by the officers having charge of the streets. Chap. 565, N. Y. L. 1890.

Violation of statute requiring sign boards is negligence. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 32 App. Div. 627; *Henn v. Long Island R. Co.*, 51 App. Div. 292.

Plaintiff was sufficiently warned by the presence of a sign board, though not the statutory one, which could be read with the ordinary eye 400 feet away. *Wellbrock v. Long Island R. Co.*, 31 Misc. 424.

Railroad company held not relieved of liability at a crossing, recognized by it and travelers at large as public, by posting a sign that persons crossing do so at their own risk. *Chicago &c. R. Co. v. Reith*, 65 Ill. App. 461.

The Iowa Statute makes failure to erect caution boards negligence *per se*. *Field v. Chicago &c. R. Co.*, 14 Fed. Rep. 332.

Want of signal boards will not attach absolute liability where plaintiff's own negligence caused the injury. *Field v. Chicago &c. R. Co.*, 4 *McCrury*, 573.

*Chicago &c. R. Co. v. Robinson*, 8 Ill. App. 140; *Ormsbee v. Boston &c. R. Co.*, 14 R. I. 102; *Penn. R. Co. v. Richter*, 42 N. J. L. 180; *Telfer v. Northern R. Co.*, 1 Vroom. 188; *Haslan v. M. & E. R. Co.*, 4 id. 147; *Payne v. Chicago &c. R. Co.*, 44 Iowa 236; *Payne v. Chicago &c. R. Co.*, 39 id. 523; *Lang v. Holiday Creek R. Co.*, 49 id. 469.

Failure to erect caution board required by statute not actionable negligence, where the injured person was familiar with the crossing and had it in mind at the time. *Haas v. Grand Rapids &c. R. Co.*, 47 Mich. 401.

*Penn. R. Co. v. Beale*, 73 Pa. St. 504; *R. Co. v. Houston*, 95 U. S. 697; *Lake Shore &c. R. Co. v. Miller*, 25 Mich. 274. See, however, *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *New York &c. R. Co. v. Kistler*, 16 Oh. C. C. 316.



## (f). WHAT FURTHER CARE REQUIRED.

The giving of statutory signals does not always discharge a railroad company from negligence, as where a train is run with undue speed, or in other dangerous manner through a city or village.

Statutory signals for a crossing were not alone sufficient. *Dyer v. Erie R. Co.*, 11 N. Y. 228.

The ringing of a bell for a crossing was not, under the circumstances, conclusive of care. Defendant's negligence was for the jury. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, aff'g judg't for pl'ff.

The giving of statutory signals does not always discharge a railway company from negligence, as where a train was run at undue, improper and highly dangerous speed through a city or village. Question was for the jury. *Thompson v. N. Y. C. & H. R. R. Co.*, 110 N. Y. 636; reversing 31 Hun, 391. See same doctrine in *Harty v. Railroad Co.*, 42 N. Y. 468; *Vandewater v. N. Y. Central R. Co.*, 135 N. Y. 583.

A railroad company has not discharged its whole duty to the public, by simply causing the bell to be rung, or the whistle sounded for the distance required by statute, before crossing a street or highway, and particularly in populous cities and villages. *Zimmer v. N. Y. C. & H. R. R. Co.*, 1 Hun, 552, aff'g judg't for pl'ff.

The plaintiff's intestate, while crossing defendant's tracks, at their intersection with a street in the city of Rochester, on a dark night, was struck by an engine moving backwards, and killed. Upon the trial the justice charged, that it was for the jury to say, whether it was the duty of the company, under the circumstances, to have a light upon the engine, and, as it was moving backwards, upon the rear of it, and if so what kind of a light was required; and then said, "the company was bound to have so much light, and so located, that a person reasonably diligent, and of natural powers of observation, might have been able to discover it." Held, that the charge was correct.

The court also charged, that it was the duty of the engineer "to keep a look-out to see, whether he is running down foot-passengers, who are crossing the railroad track, upon the highways of the city." Held, no error. *Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415, aff'g judg't for pl'ff.

Where an engine was propelled through a city street two hours after sundown, in the winter, without a headlight and without ringing a bell, the jury was justified in finding the company guilty of negligence. *Donoran v. L. I. R. Co.*, 67 Hun, 73, aff'g judg't for pl'ff.

Plaintiff's intestate was killed at a street crossing by defendant's locomotive engine running backwards at a rapid rate through a city at an early hour in the morning, while it was quite dark, without a light on

the rear end or signal of its approach. Defendant's negligence was for the jury. *Zoliewski v. N. Y. Cent. &c. R. R. Co.*, 1 Misc. 438.

Precaution necessary to be taken not wholly within the discretion of the jury. Statutory signals complied with, satisfy requirements. *Semel v. N. Y. &c. R. Co.*, 9 Daly, 321.

*Terre Haute &c. R. Co. v. Jones*, 11 Ill. App. 322; *Indianapolis &c. R. Co. v. Hamilton*, 44 Ind. 76.

Requirement of due warning satisfied if statutory signals be given. *Lake Shore &c. R. Co. v. Elson*, 15 Ill. App. 80.

*Peoria &c. R. Co. v. Berry*, 15 Ill. App. 155; *Chicago &c. R. Co. v. Dougherty*, 110 Ill. 521; *Chicago &c. R. Co. v. Robinson*, 106 id. 142; *Peoria &c. R. Co. v. Siltman*, 67 id. 72; *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Tessmer v. New York &c. R. Co.*, 72 Conn. 208.

Compliance with ordinance regulations as to speed and signals do not constitute the sole measure of care, as they do not take away the common law duty of ordinary care under the circumstances peculiar to each case. *Coulter v. Great Northern R. Co.*, 5 N. D. 568.

See, also, *Missouri P. R. Co. v. Moffat*, 56 Kan. 667; *Downing v. Morgan's &c. R. Co.*, 104 La. 508; *Philadelphia &c. R. Co. v. State*, 61 N. J. L. 71; *Pennsylvania R. Co. v. Miller*, 99 Fed. Rep. 529; *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155.

Ordinary care must be used to keep a lookout and discover danger at a crossing. *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60.

See, also, *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Missouri &c. R. Co. v. Bellew*, 22 Tex. Civ. App. 265; *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629; *Felton v. Newport*, 105 Fed. Rep. 332; *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; *Bradley v. Ohio River &c. R. Co.*, 126 id. 735; *Mason v. Southern R. Co.*, 58 S. C. 70.

A statute requiring maintenance of a lookout for persons or property on the track, and, upon discovery, an immediate alarm, the use of brakes and every possible means to prevent accident, held to impose absolute liability, where train runs backwards. *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655.

The statute construed not to apply, where a person has gone a reasonably safe distance from the track. But where, on discovering an approaching train, a man on horseback attempted to turn back, when the beast became unmanageable and backed against the train, which could have been stopped when he was first seen, his widow was allowed to recover in a statutory action. *Louisville &c. R. Co. v. Truett*, 111 Fed. Rep. 876.

See, also, *Illinois C. R. Co. v. McCalip*, 76 Miss. 360; *King v. Illinois C. R. Co.*, 114 Fed. Rep. 855.

An engineer must see, what, with reasonable care may be seen. *E. T. &c. R. Co. v. White*, 5 Lea. (Tenn.) 540.

*Frazer v. South &c. R. Co.*, 81 Ala. 185; *A. G. &c. R. Co. v. Jones*, 71 Ala. 487.

Timely warning should be given by engineer of intention to cross a street. *T. & P. R. Co. v. Lowry*, 61 Tex. 149.

See, also, *Texas &c. R. Co. v. Curlin*, 13 Tex. Civ. App. 505.

Knowledge of the practice of passing around the end of trains obstructing the crossing makes it incumbent on the railroad, not only to signal before starting, but to have some one at the end to guard against injury. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424.

Where, owing to a curve and the obstruction of the smoke stack, the engineer cannot keep an adequate lookout alone, it is the duty of the fireman to assist him. *Arrowood v. South Carolina &c. R. Co.*, 126 N. C. 629.

A long continued neglect to maintain a brakeman at the rear end of backing trains does not relieve defendant of liability, where ordinary care requires it. *Galveston &c. R. Co. v. Eitzen*, (Tex. Civ. App.) 39 S. W. Rep. 625.

The engine of a train making a flying switch had passed a crossing when a ten-year-old boy, whose view of the rest of the train was obstructed, and who was not otherwise warned, started to cross and was killed. A finding of gross negligence on part of the defendant was sustained. *Gulf &c. R. Co. v. Letsch*, (Tex. Civ. App.) 55 S. W. Rep. 584; s. c., aff'd, 56 id. 1134.

It was for the jury to say whether pushing instead of pulling a train was, under the circumstances, negligent notwithstanding expert testimony that it was the only practical way. *Carrow v. Barre R. Co.*, (Vt.) 52 Atl. Rep. 537.

## V. Running Switch.

It is gross and criminal negligence to make a running switch over a crossing in a populous part of a village. *Brown v. N. Y. C. R. Co.*, 32 N. Y. 597; aff'd s. c., 31 Barb. 385.

See *Woodward v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 381.

The plaintiff's intestate waited for the train to pass the crossing on another track, and, then going on the north track, was struck by a locomotive coming suddenly on the same track at the rate of ten or twelve miles per hour, without signals. There was some interruption of the view, and the customary flagman was absent.

The intestate's negligence was for the jury. Competent to show ab-

sence of customary flagman. *Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518.

Traveler passing between parts of a train separated by a few feet, and using his eyesight steadily to apprehend the approach of cars, was struck by a car kicked on one of the tracks.

Contributory negligence for the jury. *Mahar v. G. T. R. Co.*, 19 Hun, 32, citing *Carr v. N. Y. Central & C. R. Co.*, 60 N. Y. 633; *Wood v. Village of Andes*, 11 Hun, 544.

Second half of a detached train ran over traveler; it was negligence in the employes not to have known that the train was detached. *Farley v. Chicago & C. R. Co.*, 56 Iowa, 337.

Whether the use of what is termed "flying switch" is safe and prudent in any given case is for the jury to determine. *White v. Fitchburg R. Co.*, 136 Mass. 321.

*Howard v. St. Paul & C. R. Co.*, 32 Minn. 214; *Lehigh & C. Co. v. Lear*, 8 Cent. R. (Pa.) 107.

Making a flying switch on a public highway without precautionary measures being taken is evidence of gross negligence. *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150.

*Kay v. R. Co.*, 65 Pa. St. 269; *Butler v. R. Co.*, 28 Wis. 487; *Illinois Central R. Co. v. Baches*, 55 Ill. 379; *Chicago & C. R. Co. v. Dignam*, 56 id. 487; *Baltimore & C. R. Co. v. Wheeler*, 63 Ill. App. 193; *Chicago & C. R. Co. v. O'Neil*, 64 id. 623; *Pinney v. Missouri & C. R. Co.*, 71 Mo. App. 577; *Gulf & C. R. Co. v. Letsch*, (Tex. Civ. App.) 55 S. W. Rep. 584; *Alabama & C. R. Co. v. Anderson*, 109 Ala. 299; *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356; *Bradley v. Ohio River & C. R. Co.*, 126 N. C. 735.

Traveler not bound to anticipate company would make a flying switch across and over a public highway. *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150.

See, also, *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642; *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356.

Wanton and willful recklessness only, held a defense to the statutory action for damage caused by flying switch. *Pulliam v. Illinois C. R. Co.*, 75 Miss. 627.

Plaintiff was struck by a car making a "kicking switch" at high speed without warning. There was considerable surrounding noise at the time. Before he started to cross he saw the car 250 feet away, but did not look again. Verdict for plaintiff was sustained. *Gulf & C. R. Co. v. Holland*, (Tex. Civ. App.) 66 S. W. Rep. 68.

## VI. Gates.

## (a). NEGLIGENCE.

Unless directed so to do by competent authority, a railway company is not required to keep a flagman or gate at a crossing, and negligence cannot be predicated on failure so to do; but if it elect to do so, the jury may consider on the question of negligence of the defendant and the contributory negligence of the plaintiff, the actions, directions, conduct, omission or absence of the flagman, the condition and handling of the gates, and especially whether such gates being open is apparent assurance that a train is not dangerously near, and a consequent invitation to the traveler to cross.\*

The refusal of the court to charge that, "if, notwithstanding the condition of the gates, he might have seen or heard the engine if he had looked or listened, and as he did not, the plaintiff cannot recover," was not error; that the open gate and the absence of the usual signals were direct and explicit assurance that no train or engine was approaching with intent to cross the street, upon which he had a right, to a certain extent, to rely; that the degree of care in such a case was different from that ordinarily required of a traveler approaching a railroad crossing, and it was for the jury to say whether the deceased exercised that ordinary care and prudence which, under the circumstances, it would be natural to expect; that, as matter of law, he was not chargeable with negligence in not seeing the approaching engine, and whether he looked or listened was for the jury to determine, and if they found he did not, whether, under the circumstances, if he had done so, he would have ascertained that the engine was approaching with intent to cross the highway. *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, aff'g judgt for pl'ff.

A railroad company, in operating gates at the crossing, must use care that the travelers are not injured by the gates or cars. If the gate be raised and is motionless, there is an invitation to pass, and the gate should be lowered, if necessary, with due regard to safety. Gate struck pedestrian while passing under it. *Feeney v. L. I. R. Co.*, 116 N. Y. 375.

Defendant's gateman, at crossing, so operated the gate as to scare the plaintiff's horse, so that it ran and the rein broke, causing injury. If the negligence of defendant concurred to cause injury, then the breaking of the rein would not prevent recovery, unless plaintiff was negligent, respecting the use of the rein. *Putman v. N. Y. C. & H. R. R. Co.*, 47 Hun, 439.

But see *Moore v. Abbott*, 32 Me. 461; *Coombs v. Topshan*, 38 id. 204; *Farrar v. Greene*, 32 id. 574.

\* NOTE.—Regulated by statute in New York by N. Y. L. 1890, ch. 565, sec. 33 as amended by L. 1892, ch. 766, as amended by L. 1901, ch. 301.

A railroad company, which voluntarily maintained gates and a flagman, is chargeable with the same care as if the duty were compulsory. *Edgerly v. Long Island R. Co.*, 46 App. Div. 284.

Negligence not inferred from failure to maintain gates. *Cohn v. New York &c. R. Co.*, 5 App. Div. 196.

In absence of statute or ordinance, crossing gates are not required. *Martin v. New York &c. R. Co.*, 20 Misc. 363.

But their presence or absence may have an important bearing on the question of the exercise of due care at a dangerous crossing. *St. Louis &c. R. Co. v. Stewart*, 68 Ark. 606.

See, also, *New York &c. R. Co. v. Moore*, 105 Fed. Rep. 725; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Cleveland &c. R. Co. v. Reiss*, 13 Oh. C. C. 405; *English v. Southern P. R. Co.*, 13 Utah, 407.

Violation of ordinance in failing to operate gates is negligence *per se*. *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 21.

Railroad held negligent in ceasing to operate its gates, though their erection had been voluntary. *Chicago &c. R. Co. v. Redmond*, 70 Ill. App. 119.

A gong signal, voluntarily installed, must be kept in repair. *Cleveland &c. R. Co. v. Coffman*, (Ind. App.) 64 N. E. Rep. 233.

Where the gates were not customarily operated during certain hours of the day, it was error to leave it to the jury to say whether such failure was negligence. *Chicago &c. R. Co. v. Durand*, (Kan.) 69 Pac. Rep. 356.

Ordinance requiring gates and flagmen where the crossing was not dangerous was unreasonable. *State v. Bloomfield*, 59 N. J. L. 109.

It was for the jury to say whether defendant was negligent in raising the gates and permitting a boy of six and a half to go upon the track in front of an approaching train, the view being obstructed by a passing train. *Tabello v. Delaware &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 561.

Gateman was charged with the duty of protecting a child of seven from injury. *Jones v. Harris*, 186 Pa. St. 469.

#### (b). CONTRIBUTORY NEGLIGENCE.

A train had passed; the gate had been raised and the gateman had gone into his house; this was a substantial invitation to pass, and just as significant as if the gateman had beckoned the traveler to come on. Contributory negligence was for the jury. *Glushing v. Sharp*, 96 N. Y. 676.

A traveler was killed at a crossing by the superintendent's car, which hid the view of the engineer and fireman. No signal was given until the car was right upon the intestate. *The gates at the crossing were open and*

*the gateman absent.* The traveler was not required to look and listen, as a matter of law, but contributory negligence was for the jury. *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 134, aff'g judg't for pl'ff.

**From opinion.**—"The defendant 'for the better protection of life,' and to 'promote the safer and better management of its road,' either of its own volition or under the command of law (Laws of 1884, chap. 439, sec. 31), had erected gates across Walnut street, on either side of its tracks, and had stationed a person there 'to open or close such gates when an engine or train passed.'

The duty of the company was imperative, and it is obvious that an open gate was a direct and explicit assurance to the traveler that neither train nor engine was rendering the way dangerous—that none was passing. A closed gate was an obstruction preventing access to the road; an open gate was equally positive in the implication to be derived from it, that the way was safe. Nothing less could be implied, and no other conclusion could be drawn from that circumstance. The silence of the bell and whistle was an indication that no train or locomotive was within eighty rods of the crossing; the open gate was affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass. The way, then, was open to the interstate, and as the highway was straight, that fact was apparent to him, not only when he reached the track, but for a long distance off. He had a right to rely to a certain extent upon that representation. *Stapley v. Railway*, 1 Ex. L. R. 21; *Glushing v. Sharp*, 96 N. Y. 676. It is difficult, therefore, to see how his death can be attributed to any other cause than the negligent acts of the defendant. But if there is room for a different inference, there is not enough of it to make the question one of law."

Defendant had erected safety gates on each side of its tracks at crossing. It was raining hard and plaintiff had an umbrella up. As she approached the crossing she looked and saw that the gates were up and stationary. She passed the first gate, crossed the tracks, and as she was passing under the second gate, it was lowered by the gateman more rapidly than usual, and struck and injured her.

The evidence authorized the jury in finding that defendant omitted to observe that degree of care required of it, and that, owing to the omission, plaintiff was injured; that the omission on her part to look, when passing under the second gate, to see whether it was coming down was not, as matter of law, negligence; but that it was a question of fact for the jury. *Feeney v. L. I. R. Co.*, 116 N. Y. 375, aff'g judg't for pl'ff.

**From opinion.**—"The degree of care required of a person approaching a dangerous place should be proportioned to the degree of danger, known or apparent, to be encountered. (*Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 456.) In crossing the tracks of a railroad operated by steam, more care is required than in crossing a railroad operated by horses, because the cars upon the former move more rapidly and cannot be so readily stopped as those upon the latter. (*Barker v. Savage*, 45 N. Y. 193.) There is still less danger in passing under safety gates, as they need not be lowered rapidly and should at all times be under the control of the gateman. If he does his duty, there is little or no danger. The plaintiff had the right to assume that the gateman would not be

negligent on the occasion in question (*Newson v. N. Y. Central R. Co.*, 29 N. Y. 383), although she was not, on this account, relieved from the necessity of exercising that degree of care that would have been used by a person of ordinary prudence under the same circumstances."

"O." was going south on the west sidewalk of a city street running north and south, and across which three tracks of the defendant's railroad ran. At "O.'s" approach the safety gates began to rise, and he went on. He could see nothing south or west as he approached the middle track on account of cars standing thereon, one of which reached half across the sidewalk. On passing from behind this car between the middle of the south track he was struck by the cross-beam of a tender approaching so that it left but three feet between it and the car. "O." was a stranger in the locality and was walking fast with head down, and, the sidewalk being rough, he did not look towards the approaching locomotive whose bell was not rung. The gateman had begun to lower the south gate, and shouted to "O.," who paid no attention.

Whether he heard the shout or not, the open gate was virtually an invitation to him to proceed and a train crossing slowly was in plain sight and would naturally add to his confidence. The question of contributory negligence was for the jury. Although deceased was bound to use his eyes, he was not bound to use them in any particular manner or at any particular instant of time. *Oldenburg v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 414, aff'g judgt for plff.

**From opinion.**—"As said by this court in a recent case: 'The raising of the gate was substantial assurance to him of safety, just as significant, as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience.' *Glushing v. Sharp*, 96 N. Y. 676. Or, as laid down in a still later case: 'The open gate was an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass.' *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, 241.

While the deceased had the right to rely, to a certain extent, upon the assurance thus given by the defendant, that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances. The degree of care depended upon his knowledge of the situation, or upon those facts that he would have discovered by the use of ordinary vigilance. It does not appear that he had ever seen this crossing before, or that he knew anything about it, except what he observed on the occasion when he met his death. In this respect, as well as by the implied invitation to proceed arising from the use of safety gates, this case is easily distinguished from those relied upon by the defendant. *Woodard v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 369; *Young v. N. Y., L. E. & W. R. Co.*, 107 id. 500."

A traveler approaching a railroad crossing, guarded by gates, need not exercise the same vigilance in looking and listening as would be re-



quired, if the gates were absent. *Rodrian v. N. Y. & C. R. Co.*, 125 N. Y. 526; *Oldenburg v. N. Y. Central R. Co.*, 121 id. 411; *Palmer v. N. Y. C. R. Co.*, 112 id. 234.

The plaintiff, approaching the defendant's tracks, found the gates closed; the train passed, the gates were opened, and the plaintiff started on, but after he had passed the first gate, the gates were again closed, so that escape was impossible, and he was struck by the train, view of which was obstructed by the train that had just passed, and by the darkness of the night.

The plaintiff and his witnesses testified, that they neither heard nor saw the latter train until a moment before the collision.

Contributory negligence was for jury. *Kane v. N. Y., N. H. & H. R. R. Co.*, 132 N. Y. 160.

It was shown that at a point where the defendant's railroad tracks crossed a street in a village, the plaintiff's intestate waited for about twenty minutes, at the end of which time the defendant's servant raised the gates high enough for her to pass through and looked at her. She started to cross the tracks, whereupon the gates were opened wide by the defendant's agent, and a man driving a horse and wagon started to cross the tracks. An engine, projecting fifteen feet into the street, automatically blew off steam, making a noise that frightened the horse, which became unmanageable and ran against the plaintiff's intestate, causing injuries resulting in her death.

The raising of the gates was an assurance of safety to the plaintiff's intestate, which she was entitled to rely upon. For jury. *Scaggs v. The President, Managers and Company of the Delaware & Hudson Canal Company*, 74 Hun, 198; s. c., rev'd, 145 N. Y. 201.

Plaintiff's intestate on a dark night was driving a heavy wagon over several tracks of defendant's road; the gates were open and an engine was moving slowly with no lights and without signals. The intestate was last seen standing up and looking up and down the tracks; a flagman called out from the further side "stay back."

Nonsuit error. Open gates were an assurance of safety. *Sindeman v. N. Y. C. & H. R. R. Co.*, 42 Hun, 306.

*Glushing v. Sharp*, 96 N. Y. 676.

A person driving a team approached a crossing guarded with gates shut down, whereupon he stopped until a train had passed and the gate-tender had raised the gates and signaled him to cross; upon doing so he was struck by another train and his wagon thrown against plaintiff, who was on the street. The question was for the jury, and if the driver's act in going upon the track on a trot, or whipping up his team in the face of the danger could be a defense against plaintiff, the question of

contributory negligence was also for jury. *Bond v. N. Y. C. &c. R. Co.*, 69 Hun, 476.

The duty of a traveler to look and listen may be modified by the fact that the gates maintained at the crossing are open; still, it is his duty to be on the lookout for danger, and to use the same care that a man of ordinary prudence would use under the same circumstances. *Schultz v. N. Y. C. & H. R. R. Co.*, 69 Hun, 515.

Deceased was negligent in driving on after a freight train had passed when an express was coming in plain sight for several hundred yards away. He had ample opportunity of knowing that there was no flagman, and gates were not in operation at night. *Lamb v. New York &c. R. Co.*, 18 App. Div. 579.

A traveler, seeing an engine at the crossing and knowing an escape of steam is liable to occur, assumes the risk of approaching with his horse, and, the danger being obvious, it is immaterial that the gates were up. *Wilson v. New York &c. R. Co.*, 41 App. Div. 36.

Traveler may rely on the appearance of safety indicated by the position of crossing gates. *Woehrle v. Minnesota &c. R. Co.*, 82 Minn. 165.

See, also, *Pierce v. Jones*, 22 Ind. App. 163; *Overtoom v. Chicago &c. R. Co.*, 181 Ill. 323; *Louisville &c. R. Co.*, (Ky.) 64 S. W. Rep. 725; *Chicago &c. R. Co. v. Redmond*, 70 Ill. App. 119; *Conaty v. New York &c. R. Co.*, 164 Mass. 572; *Hicks v. New York &c. R. Co.*, id. 424; *Roberts v. Delaware &c. Canal Co.*, 177 Pa. St. 183.

Driver was not negligent, *per se*, in proceeding with a heavy load at a trot up a steep grade where the gates were up and a flag flying indicating that trains would stop before reaching the crossing. *Clark v. Boston &c. R. Co.*, 164 Mass. 434.

Nor in not waiting for a train to pass far enough for him to see the track behind it, where the gates are open. *Indianapolis &c. R. Co. v. Neubacher*, 16 Ind. App. 21.

But the traveler must, nevertheless, use his senses; he is not justified in proceeding heedless of sight or sound, or relieved of all duty of looking and listening. *Romeo v. Boston &c. R. Co.*, 87 Me. 540.

See, also, *Ellis v. Boston &c. R. Co.*, 169 Mass. 600; *Pennsylvania &c. R. Co. v. Pfuelb*, 60 N. J. L. 278; s. c. aff'd, 61 id. 287; *Rangeley v. Southern R. Co.*, 95 Va. 715; *White v. Chicago &c. R. Co.*, 102 Wis. 489; *Schneider v. Northern P. R. Co.*, 81 Minn. 383.

Where an automatic gong announced the approach of a train, and a driver, seeing a train some distance off, attempted to cross without looking in the other direction, where he might have seen the train that struck him close at hand, his negligence prevented his recovery. *Brincker v. Michigan C. R. Co.*, 121 Mich. 283.

And it has been held that a traveler is not relieved of the duty to look and listen by the fact that such a gong has been provided at a crossing. Where he failed in such duty, he was not allowed to recover though the gong was out of order. *Conkling v. Erie R. Co.*, 63 N. J. L. 338.

Where a traveler is fully aware of the approach of a train, he cannot complain of failure to lower gates or provide a flagman. *Walker v. Kinmare*, 76 Fed. Rep. 101.

See, also, *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208; *Bjork v. Illinois C. R. Co.*, 85 Ill. App. 269; *Chicago &c. R. Co. v. Sutherland*, 88 Ill. App. 295.

Nor where he crosses in spite of the warning of closed gates. *Lake Shore &c. R. Co. v. Ehlerl*, 63 Oh. St. 320.

See, also, *McAnnally v. Pennsylvania R. Co.*, 194 Pa. St. 464; s. c., 47 L. R. A. 788.

Traveler's negligence was for the jury, where, after warning had been given to stop, traveler whipped up his horse, and the gateman shouted "go on," and lifted up the gates. *Doyle v. Boston &c. R. Co.*, 145 Mass. 386.

*Randall v. Connecticut &c. R. Co.*, 132 Mass. 269; *Craig v. New York &c. R. Co.*, 118 id. 431; *Gaynor v. Old Colony &c. R. Co.*, 100 id. 208.

And she failed to alight to hold her horse while the train was passing after being shut within the crossing area by the lowering of the gates. *Davis v. Central R. &c.* (N. J. L.) 52 Atl. Rep. 561.

Operation of gates at a crossing, held not to relieve a street car company of the statutory duty of stopping and sending a man ahead. *Cincinnati Street R. Co. v. Murray*, 53 Oh. St. 570; s. c., 30 L. R. A. 508.

## VII. Flagman.

### (a). NEGLIGENCE.

A company is not required to keep a flagman at a public crossing, but if it elect to do so, by establishing a custom, it may make a law unto itself.

Withdrawal of customary flagman may impute negligence, but the traveler must use his eyes and ears. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

But absence of customary flagman may be considered on subject of contributory negligence. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.

But, see, *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

The railway company is not bound to keep a flagman at every crossing. Where, on the trial of an action by a foot passenger against a railroad company for injuries received from a passing train, while attempting to cross the track in a city street, the judge charged the jury, that

it was a question for them to determine, whether the crossing in question was in so populous a portion of the city, that it was due to the public safety and common prudence, that the company should keep a flagman stationed at that point, and if they determined that it was, then an omission to do so was negligence, it was error. *Beisiegel v. N. Y. C. & H. R. R. Co.*, 40 N. Y. 9, rev'g judg't for pl'ff.

*Houghkirk v. Prest. &c. D. & H. Canal Co.*, 92 N. Y. 219; rev'g s. c., 28 Hun, 407.

If the customary flagman neglects to give warning and the traveler does not hear the signal, and injury arises solely therefrom, the defendant may be liable. *Kissinger v. N. Y. & H. R. R. Co.*, 56 N. Y. 538, aff'g judg't for pl'ff.

Omission to post flagman or place gates at a crossing is *not negligence*. *Weber v. N. Y. & H. R. R. Co.*, 58 N. Y. 451.

The absence of usual flagman at the crossing is admissible on question of defendant's negligence in running its train with prudence. *McGrath v. N. Y. C. & H. R. Co.*, 63 N. Y. 522, rev'g judg't for def't. *Friess v. N. Y. C. &c. R. Co.*, 67 Hun, 205

It is not for the jury to determine what signals should have been given in a particular case, and a general submission of that question to them without qualification or limitation is error. *Dyer v. Erie R. Co.*, 71 N. Y. 238, rev'g judg't for pl'ff.

The absence of the flagman customarily at the crossing, or his failure to give warning, imputes negligence. *Dolan v. D. & H. Canal Co.*, 71 N. Y. 285.

When plaintiff was beckoned two or three times by the flagman to cross the track, he had a right to assume that it was safe to do so, so far as the acts of the defendant and its agents were concerned; and if more steam was emitted from the engine while he was passing than before, that was an unfair surprise to the plaintiff, and if it contributed to his injury, it was the fault of the defendant's agents, for which the defendant was responsible. *Borst v. Lake Shore & Mich. S. R. Co.*, 4 Hun, 349.

The omission of the company to station a flagman at the crossing may be proved and considered by the jury in determining whether, under all the circumstances of the case, including the absence of the flagman, the company exercised reasonable care and prudence in running the train at the time and place in question, yet, it is error for the court to charge that if the jury finds that it was the duty of the company, under the circumstances of the case, to keep a flagman at the crossing, as a matter of precaution to warn those approaching it, its omission to perform that duty is negligence, which may make it liable for the injuries sustained.

The same rule applies to an omission of the company to erect and keep a gate at the crossing, and as to the charge of the court in respect thereto. *Doyle v. L. I. R. Co.*, 33 Hun. 37, rev'g judg't for pl'ff.

A team, driven by the plaintiff, approached the crossing from the east and the gates being down, stopped a little way from the east gate while a train on the Central track passed by, going from the city, north. As this train passed, the gate-tender began to raise the east gate, and as the bars went up the team started along under the gate to cross the tracks. As the team came upon the Central tracks the people in the wagon, for the first time, saw approaching them from the north, a train on the Lackawanna track, which adjoined the Central track. The gate-tender did not raise the west gate at all. He beckoned the people in the wagon to drive on across the tracks. Plaintiff, who became frightened and excited, whipped up his team and drove across the tracks, and when on the Lackawanna track the train struck the wagon.

As the gate-tender was situated where he had a favorable view of the tracks, the people in the wagon had a right to suppose, when the gate-tender raised the east gate, that he intended to raise the west gate immediately thereafter; that no trains were coming, and that the team might safely pass over the track at the crossing.

That, whether they did rely upon this act of the gate-tender, and, therefore, made less vigilant use of their eyes than they would otherwise have done to discover whether a train was coming, and whether they were justified in so doing, and whether they failed under the circumstances, in view of the raising of the east gate by the gate-tender, to exercise such a degree of care and caution as an ordinarily prudent man would have used, were questions of facts for the jury.

Judgment in favor of the defendants, entered upon an order directing a nonsuit and a dismissal of the plaintiff's complaint, reversed. *Glushing v. Sharp*, receiver (96 N. Y. 676) ; *Lindemann v. N. Y. C. & H. R. R. Co.* (42 Hun. 306) followed. *Callaghan v. D., L. & W. R. Co., et al.*, 52 Hun. 276, 277.

Error to charge that the jury might find negligence from the absence of a light, or gate, or flagman, or some warning. *Case v. N. Y. Cent. & C. R. Co.*, 75 Hun. 527.

The defendant's train was backed towards the public crossing without a brakeman at the rear, and without notice by bell or whistle; the flagman or gate-tender was absent from his post, and the position of the gates, if not an invitation to pedestrians to cross, was, at least, ambiguous. The defendant was negligent. *Wiley v. L. I. R. Co.*, 76 Hun. 29.

Negligence of a flagman, to signal that the track was clear after a

freight train had passed, while an express was in fact coming, was for the jury. *Waldele v. New York &c. R. Co.*, 4 App. Div. 549.

Defendant not liable to one crossing recklessly against warnings of a flagman during a high wind and while snow was blowing. *Wilber v. New York &c. R. Co.*, 17 App. Div. 623.

The jury may consider evidence that no flagman was kept at the crossing in the populous part of a city. *Moore v. N. Y. C. &c. R. Co.*, 2 Misc. 23.

Railroad is not bound as matter of law to maintain gates or flagman at a crossing, in the absence of requirement by competent authority. *Martin v. New York &c. R. Co.*, 20 Misc. 363.

Whether failure to keep a flagman or maintain gates is negligence is for the jury. *Lesan v. Maine &c. R. Co.*, 77 Me. 85.

*Philadelphia &c. R. Co. v. Layer*, 112 Pa. St. 414; *Lehigh Valley R. Co. v. Brandtmaier*, 113 id. 610; *Penn. R. Co. v. Marshall*, 119 Ill. 399; *Delaware &c. R. Co.*, 6 Cas. (Pa.) 454; *Hart v. Chicago &c. R. Co.*, 56 Iowa 166; *Bradley v. Boston &c. R. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 id. 562; *Haupt v. New York &c. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594; *Newport News &c. R. Co. v. Stewart*, 99 Ky. 496; *Cleveland &c. R. Co. v. Richardson*, 10 Oh. C. D. 326.

Held unnecessary where the view was unobstructed. *Lake Shore &c. R. Co. v. Reynolds*, 23 Oh. C. C. 199.

Or the crossing little used. *Hutcherson v. Louisville &c. R. Co.* (Ky.) 52 S. W. Rep. 955.

*Northern C. R. Co. v. Medairy*, 96 Md. 168.

Although not required by statute, the absence of a gate or a flagman may impute negligence. *Eaton v. Fitchburg R. Co.*, 129 Mass. 364.

*Commonwealth v. Boston &c. R. Co.*, 101 Mass. 201; *Cleveland &c. R. Co. v. Reiss*, 13 Oh. C. C. 405; *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Missouri &c. R. Co. v. Magee*, 92 Tex. 616.

Ordinance requiring gates and flagmen, where the crossing was not dangerous, was held unreasonable. *State v. Bloomfield*, 59 N. J. L. 109.

Failure of the authorities to require a flagman as permitted by statute, held not to relieve company from charge of negligence, where ordinary care and prudence under the circumstances requires the precaution. *Chesapeake &c. R. Co. v. Gunter*, (Ky.) 56 S. W. Rep. 527.

Improper signal of flagman to "come on," creates liability in the company for injuries sustained by reason thereof. *Penn. R. Co. v. Sloan*, 125 Ill. 72.

See, also, *Edwards v. Chicago &c. R. Co.*, (Mo. App.) 67 S. W. Rep. 950; *Chicago &c. R. Co. v. Spring*, 13 Ill. App. 174; *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162; *Texas &c. R. Co. v. Gilleland*, (Tex. Civ. App.) 36 S. W. Rep. 1134.

Defendant's negligence was for the jury, where no flagman was at crossing and escape of steam from company's engine frightened horse on the highway. *Hart v. Chicago &c. R. Co.*, 56 Iowa, 166.

*Hill v. Portland &c. B. Co.*, 55 Me. 438; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Toledo &c. R. Co. v. Harman*, 47 Ill. 298; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Haas v. Grand Rapids &c. R. Co.*, 47 Mich. 401.

Negligence in backing a train over a crossing without flagman, signals, or warning, is a question for the jury. *Union Pac. R. Co. v. Henry*, 36 Kas. 565.

*K. P. R. Co. v. Richardson*, 25 Kas. 409; *K. P. R. Co. v. Pointer*, 14 id. 49; *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Flagman's duty, held not to extend to warning one whose horses were frightened at a switch engine near the crossing, where it was not going to run over it. *Walters v. Chicago &c. R. Co.*, 104 Wis. 251.

Although traveler, when warned by flagman, did not stop, engineer, after discovering his danger, should not refuse to use the means in his power to prevent the injury. *H. & T. R. Co. v. Carson*, 66 Tex. 345.

*Little Rock &c. R. Co. v. Cavenesse*, 48 Ark. 106; *St. Louis &c. R. Co. v. Freeman*, 36 id. 41; *Harvey v. Rose*, 26 id. 3; *Little Rock &c. R. Co. v. Parkhurst*, 36 id. 377; *Bauer v. St. Louis &c. R. Co.*, 46 id. 388; *St. Louis &c. R. Co. v. Wilkerson*, 46 id. 513; *O'Keefe v. Chicago &c. R. Co.*, 32 Iowa, 467; *Morris v. Chicago &c. R. Co.*, 45 id. 29. See, however, *Nashville &c. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Brown v. Lynn*, 31 Pa. St. 510; *Northern &c. R. Co. v. Price*, 29 Md. 420; *Baltimore &c. R. Co. v. Kean*, 3 Cent. R. (Md.) 716; *Locke v. First Division &c. R. Co.*, 15 Minn. 350; *Nelson v. Atlantic &c. R. Co.*, 68 Mo. 593; *Frazer v. South &c. R. Co.*, 81 Ala. 185; *Government Street R. Co. v. Hanlon*, 53 id. 70; *Tanner v. L. & N. R. Co.*, 60 id. 621; *Cook v. Cen. R. Co.*, 67 id. 533; *Mobile &c. R. Co. v. Wilson*, 76 Fed. Rep. 127.

#### (b). CONTRIBUTORY NEGLIGENCE.

Withdrawal of flagman from accustomed place at the crossing does not justify a traveler in omitting the use of senses; hence the evidence of such custom and of absence of flagman, as bearing on plaintiff's negligence, is error. *McGrath v. N. Y. C. & H. R. R. Co.*, 59 N. Y. 168; rev'g s. c., 1 Hun. 437, and judg't for pl'ff.

*Waddelle v. New York &c. R. Co.*, 4 App. Div. 549.

Where plaintiff was placed in immediate peril by reason of having acted upon flagman's signal to proceed when a train was approaching he could not be held to the use of the best and most accurate judgment in the moment of excitement. *Hurley v. New York &c. R. Co.*, 90 Hun. 1.

*Waddelle v. New York &c. R. Co.*, 4 App. Div. 549.

Pedestrian crossed track in snow storm, without looking a second time, after looking and listening at a distance of twelve feet. The flag-

man gave no warning. Contributory negligence was for the jury. *Wilber v. New York &c. R. Co.*, 8 App. Div. 138.

Plaintiff was negligent *per se* in failing to make any effort to stop his horse upon seeing the gates descend when about 10 feet from them. *Brink v. Erie R. Co.*, 41 App. Div. 483.

Traveler may rely on flagman's signal to cross. *Alabama &c. R. Co. v. Anderson*, 109 Ala. 299.

See, also, *St. Louis &c. R. Co. v. Gill*, (Tex. Civ. App.) 55 S. W. Rep. 386; *Pierce v. Jones*, 22 Ind. App. 163; *Ayres v. Pittsburg &c. R. Co.*, 201 Pa. St. 124.

Or upon absence of warning by a flagman charged with that duty. *Chicago &c. R. Co. v. Blauhl*, 115 Ill. 183; aff'g s. c., 70 Ill. App. 518.

See, also, *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123; *Dolph v. New York &c. R. Co.* (Conn.) 51 Atl. Rep. 525.

But he must also exercise ordinary care in the use of his senses. *Wabash R. Co. v. Smillie*, 91 Ill. App. 7.

See, also, *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487; *Hancock v. Lake Erie &c. R. Co.*, 21 Ind. App. 10.

It must appear that traveler understood warning, otherwise no negligence. *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150.

See, also, *Bresnahan v. Michigan &c. R. Co.*, 49 Mich. 410; *Michigan &c. R. Co. v. Campan*, 35 id. 468; *R. Co. v. Miller*, 25 id. 290; *Dimick v. Chicago &c. R. Co.*, 80 Ill. 338.

The question of negligence is for the jury when a person in the absence of customary flagman failed to take farther precautions. *Chicago &c. R. Co. v. Hutchinson*, 120 Ill. 587.

*Cleveland &c. R. Co. v. Schneider*, 14 West. R. 558; see, also, *Baker v. Pendergast*, 32 Oh. St. 494.

It was held not negligence, *per se*, where traveler stopped and listened, and trees obstructed his view and flagman gave no signal. *Berry v. Penn. R. Co.*, 48 N. J. L. 141.

*Strong v. Sacramento &c. R. Co.*, 61 Cal. 326.

Where one followed a preceding team and was struck by a train completely hidden from view, he was not guilty of negligence. *Funston v. Chicago &c. R. Co.*, 61 Iowa, 452.

*Dimick v. Chicago &c. R. Co.*, 80 Ill. 338.

At a crossing, where sight and sound were unobstructed, a flagman, after a train had passed, turned to operate a semaphore. Plaintiff, in a covered wagon, without looking, attempted to cross behind another wagon and persisted, though the flagman returned and tried to prevent him. The company was held free from negligence and the plaintiff guilty of contributory negligence. *Work v. Chicago &c. R. Co.*, 105 Fed. Rep. 871.



## GATES AND FLAGMAN—ERECTION OF.

Chapter 439, Laws of 1884, providing that the Supreme Court or county court may order that gates shall be erected across a street and that a person be stationed to open and close the same, &c., is constitutional and the railroad company is liable under sec. 154 of the Penal Code for disobedience of such order. *People v. L. I. R. Co.*, 134 N. Y. 506.

Chapter 439, Laws of 1884, authorizing the Supreme Court to order a flagman to be stationed at a railway crossing upon a street, &c., at the same level, is constitutional. *People v. L. I. R. Co.*, 58 Hun. 412; s. c. aff'd, 134 N. Y. 506.

## VIII. Customary and Private Ways.

Where the public for a considerable period of time have notoriously and continuously been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, a license to so cross has been held to result, and to impose a duty upon the railroad corporation as to all persons so crossing to exercise reasonable care in the running of its trains, to protect them from injury, and so when particular persons have a right of passage; but there is much authority for the rule that mere passive acquiescence will not constitute a license.

See the subject treated exhaustively under "Private Premises, Injuries Thereon," *post*.

A workman from a factory waited for some cars, unattended, save by a brakeman, to pass and then stepped behind them with the intention of crossing the track beyond, but, to avoid a train on that track, he stepped back on the track just passed and was struck by the first-named cars, which had, in the meantime, come to a stop and then moved backwards. The defendant was not liable. The defendant permitted people to cross these tracks, but owed them no active diligence, nor was it restricted in the use of the tracks by the license. Departure from ordinary use would not make it liable, unless danger would be anticipated from the act. *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; rev'g s. c., 4 Hun. 760.

Citing *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

Where a railroad company has placed obstructions to the view upon its lands near a farm crossing, known to be used to some extent by the public, and where the place is such that one lawfully using the crossing cannot see, or with ordinary care otherwise discover the approach of a train, the company is required to exercise such care as will be likely to warn of its approach, or so to manage its trains as that it will not be likely to injure one so using the crossing. *Cordell v. N. Y. C. & H. R.*

*R. R. Co.*, 70 N. Y. 119, 124, rev'g judg't for pl'ff; s. c., 64 id. 535, rev'g s. c., 6 Hun, 461.

**From opinion.**—"It may be that the fact of obstructions, and other existing circumstances, rendered it the duty of the defendant in approaching this crossing (a farm crossing), which was known to be used to some extent by the public, to exercise more care and vigilance than was exercised in the management of the train, and in giving warning of its approach. It is not necessary to determine the question, as there must be a new trial, and the evidence may be changed; but I cannot assent to the proposition, that as matter of law the company were absolutely relieved from obligation to exercise proper care in addition to that required by statute in the management of its trains in full view of the surrounding facts. The court should have confined the jury to the question of negligence in the management of the train, and not placed it upon the obstructions execept, as a circumstance requiring greater caution in running the train. The case of *Sutton v. N. Y. C. & H. R. R. Co.*, (66 N. Y. 243), is not decisive in this case. That was the case of a mere licensee, who was permitted to cross the track for water, and it was held that the company was not required to exercise the highest degree of vigilance to prevent his being injured. In that case some empty cars were started by the wind, and ran down a grade by their own weight, and injured the plaintiff. It appears that if the brake had been properly set on the cars, they would not have been started by the wind, and we held the company not liable for this casualty. Here the plaintiff was something more than a mere licensee. The place was in some respects a public crossing, and the plaintiff had a right to go upon the track, and, I think, that the company owed him a duty, if the place was such that he could not see the train, or otherwise with ordinary care know of its approach, to have exercised such care as would have been likely to warn of its approach, or at least, that it would so manage the train as that it would not be likely to injure the plaintiff, or others similarly situated."

The train which caused the death was backing up, amidst noise, without a bell being rung or other signal given, in charge of a brakeman, who was on a platform between two cars, where he could not see persons on the track or have notice to apply the brakes in case of danger. Persons were at all times crossing the tracks, several hundreds crossing daily at a point where the owners of adjoining lands had a right of way, and where the public for thirty years had been in the habit of crossing.

Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury.

Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train, approaching such a crossing, the company is bound to give some notice and warning, and as to what is sufficient is a question of fact for a jury.

Where a train is backing toward a crossing, the fact that the bell was

rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precaution should have been taken upon the train, under the circumstances. *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, aff'g judg't for pl'ff.

Distinguishing *Laremore v. C. P. & N. Y. Co.*, 101 N. Y. 391; *Sutton v. N. Y. Cent. R. Co.*, 66 id. 243; *Nicholson v. E. R. Co.*, 41 id. 525.

Chapter 187, Laws 1876, authorized the defendant to operate cars at any speed provided by common council, provided it should fence the road and provide openings. The plaintiff's intestate was killed at one of the openings. His hearing was impaired and he went straight across the track in the smoke from another train. No signals were required at the spaces, and the intestate was negligent and no recovery was allowed. *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

Where the public have for a long time notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains so as to protect them from injury.

Although in such a case the company is absolutely bound to ring a bell or blow a whistle as the train approaches the crossing, it is bound to give some notice and warning; and the fact that the bell was rung does not establish, as matter of law, that the company used reasonable care. As to whether any other precautions should have been taken, and as to what is sufficient in such a case, are questions for the jury. *Swift v. S. I. R. T. Co.*, 123 N. Y. 645, aff'g judg't for pl'ff.

The plaintiff, while crossing defendant's track, in the evening, at a point where a street was to be, but had not yet been laid out, but where people were in the habit of crossing and recrossing, was struck by one of defendant's engines and injured. Held, that he was guilty of contributory negligence in going upon defendant's track, and that he could not recover.

The court charged that, even if the public had no right to use the land of the defendant, at the place where the plaintiff was injured, yet, if people were in the habit of crossing and recrossing there, that the company was bound to use care and caution in running at that point. Held, that this was error; that no right could be acquired by the public in such a manner, without evidence of notice to the company and subsequent acquiescence by it.

Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon

the defendant, except the general duty, which every man owes to others, to do them no intentional wrong or injury. *Matze v. N. Y. C. & H. R. R. Co.*, 1 Hun, 417, granting new trial after verdict for pl'ff.

*Phila. &c. R. Co. v. Hummell*, 44 Pa. 375, 379, 380; see *Bush v. Brainard*, 1 Cow. 78.

Defendant accustomed to give signals at a private crossing is liable for injuries caused by failure to do so. *Nash v. N. Y. C. & H. R. R. Co.*, 51 Hun, 594.

Where a crossing over the track of a railroad company has been used so long with the assent of such company that such acquiescence amounts to a license, a duty is imposed upon the company in respect to all persons using the crossing to exercise reasonable care in operating its trains so as to protect them from injury. *Vandewater v. N. Y. & N. Eng. R. Co.*, 74 Hun, 32.

Whether the defendant's omission to properly maintain the barway at the farm crossing could be considered in this case upon the question of the defendant's negligence is not free from doubt. In *Keyser v. C. & G. T. R. R. Co.* (56 Mich. 559) it was held that a railroad company's neglect to fence its track was for the jury to consider as bearing upon its liability for an injury done to a child who got upon the track in consequence thereof. (See, also, *Marcott v. Marq., Hought. & Ont. R. R. Co.*, 47 Mich. 9; *Morrissey v. Providence & Wor. R. R. Co.*, 15 R. I. 211.) A contrary doctrine seems to have been held in *Walkenhauer v. C., B. & Q. R. Co.* (17 Fed. Rep. 136) and *Fitzgerald v. St. Paul, M. & M. Ry. Co.* (29 Minn. 336). *Meagher v. Coopersdown & Charlotte Valley R. Co.*, 75 Hun, 455.

Where a fence separates the tracks running in different directions, the fact that a plank walk for the transfer of baggage connects the two sides of the station with gates in the fence, and that one of the gates is closed and the other left open, does not imply an invitation to cross. *Kent v. New York &c. R. Co.*, 51 App. Div. 508.

A railroad company holding out a private crossing as one suitable for travelers to use is liable for injuries caused by its own negligence. *Murphy v. Boston &c. R. Co.*, 133 Mass. 121.

*Sweeney v. Old Colony &c. R. Co.*, 92 Mass. 378; See, also, following cases: *Campbell v. Boyd*, 88 N. C. 129; *Mulholland v. Brownigg*, 2 Hawks. (N. C.) 349; *Combs v. New Bed. &c. R. Co.*, 102 Mass. 584; *Tobin v. P. S. &c. R. Co.*, 59 Mo. 188; *Illinois C. R. Co. v. Clark*, 83 Ill. App. 620; *Illinois C. R. Co. v. Klein*, 95 id. 220; *Louisville &c. R. Co. v. Bodine*, (Ky.) 59 S. W. Rep. 740; *Connell v. Chesapeake &c. R. Co.*, (Ky.) 58 S. W. Rep. 374; *Green v. Chicago &c. R. Co.*, 110 Mich. 648; *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88; *Bradley v. Ohio River &c. R. Co.*, 126 N. C. 735; *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Missouri &c. R. Co. of Tex. v. Bellow*, 22 Tex. Civ. App. 265; *Risinger v. South-*

ern R. Co., 59 S. C. 129; *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056.

But a mere passive permission will not subject it to liability. *Wright v. Boston &c. R. Co.*, 142 Mass. 296.

*Hickey v. Boston &c. R. Co.*, 14 Allen, 429; *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Gaynor v. Old Colony &c. R. Co.*, 100 id. 208; *Morrissey v. Eastern R. Co.*, 126 id. 377; *Wright v. Boston &c. R. Co.*, 129 id. 440; *Lewis v. Baltimore &c. R. Co.*, 13 Am. L. Reg. N. S. (Md.) 284; *Baltimore &c. R. Co. v. State*, 62 Md. 479; *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Philadelphia &c. R. Co. v. Hummel*, 44 Pa. St. 375; *Gillis v. Penn. R. Co.*, 59 id. 129; *Jeffersonville &c. R. Co. v. Goldsmith*, 47 Ind. 43; see, also, *Moenner v. Carroll*, 46 Md. 212.

No implied license to the public to use as a crossing such a dangerous place as a switch yard. *Grady v. Georgia R. &c. Co.*, 112 Ga. 668.

An unpaved and ungraded street was used by the public as a crossing; and when blocked by defendant's cars on a siding it was customary for people to crawl under them. A boy of eight, while playing under the cars was run over, when they were set in motion when struck by others, switched onto the siding without notice. Direction for defendant held error. *Hofler v. Southern R. Co.*, (Ky.) 53 S. W. Rep. 665.

The same care as at a public crossing is required where track passes along a street lined with stores. *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 41 S. W. Rep. 59.

Where crossing had been obstructed by company's cars, additional care must be used by the company in passing it. *Thomas v. Delaware &c. R. Co.*, 19 Blatch. U. S. 533.

It was held not negligence to omit signals at a private crossing where there were gates, but where trains never stopped. *Philadelphia &c. R. Co. v. Frank*, 67 Md. 339.

*Northern Central R. Co. v. State*, 54 Md. 115; *Louisville &c. R. Co. v. Survant*, (Ky.) 44 S. W. Rep. 88; *Lyons v. Illinois C. R. Co.*, (Ky.) 59 S. W. Rep. 507; *Southern R. Co. v. Barbour*, (Ky.) 51 S. W. Rep. 159; *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159; s. c. aff'd, 185 Ill. 400.

A statutory requirement that a railroad signal at crossing of "any other road," construed to apply to public highways and not to private roads. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

But a way used for years by the public to reach the depot was held to be a "traveled place" within a statute regulating railway signals. *Risinger v. Southern R. Co.*, 59 S. C. 429.

Though farm crossings are not embraced in the statutory provisions as to signals at a "traveled road or street," common law principles may require signals. *Czech v. Great Northern R. Co.*, 68 Minn. 38; s. c., 38 L. R. A. 302.

A crossing near depot habitually used by persons passing to and from the depot must be protected by the railroad. *R. Co. v. Hirsch*, 69 Miss. 126.

Negligence to use a bridge over a private crossing known to be in defective condition. *Evans v. Charleston &c. R. Co.*, 108 Ga. 270.

Negligence *per se* to ride a bicycle over a private crossing without looking or listening. *Sewell v. New York &c. R. Co.*, 171 Mass. 302.

## IX. Construction and Repair of Crossings.

**A railroad company must use reasonable care and skill in the construction and maintenance of crossings over a public street.**

### (a). NEGLIGENCE.

Plaintiff was thrown from his wagon by the breaking of a wheel as it struck a rail on defendant's track at a highway crossing. Plaintiff gave evidence tending to show that the planks at the crossing had become decayed and worn down, so that the rail projected and thus caused the accident. The court laid down the rule as to defendant's duty as above. *Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594; aff'g s. c., 13 Hun, 1, and judg't for pl'ff.

*Cott v. L. R. R. Co.*, 36 N. Y. 204; *People v. N. Y. C. & H. R. R. Co.*, 74 id. 302.

A horse got its shoe caught between a plank and a rail, at a street crossing. There was more space than was necessary for the flange, and the plank was above the rail. For the jury. *Payne v. Troy & Boston R. Co.*, 83 N. Y. 572; rev'g s. c., 9 Hun, 526, and judg't for def't.

The defendant was putting in a crossing; a deaf baker attempted to cross, one of the defendant's servants leading the horse. The horse ran and the wagon hit a post and spilled out the baker and his biscuits. For the jury. *Rembe v. N. Y. C. & W. R. R. Co.*, 102 N. Y. 721.

The plank, between which and the rail the plaintiff caught his foot, was two and one-half inches from the rail, while at this and other crossings, other planks were beveled and came close to the rail. For the jury. *Spoooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22.

The plaintiff, while crossing defendant's road, fell and was injured by cars. The street at that place was icy. No duty rested on the defendant to keep the space free from ice, and the evidence to show the defendant negligent in this regard was improper. *Silberstein v. R., W. S. & P. F. R. Co.*, 117 N. Y. 293.

The plaintiff struck his foot against one of the rails of a street railway track, and was injured by falling. The top of the rail was over two

inches above the surface of the street, but had been even therewith, when laid, about ten years prior. Defendant's negligence was for the jury. *Schild v. C. P. N. & E. R. Co.*, 133 N. Y. 146.

*Rex v. Kerrison*, 3 M. & S. 526; *Oliver v. No. Eastern &c. R. Co.*, L. R. 19 Q. B. 409.

Horse injured at highway crossing; defendant liable for neglect to keep its roadway in repair, and presumption of negligence arose from existence of defect and injury thereby. Defendant was negligent as a matter of law. *Worcester v. 42d &c. R. Co.*, 50 N. Y. 203; *France v. Erie R. Co.*, 2 Hun. 513.

A railway ran on a street, and the planking to facilitate easy crossing of teams left such unnecessary space, that the plaintiff's horse wrenched its hoof off therein. Defendant liable. *Cuddeback v. Jewett*, 20 Hun. 187.

It was for the jury to say whether defendant was negligent in removing planking at the crossing in order to prevent the accumulation of ice and the derailment of trains. *Lowell v. Central Vermont R. Co.*, 15 App. Div. 218.

Company not required to use extraordinary care to keep crossings level. *Taylor v. Long Branch R. Co.*, 16 App. Div. 1.

Railroad was not liable for the fright of a mule at a hole and some rotten planks where it was not calculated to frighten ordinary horses. *Northern Alabama R. Co. v. Sides*, 122 Ala. 594.

A private crossing, left open for use of the public, must be kept in repair. *Central R. &c. Co. v. Robertson*, 95 Ga. 430.

See, also, *Southern P. Co. v. Hooper*, 110 Ga. 779; *Taylor &c. R. Co. v. Warner*, 88 Tex. 642.

A railroad company, held liable for leaving unlighted and unguarded, a hole dug in a smooth space between two streets, provided for passengers but customarily used by the public. *Burton v. Western &c. R. Co.*, 98 Ga. 783.

Negligence to pile cinders along a highway at a crossing where they are concealed by weeds until one is close upon them. *Illinois C. R. Co. v. Griffin*, 184 Ill. 9; aff'g s. c., 84 Ill. App. 152.

Railroad employes were negligent in leaving a spike in an upturned plank at a crossing while they were repairing it, so that the horse, which they had invited to pass, might step on it. *Terre Haute &c. R. Co. v. Grandfield*, 58 Ill. App. 136.

Not negligence *per se* to leave space between plank and rail, of such a size that a small child could get its foot in it. *Alchison &c. R. Co. v. Roemer*, 59 Ill. App. 93.

As to what constitutes an "approach" within a statute requiring the

railroad companies to keep approaches to crossings in repair, see *Illinois C. R. Co. v. Truesdell*, 68 Ill. App. 324.

Where the private crossing required by statute to be kept in repair, is a farm crossing, it must be safe, not only for drivers, but for pedestrians. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159; s. c. aff'd, 185 Ill. 400.

See, also, *Baltimore &c. R. Co. v. Keck*, 89 Ill. App. 72.

The statutory duty of a railroad company to properly construct highway crossing, held not to depend on the prior existence of one. *Evansville &c. R. Co. v. State*, 149 Ind. 276.

And by maintaining a crossing constructed by a former owner it is bound to keep it in repair. *Seybold v. Terre Haute &c. R. Co.*, 18 Ind. App. 367.

Statutory duty to restore highway to former condition held to include erection of barriers during construction operations. *Seybold v. Terra Haute &c. R. Co.*, 18 Ind. App. 367.

Railroad company, held liable for failure to provide crossways wide enough for harvesting machines in general use. *Atchison &c. R. Co. v. Henry*, 60 Kan. 322.

That it was wider than the minimum authorized, held no defense. *Atchison &c. R. Co. v. Henry*, 57 Kan. 154.

Insufficient filling between rails delayed traction engine. Company held liable for damage from collision with express train. *Louisville &c. R. Co. v. Bloyd*, (Ky.) 55 S. W. Rep. 694.

An overhead bridge with small cracks in flooring, admitting steam from a locomotive, which frightened a horse, held not defective. *Kilsey v. New York &c. R. Co.*, (Mass.) 63 N. E. Rep. 80.

Obstruction of highway by cars as a result of which injuries ensue, renders company liable. *Vicksburg &c. R. Co. v. Alexander*, 62 Miss. 496.

*Peoria &c. R. Co. v. Lyons*, 9 Ill. App. 350; *Osgood v. Lynn*, 130 Mass. 492; *State v. Morris &c. R. Co.*, 25 N. J. L. 437.

A statutory requirement to keep the approaches to "highway" crossings in repair, held to apply to city streets. *Homlin v. Southern R. Co.*, 76 Miss. 410.

A railroad is only chargeable with the failure to use reasonable care to discover and repair a crossing; it is not an insurer of their safety. *Nixon v. Hannibal &c. R. Co.*, 141 Mo. 425.

A statutory duty to provide "suitable crossings," construed to include the lighting of an overhead bridge. *Concord v. Boston &c. R. Co.*, (N. H.) 38 Atl. Rep. 378.

Defendant was liable, where plaintiff was prevented from crossing in



time by the fright of his mule at an excavation in its road bed near the crossing. *Parks v. Southern R. Co.*, 124 N. C. 136.

Defendant was not liable because a cut on its right of way was left unfenced, where to reach it, plaintiff had to drive 20 feet out of the highway and a foot above its surface. *Daneck v. Pennsylvania R. Co.*, 59 N. J. L. 415.

Statutory liability for defects in a "crossing," construed not to apply to sidewalk. *Lynch v. Cleveland &c. R. Co.*, 20 Oh. C. C. 248.

Injury to horse by reason of space between rail and planking is attributable to defendant's negligence. *Baughman v. Shenango &c. R. Co.*, 92 Pa. St. 335.

*Brown v. Penn. R. Co.*, 15 Phila. R. 321; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Woburn v. Boston &c. R. Co.*, 109 Mass 283. See *Ferguson v. Virginia &c. R. Co.*, 13 Nev. 184.

Plaintiff had safely crossed in front of an approaching train, when his horse took fright at steam escaping from a heating apparatus and backed into the train. His negligence in crossing in front of the train did not prevent his recovery. *Mendenhall v. Philadelphia &c. R. Co.*, (Pa.) 51 Atl. Rep. 1028.

Failure to comply with statutory requirement to restore street at crossing to safe condition, imposes liability, for resulting damage regardless of negligence. *Galveston &c. R. Co. v. White*, (Tex. Civ. App.) 32 S. W. Rep. 186; *Dublin v. Taylor &c. R. Co.*, 50 id. 120; rev'g s. c., 49 id. 667.

A statute requiring construction of farm crossings within inclosed land, construed not to apply to rights previously acquired. *San Antonio &c. R. Co. v. Bell*, (Tex. Civ. App.) 32 S. W. Rep. 374.

A crossing, dangerous by reason of its location and the lay of the surrounding land, is a circumstance for consideration of the jury in determining whether the proper care has been taken in the particular case to avoid accident, but is not itself, ordinarily, a ground of recovery. *Texas &c. R. Co. v. Warren*, (Tex. Civ. App.) 32 S. W. Rep. 578; *San Antonio &c. R. Co. v. Stollers*, 49 id. 679.

Statutory penalty for failure to repair does not exclude suit for damages. *St. Louis &c. R. Co. v. Byas*, 12 Tex. Civ. App. 657.

A plank so far from the rail as to cause a severe jolt to a crossing vehicle, held not a compliance with a statute requiring restoration of street to safe condition. *Missouri &c. R. Co. v. Connelly*, 14 Tex. Civ. App. 529.

Railroad company was held liable for permitting an upturned sliver in a plank to remain so as to catch plaintiff's shoe and prevent his cross-

ing in time to avoid a train. *Houston &c. R. Co. v. Weaver*, (Tex. Civ. App.) 41 S. W. Rep. 846.

Negligence of a railroad company, in providing a crossing over a ditch in a city street, with a railless bridge on an incline only one-fifth the width of the sidewalk connecting with it, was for the jury. *Houston &c. R. Co. v. Dunn*, 17 Tex. Civ. App. 687.

Negligence in failing to fill between tracks at a crossing was not ground of recovery, where the accident happened beyond the limits of the street. *San Antonio &c. R. Co. v. Belt*, (Tex. Civ. App.) 46 S. W. Rep. 374.

Liability for failure properly to restore a highway cannot be avoided by delegating the duty to an independent contractor. *Texas &c. R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

A mud hole in the street, caused by a leak from defendant's tank, was not the proximate cause of the accident, where deceased's horse became frightened at an engine and was running away. *Ft. Worth &c. R. Co. v. Neely*, (Tex. Civ. App.) 60 S. W. Rep. 282.

Statutory duty to restore highways crossed, construed to include the erection of barriers for the protection of travelers during the course of making the restoration. *Texas &c. R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

Defendant was negligent in leaving a pile of stones at a crossing while making alterations, without lighting or guarding them, in violation of an ordinance. *Houston &c. R. Co. v. Pollard*, (Tex. Civ. App.) 66 S. W. Rep. 851.

By opening a way along its right of way for use, during the repairs of the highway bridge, a railway company undertakes to see that it is reasonably safe. *Marshall v. Valley R. Co.*, 97 Va. 653.

Negligence in leaving upper rail upon a curve projecting an inch above planking, for the jury. *McDermott v. Chicago &c. R. Co.*, 91 Wis. 38.

Statutory duty of restoration of highway at crossing does not require repair of original defects. *Sutton v. Chicago &c. R. Co.*, 98 Wis. 151.

The duty of a railroad company to restore a highway crossed to a condition of usefulness is a common law duty. *State v. Lake Erie &c. R. Co.*, 83 Fed. Rep. 284.

Fright of plaintiff's horse and not defendant's negligent maintenance of a crossing, was the proximate cause of the overturning of a carriage by an unevenness in the approach to a crossing, safe for carriages driven at ordinary speed. *Myers v. Chicago &c. R. Co.*, 101 Fed. Rep. 915.

#### (b). CONTRIBUTORY NEGLIGENCE.

Where the defendant maintained a frog on its track on the sidewalk

of a city street, and the frog was an open one, and so constructed, that a traveler's foot might be caught therein, and no means were taken to prevent the same by blocking it, or otherwise, as was extensively done in other places, a verdict in favor of a boy of twelve years not familiar with the crossing nor the construction of the frog, nor aware of any danger, was sustained. *A person has a right to travel on a sidewalk, although he knows it to be unsafe, and any question of carelessness on his part is for the jury.* *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun, 205.

Not negligence *per se* to use a crossing known to be dangerous. *Harper v. Missouri &c. R. Co.*, 70 Mo. App. 604.

See, also, *Nixon v. Hannibal &c. R. Co.*, 141 Mo. 425; *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Malmstrom v. Northern P. R. Co.*, 20 Wash. 195.

In absence of knowledge to contrary, traveler may assume that the crossing is in proper condition. *Southern R. Co. v. Posey*, 124 Ala. 486.

*Chicago &c. R. Co. v. Bartley*, 59 Kan. 776.

Plaintiff was not negligent *per se* in attempting to cross in front of a train, where his mule took fright at an excavation by the tracks, which he could not see until he got upon the crossing. *Parks v. Southern R. Co.*, 124 N. C. 136.

See, also, *Tankard v. Roanoke &c. R. Co.*, 117 N. C. 558.

Company not liable when in the attempt to pass the obstruction a traveler takes a dangerous way and is injured. *Jackson v. R. Co.*, 13 Lea. (Tenn.) 491.

See, also, *Tisdale v. Norton*, 8 Mete. 388; *Hyde v. Jamaica*, 27 Vt. 443; *Reynolds v. Northern R. Co.*, 22 Wash. 165; *Evans v. Charleston &c. R. Co.*, 108 Ga. 270.

When such conduct is for the jury. *Corey v. Northern &c. R. Co.*, 32 Minn. 457.

*Kelly v. Southern &c. R. Co.*, 28 Minn. 98; *Meyers v. Chicago &c. R. Co.*, 59 Mo. 223; *Roberts v. Chicago &c. R. Co.*, 35 Wis. 679.

Pedestrian with ample time to cross in front of train, caught his foot in defective crossing and was run down. Was not guilty of contributory negligence. *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; s. c. aff'd. 180 Ill. 453.

## DAMAGES.

- I. FAILURE TO DULY CARRY GOODS.
- II. REPAIRS, LOSS OF USE, &c.
- III. FAILURE TO DULY CARRY PASSENGERS.
  - (a) Expulsion from train.
  - (b) Detention.
- IV. EARNINGS AND PROFITS.
  - (a) Husband and wife.
- V. HUSBAND AND WIFE.
  - (a) Action by husband.
  - (b) Action by wife.
- VI. ELEMENTS OF DAMAGE.
  - (a) Physical and mental effects, loss of time, &c.
  - (b) Mental suffering.
  - (c) Mental suffering, disfigurement.
  - (d) Mental suffering, in case of death.
  - (e) Mental suffering, failure to deliver telegram.
  - (f) Nursing, medical treatment, &c.
  - (g) Prospective damages.
  - (h) Exposure.
  - (i) Fright.
- VII. DAMAGES TO PARENT FOR INJURY TO CHILD.
- VIII. INJURIES CAUSING DEATH.
  - (a) Funeral expenses.
- IX. DAMAGES TO PARENT FOR DEATH OF CHILD.
  - (a) Father.
  - (b) Mother.
- X. DEATH OF PARENT, HUSBAND, OR WIFE.
- XI. PRIVATE PREMISES.
  - (a) Trees.
  - (b) Crops and buildings.
  - (c) Other property.
- XII. PROXIMATE CAUSE.
  - (a) Predisposition to disease.
  - (b) Medical treatment.
- XIII. EXEMPLARY DAMAGES.
- XIV. NOMINAL DAMAGES.

## XV. EXCESSIVE DAMAGES.

- (a) Verdicts not excessive.
- (b) Verdicts inadequate.
- (c) Verdicts excessive.

## XVI. MITIGATION OF DAMAGES.

- (a) Insurance.
- (b) Money expended for injured person.

## XVII. INTEREST.

Liability of directors, at suit of stockholders, for negligence, is confined to damage to the corporation, and does not include contingent liability of stockholders for debts of the corporation. *Bloom v. National &c. Loan Co.*, 152 N. Y. 114; aff'g s. c., 81 Hun, 120.

Purchaser of an equity of redemption received from a title company, employed to take charge of the transaction, a deed with a description of the wrong property. The deed was reformed, but the purchaser lost the property by the foreclosure of an unknown additional mortgage. Recovery against the title company was allowed for the amount paid for the property. *Elmer v. Title Guarantee &c. Co.*, 156 N. Y. 10; aff'g s. c., 89 Hun, 120.

Damages for a sheriff's failure to levy is the value of the property at forced sale. *Gilbert v. Gallup*, 76 Ill. App. 526.

No recovery allowed for injury which plaintiff by reasonable effort could have prevented. *Hartford Deposit Co. v. Calkins*, 85 Ill. App. 627.

Damages for failure to issue process to review judgment, is the amount paid on the judgment, in the absence of proof that the payment could have been avoided if process was properly issued. *Baltimore &c. R. Co. v. Weedon*, 78 Fed. Rep. 584.

## I. Failure to Duly Carry Goods.

For failure to deliver goods entrusted to a common carriage for transportation, the carrier is liable in damages for the value of the goods at the place of destination at due time of delivery, less the price to be paid for such transportation, in case the same has not been paid. *Sturges v. Bissell*, 46 N. Y. 462.

The Nith, 36 Fed. Rep. 86; *Mo. P. R. Co. v. Edwards*, 28 Tex. 307.

If merchandise be not carried within a reasonable time, the damages from a falling market is the difference in value at the time and place of due delivery and that of actual delivery. *Ward v. N. Y. C. R. Co.*, 47

N. Y. 29, rev'g judg't for def't; disapproving *Wilbert v. N. Y. &c. R. Co.*, 19 Barb. 36; 29 id. 633.

Same principle: *Griffin v. Colver*, 16 N. Y. 489; *Sands v. Lilienthal*, 46 id. 541; *Sherman v. Hudson R. Co.*, 64 id. 254; *Kent v. Hudson R. Co.*, 22 Barb. 278; *Medbury v. New York &c. Road*, 26 id. 564; *St. Louis &c. R. Co. v. De Shong*, 63 Ark. 442; *Little Rock &c. R. Co. v. Miller Coal Co.*, 66 id. 645; s. c., 51 S. W. Rep. 1045; *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497; *Louisville &c. R. Co. v. Heilprin*, 95 Ill. App. 402; *Tebbs v. Cleveland &c. R. Co.*, 20 Ind. App. 192; *Missouri &c. R. Co. v. Truskett*, (Ind. Terr.) 53 S. W. Rep. 444; *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785; *Palmer v. Penobscot Lumbering Asso.*, 90 Me. 193; *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *Sisson v. Cleveland &c. R. Co.*, 14 Mich. 489; *Hance v. Wabash R. Co.*, 62 Mo. App. 60; *Johnson &c. Comm. Co. v. Wabash &c. R. Co.*, 64 id. 590; *Wilson v. Missouri &c. R. Co.*, 66 id. 388; *Klass Comm. Co. v. Wabash R. Co.*, 80 id. 164; *East Tennessee &c. R. Co. v. Hale*, 85 Tenn. 69; *Galveston &c. R. Co. v. Ball*, 80 Tex. 602; *Gulf &c. R. Co. v. Stanley*, 89 Tex. 42; *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74; *Texas &c. R. Co. v. Berehfield*, 12 id. 145; *Inman v. St. Louis &c. R. Co.*, 14 id. 39; *San Antonio &c. R. Co. v. Wright*, 20 id. 136; *Missouri &c. R. Co. v. Witherspoon*, 18 id. 615; *Texas &c. R. Co. v. Truesdell*, 21 id. 125; *Gulf &c. R. Co. v. Staton*, (Tex. Civ. App.) 49 S. W. Rep. 277; *Reeves v. Texas &c. R. Co.*, 32 id. 920; *Texas &c. R. Co. v. Avery*, 33 id. 704; *Missouri &c. R. Co. v. Cobb*, 36 id. 500; *San Antonio &c. R. Co. v. Thompson*, 66 id. 792; *Central Trust Co. v. Savannah &c. R. Co.*, 69 Fed. Rep. 683; *O'Hanlon v. North R. Co.*, 6 Best & Smith, 484; *Bracket v. McNair*, 14 T. R. 170; *Collard v. S. E. Railway Co.*, 7 Hurl. & N. 79; *Wilson v. Lancashire &c. R. Co.*, 99 Eng. C. L. 632; *Same v. N. Castle & Ber. R. Co.*, 18 E. L. & E. 557.

Owner cannot abandon damaged goods. Can recover only for difference in market value, between injured and damaged condition. *King v. Sherwood*, 22 App. Div. 548.

Where dogs are returned on failure to find consignee and reshipped by owner without attention from him, he was not allowed to recover for death of one due to long confinement. *Harrison v. Wier*, 75 N. Y. Supp. 909.

Plaintiff recovered value of bicycle bought and shipped for use on a vacation outing, but not delivered or found until after the vacation was over. *Mitchell v. Weir*, 19 Misc. 530; s. c. aff'd, 19 App. Div. 183.

Value of a portion of a shipment delivered, is evidence as to the value of the portion lost. *Marquis v. Wood*, 29 Misc. 590.

Expense of writing and telephoning for goods, included in damages. *Murrell v. Pacific Ex. Co.*, 54 Ark. 22.

Refusal to ship from a given place does not charge carrier with the loss due to inability to sell there. *Little Rock &c. R. Co. v. Conatser*, 61 Ark. 560.

Where damages are due to delay, the cost of extra feed is an additional item. *Missouri &c. R. Co. v. Truskett*, (Ind. Terr.) 53 S. W. Rep. 444.

So also, cost of putting stock in condition for next market. *Stock-Yards Co. v. Hawkins*, 8 Kan. App. 155.

In an action for breach of contract to carry, by wrongful expulsion, damages were confined to value of ticket and loss of time. *Union P. R. Co. v. Shook*, 3 Kan. App. 710.

See, also, *Louisville &c. R. Co. v. Robinson*, (Ky.) 36 S. W. Rep. 6.

Measure of damages for delivery to consignee in violation of orders of consignor, is the value of the goods. *Louisville &c. R. Co. v. Hartwell*, 99 Ky. 436.

Expense of telegrams, searching of teams in hauling, is included in damages for delay. *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326.

Decline in market price during delay, not included. *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461.

Nor highest price due to "corner" on board of trade. *Johnson &c. Comm. Co. v. Wabash R. Co.*, 64 Mo. App. 590.

Loss, due to shrinkage in weight or to physical injury, included. *Gann v. Chicago &c. R. Co.*, 72 Mo. App. 34.

See, also, *Shelby v. Missouri &c. R. Co.*, 77 Mo. App. 205, (also extra feed and labor).

Agreement, that damage be determined by value at place of shipment, enforced. *Horner v. Missouri &c. R. Co.*, 70 Mo. App. 285.

Shipper recovered for trouble and expense of carrying goods to another carrier, upon defendant's refusal to accept them. *Lanning v. Sussex R. Co.*, 1 N. J. L. J. 21.

Carrier with notice thereof, held liable for damages incurred under a penalty contract, due to delay in delivery. *Illinois C. R. Co. v. Southern &c. Cabinet Co.*, 104 Tenn. 568.

Where there is no transportation at all, the damage is the difference between the market value at the place of destination and the place of shipment, with interest from commencement of suit, less freight, in the absence of notice of a special contract. *International &c. R. Co. v. Startz*, (Tex. Civ. App.) 33 S. W. Rep. 575.

Notice was given to carrier that a pop corn wagon was for use on a certain day. There was a delay of 13 days in delivery. Defendant was liable for a loss of profits on that day, and fair rental value for the other 12. *Gulf &c. R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. Rep. 220.

Extra feed and labor during delay included. *Galveston &c. R. Co. v. Thompson*, (Tex. Civ. App.) 41 S. W. Rep. 8.

Where the cattle injured have no market value, the measure of damages is the difference between their actual value before and after injury. *Texas &c. R. Co. v. Fambrough*, (Tex. Civ. App.) 55 S. W. Rep. 188.

See, also, *Houston &c. R. Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43.

Carrier not liable for injury after proper tender to consignee and refusal by him. *St. Louis &c. R. Co. v. Gates*, 15 Tex. Civ. App. 135.

Measure of damages for injury causing the loss of an unborn colt, held to be the depreciation in the value of the mare. *Texas &c. R. Co. v. Randle*, 18 Tex. Civ. App. 348.

In absence of notice of a special contract, damages resulting from a breach thereof caused by delay, cannot be recovered. *International &c. R. Co. v. Hatchell*, 22 Tex. Civ. App. 498.

See, also, *Pacific Ex. Co. v. Redman*, (Tex. Civ. App.) 60 S. W. Rep. 677; *Missouri &c. R. Co. v. Webb*, 20 Tex. Civ. App. 431; (Special contract price); *St. Louis &c. R. Co. v. Cates*, 15 id. 135.

But notice to trainmaster, under no duty to notify station agent, is not notice to the company. *Missouri &c. R. Co. v. Belcher*, 89 Tex. 428.

And notice subsequent to shipment is insufficient to charge carrier. *Bradley v. Chicago &c. R. Co.*, 94 Wis. 44.

Plaintiff's machine, which was moved from place to place was a new invention and had no established rental value. The measure of damages for delay was the value of its use based on the character of the machine, its capacity to do work, and the amount of work to be done by it, less the expense attached to running it. *Texas &c. R. Co. v. Hassel*, (Tex. Civ. App.) 58 S. W. Rep. 54.

Value of damaged goods may be determined by sale at public auction within a reasonable time. *The Queen*, 18 Fed. Rep. 155.

And intermediate fluctuations of market value should be disregarded. *The Earnwood*, 83 Fed. Rep. 315.

Notice that a shipment of horses was for a certain purpose at a certain time, made carrier liable for what they might have earned during delay, though no contract for hire existed. *Port Blakely Mill Co. v. Sharkey*, 102 Fed. Rep. 259.

## II. Repairs, Loss of Use &c.

The loss of use and repairs of vessel are proper items of damage growing out of injury by defendant's negligence. *Wilson v. Knapp*, 70 N. Y. 596, aff'g judg't for pl'ff.

*Wright v. Mulvaney*, 78 Wis. 89.

So, where boat was sunk. *Mark v. Hudson R. Co.*, 103 N. Y. 28.

For the purpose of a recovery for a total loss, it may be shown that the cost of raising a wreck was greater than its value. *Blanchard v. V. J. S. Co.*, 59 N. Y. 292; aff'g s. c., 3 N. Y. S. C. (T. & C.) 171, and judg't for pl'ff.

Where water flowed from defendant's drain and privies into the plain-



tiff's cellar, the expense of repairs and of preventing further injury was proper; also, loss of rental and injuries caused by stench. *Jutte v. Hughes*, 67 N. Y. 267; rev'g s. c., 8 J. S. 126, and judg't for pl'ff.

Citing *Francis v. Schoellkopf*, 53 N. Y. 152; *Ruff v. Rinaldo*, 55 id. 664; *De Went v. Wiltse*, 9 Wend. 325; *McKern v. See*, 4 Robt. 450.

In action for goods stolen from a storehouse, the expense of recovery and repair thereof is recoverable. What plaintiff did to recover the property was for defendant's benefit, for which he was entitled to credit, but he could not claim such credit without allowing the expense incurred. Evidence of price paid for property in connection with its use and condition was proper in the absence of ability to value the property by experts. *Jones v. Morgan*, 90 N. Y. 4; aff'g s. c., 24 Hun, 372, and judg't for pl'ff.

Distinguishing *Beach v. Raritan &c. R. Co.*, 37 N. Y. 457.

See *Arzaga v. Villalba*, 85 Cal. 191.

Error to allow a plaintiff to testify what he paid his physician, and for the repairs to a bicycle; the value of such items should have been shown. *Schimpf v. Sliter*, 64 Hun, 463; *Gumb v. Twenty-third Street R. Co.*, 114 N. Y. 411.

Where goods were wrongfully seized under execution, evidence of loss of profits caused by interruption of business, admissible as an element of damage. *Langan v. Potter*, 28 N. Y. Supp. 752.

Necessity of repairs and reasonableness of price paid, must appear. *Edge v. Third Ave. R. Co.*, 67 N. Y. Supp. 1002.

For a hayrack destroyed, the cost of the material and value of time taken to rebuild it is recoverable. *Union Pac. &c. R. Co. v. Williams*, 3 Colo. App. 526.

Damages for injury to carriage, includes the reasonable price for hiring another during time of repair. *Wellman v. Miner*, 19 Misc. 644.

See, also, *Schalscha v. Third Avenue R. Co.*, 19 Misc. 141.

Damages for injury to a horse, carriage and harness, include compensation for the loss of their use and the expense of doctoring. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

Damages for injury to barges, included demurrage. *Pierce v. Walton*, 20 Ind. App. 66.

See, also, *Loud &c. Lumber Co. v. Peter*, 20 Oh. C. C. 73.

Damages for the loss of a deed, includes the cost of a suit to resupply it, but excludes depreciation of the property in the interval; in the absence of proof of an opportunity to sell. *People's Savings Co. v. Pickrell*, (Ky.) 56 S. W. Rep. 500; rev'g 55 S. W. Rep. 194.

Damages in an action for the unlawful detention of a threshing ma-

chine do not include anticipated profits from contracts for threshing. *Williams v. Wood*, 55 Minn. 323.

Where a car injured plaintiff's wagon, the measure of damages was difference in value of the wagon immediately before and after the injury, and a reasonable sum for loss of use of wagon for a time reasonably necessary to repair the same. *Hoffman v. Street R. Co.*, 51 Mo. App. 273.

*Street v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Monroe v. Latten*, 25 Kans. 354. Where the action is for the immediate destruction of the property, measure of damages is value of the property and interest; *Churchman v. Kansas City*, 44 Mo. App. 665; *McKnight v. Rateliff*, 44 Pa. St. 156.

Measure of damages for negligent insufficient levy of a tax, held to be the expense of its increase. *School District v. Burress*, (Neb.) 89 N. W. Rep. 609.

Cost of reasonable repairs made necessary by the injury, allowed, though they made the result more valuable than before injury. *Loud &c. Lumber Co. v. Peter*, 20 Oh. Cir. Ct. 73.

Anticipated profits of real estate business, during reconstruction, were recovered. *Choctaw &c. R. Co. v. Alexander*, 7 Okla. 579, 591.

Reasonableness of amount paid for repairs need not be proved, when within knowledge of the jury. *Chapron v. Portland &c. Electric Co.*, (Ore.) 67 Pac. Rep. 928.

Damages for partial destruction of house, held to be cost of reconstruction and compensation for loss of use. *Helbling v. Allegheny &c. R. Co.*, 201 Pa. St. 171.

Value of use and hire of animals rightly to be considered in estimating damages, where the award of the value of animals with interest thereon would be insufficient. *Craddock v. Goodwin*, 54 Tex. 588.

See *Schley v. Lyon*, 6 Ga. 535; *Hair v. Little*, 28 Ala. 248; *Davenport v. Ledger*, 80 Ill. 578; *Ewing v. Blount*, 20 Ala. 694; *Banks v. Hatton*, 1 Notf. & M. (S. C.) 221; *Haviland v. Parker*, 11 Mich. 103; *McDonald v. North*, 47 Barb. 531.

Damages for repairs, is the reasonable not actual cost. Demurrage and wages of idle crew not included, unless pecuniary loss therefrom resulted from accident. *The Robert Hadden*, 68 Fed. Rep. 1017; see, also, *The Glencairn*, 78 Fed. Rep. 379.

Commissions on money disbursed for repairs are excluded, notwithstanding a custom to allow them. *The Glencairn*, 78 Fed. Rep. 379.

Tug, responsible for stranding a schooner, offered assistance in getting her off, which was refused. Not liable for subsequent damage. *The Broux*, 86 Fed. Rep. 808.

In case of partial loss, the measure of damages is reasonable cost of

repair and pecuniary damage from lack of use; but in case of total loss there is the value of the thing lost, which is presumed to include value of its earning power. *The Hamilton*, 95 Fed. Rep. 844.

The cost of an artificial limb is special damage and must be so alleged. *Southern P. Co. v. Hall*, 100 Fed. Rep. 760.

Damages for the loss of use of water, is the value thereof in the market for irrigation purposes. *North Point &c. Irr. Co. v. Utah &c. Canal Co.*, 23 Utah, 199.

"Inconvenience," resulting from injury is not recoverable. *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589.

### III. Failure to Duly Carry Passengers.

In an action for a breach of contract to carry the plaintiff from New York to San Francisco via Lake Nicaragua, the evidence of exposure on the isthmus was proper, as bearing on the question of sickness, time lost there, expenses while there, expenses out and return; time and expenses lost by sickness are elements of damage. *Williams v. Vanderbilt*, 28 N. Y. 217, aff'g judg't for pl'ff.

No recovery allowed for ejection for non-payment of fare, of one who had been a passenger on another car that had become disabled. His remedy was suit for breach of contract. *Taylor v. Nassau &c. R. Co.*, 32 App. Div. 486.

Plaintiff delivered to defendant at New York a sum of money for a passage ticket from Johnstown, Pa., to Chicago, to be delivered that day to "R." a museum freak at Johnstown, and stated at the time that it was essential that it be delivered that day to enable "R." to proceed to Chicago, where he was required to appear four days later for the purpose of exhibition pursuant to an engagement made by plaintiff. The ticket was not delivered and "R." failed to appear at Chicago, whereby plaintiff lost the profits of the contract for his exhibition. Held, that plaintiff's statement was sufficient to put defendant on inquiry, and that defendant not having made such inquiry must be deemed to have assumed responsibility for such damage as plaintiff would sustain by reason of such breach of engagement for "R.'s" exhibition, so far as was occasioned by his own breach of contract. A recovery of consequential damages resulting from a breach of contract from special circumstances is allowed, provided they may be said to have been within the reasonable contemplation of the contracting parties. *Limon v. Penn. Ry. Co.*, 54 N. Y. St. R. 245.

See, also, *Hadley v. Bafendale*, 9 Exch. 353; *Booth v. Spuyten Duyvel Rolling Mill Co.*, 60 N. Y. 487; 1 Sutherland on Damages, 50. See "Common Carrier of Passengers," page 576.

Measure of damages for loss of baggage, is value of use to passenger, not market value. *Simpson v. New York &c. R. Co.*, 16 Misc. 613.

An occupant of a berth in a sleeping car was not allowed to recover for loss of a roll of money to be deposited in bank on arrival. *Williams v. Webb*, 27 Misc. 508; mod'g s. c., 22 id. 513.

Recovery for humiliation and indignity allowed in action for ejection. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Damages for being carried by, may include compensation for vexation and anxiety as well as physical injury in returning. *Louisville &c. R. Co. v. Quick*, 125 Ala. 553.

Passenger was ejected from a train, but her baggage was carried on. She recovered for mental and physical distress due to delay in regaining it; but not for price of clothes purchased meanwhile. *Proctor v. Southern &c. R. Co.*, 130 Cal. 20.

A theatrical manager purchased tickets for himself and troupe to be carried to a certain point, where tickets for his show to the value of \$225 had been received. Owing to a collision plaintiff failed to reach his destination and the gate money was refunded. The damages resulting from the unusual character of the business of the traveler, unknown to the carrier contracting with him, were too remote. *Georgia R. Co. v. Hayden*, 71 Ga. 518.

Damages for ejection, may include compensation for pain and suffering, loss of time and feeling of shame and humiliation. *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123.

Deputy marshal may recover what he could have made on his trip, such as fees and the like, had he not been injured. *Chicago &c. R. Co. v. Hoover*, (Ind. Terr.) 64 S. W. Rep. 579.

Two hundred and eighteen dollars for compelling a delicate woman to get off a train and walk 400 yards on a rough way on a hot day, back to the station, is not excessive. *Louisville &c. R. Co. v. Guy*, (Ky.) 37 S. W. Rep. 1043.

That plaintiff is peculiarly sensitive to indignities, is no ground for enhancing damages for ejection. *Spink v. Louisville &c. R. Co.*, (Ky.) 52 S. W. Rep. 1067.

Damages for failure to hold a train as contracted, was the loss of time, expense and personal inconvenience. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

Exemplary damages were recovered for failure to back to a brick curbing on a muddy road on a rainy night, after passing it 20 to 40 feet, and take on passenger who had signaled. *Jackson &c. R. Co. v. Lowry*, 79 Miss. 431.

Railroad company is liable for nominal damages, regardless of actual

injury, for a breach of statutory duty, to stop a train before ejecting a passenger. *Holt v. Hannibal &c. R. Co.*, 87 Mo. App. 203.

Railroad company unable to take passenger back on his return ticket because its equipment was negligently out of repair, held liable on its contract, but not in tort, and exemplary or punitive damages were not allowed. *Hansley v. Jamesville &c. R. Co.*, 117 N. C. 565.

For failure to transport plaintiff's museum in time for an exhibition, the measure of damages is the probable net profits plaintiff would have made. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524.

Passenger who voluntarily left a stated train and walked back to secure a conveyance, was not allowed to recover for inconvenience of the walk. *Houston &c. R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

In the absence of notice that plaintiff could not afford to buy other clothing and household goods, he could not recover for exposure incident to the carrier's failure to deliver them. *St. Louis &c. R. Co. v. May*, (Tex. Civ. App.) 44 S. W. Rep. 408.

Damages allowed for injury due to holding another's child, while compelled to stand in a crowded train. *Texas &c. R. Co. v. Rea*, (Tex. Civ. App.) 65 S. W. Rep. 1115.

Damages for loss of baggage, does not include loss of use and mental suffering. *Houston &c. R. Co. v. Seale*, (Tex. Civ. App.) 67 S. W. Rep. 437.

Defendant made a contract to carry an opera company from Peoria to Louisville, *guaranteeing* that the troupe would reach its destination by Monday morning. They arrived Tuesday, and were too much fatigued to play that evening. Recovery was allowed for loss of the engagement Monday evening and loss for Tuesday evening, but damages for loss of rest of engagements and breaking up of troupe was not allowed. The loss from the failure to arrive in season to give the performance, which the parties knew the troupe was going to Louisville to give, would come fairly within the contemplation of the parties; the loss from failure to pay the performance, whereby the troupe was broken up, would not. *Foster v. Cleveland C. C. & St. L. Ry. Co.*, 56 Fed. Rep. 134.

Failure to duly carry, held not proximate cause of loss of wages or profits that might have been earned, where no contract existed. *North American T. &c. Co. v. Morrison*, 178 U. S. 262; rev'g s. c., 85 Fed. Rep. 802.

So of the anticipated profits of a theatrical troupe, in the absence of a definite agreement to carry to a given point by a given time. *Southern R. Co. v. Myers*, 87 Fed. Rep. 149.

Where a carrier failed to complete journey, but put passenger off at an intermediate point, he recovered return passage money, incidental ex-

penses and compensation for loss of time. *Smith v. North American &c. Co.*, 20 Wash. 580; s. c., 44 L. R. A. 557.

In a similar case, the passenger completed the journey by other means of conveyance and recovered the expense incurred therein and compensation for loss of the time that he would probably have been employed at his destination, at wages there prevailing, less living expenses. *Ransberry v. North American &c. Co.*, 22 Wash. 476.

#### (a). EXPULSION FROM TRAIN.

Measure of damages is, compensation for loss of time, extra fare and injuries to feelings. *Jacobs v. Third Avenue R. Co.*, 75 N. Y. Supp. 679; rev'g s. c., 34 Misc. 512.

Passenger, who, after ejection, refused to reboard train at conductor's invitation unless it was backed to him, was not allowed to recover for postponement of his wedding. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Inconvenience of person unlawfully ejected from a train is subject of recovery. *Central &c. R. Co. v. Strickland*, 90 Ga. 562.

A person improperly ejected from a train may recover the amount of cost of ticket, which he had, damages on account of delay, and additional expenses for indignity and for personal injuries, if the expulsion was malicious or wanton. *Paleo v. Connell*, 127 Ill. 419.

Where a girl of six years was expelled from a train in violation of the statute, 240 feet from a station, functional derangement of the mind by fright by being thus left on the track was subject of recovery. *Illinois Central R. Co. v. Latimer*, 128 Ill. 163.

No recovery for passenger ejected near by a station, at which he embarked, for damages caused by walking a long distance to his destination, while he was ill. *Chicago &c. R. Co. v. Burrow*, 32 Ill. App. 161.

So, humiliation and indignity. *Paleo v. Bray*, 125 Ind. 229.

In case of wrongful expulsion, suffering from insult and abuse, outraged feelings, mental suffering, are elements of damage. *Shepherd v. Chicago &c. R. Co.*, 77 Iowa, 54.

See, *post*, p. 853.

Recovery of passenger, denied a ticket by ticket agent under belief that train he was taking did not stop at his destination, and required by the conductor to pay additional fare, was limited to the excess fare. *Courts v. Louisville &c. R. Co.*, 99 Ky. 574.

Humiliation, held an element of damage for wrongful ejection, in action of contract. *Lerington &c. R. Co. v. Lyons*, (Ky.) 46 S. W. Rep. 209.

Passenger refused to tell conductor whether signature on his mileage

book was his, and was arrested. A verdict for \$550 was reduced to \$10. *Palmer v. Maine C. R. Co.*, 92 Me. 399.

For refusal to permit passenger to lawfully board train, the amount paid for another ticket, loss of time, hotel expenses and compensation for other inconveniences suffered were recoverable. *Northern Cent. R. Co. v. O'Connor*, 16 Md. 281.

Loss of job of work, occasioned by ejection of a passenger, causing delay, cannot be considered. *Carsten v. Northern P. R. Co.*, 41 Minn. 154.

Remarks or comments of other passengers, after passenger was ejected, not subjects of damages. *Hoffman v. Northern P. R. Co.*, 45 Minn. 53.

Representation by ticket agent that a ticket was good on any train, does not entitle purchaser to exemplary damages for refusal to carry on a train on which, in fact, it was not good. *Yazoo &c. R. Co. v. Rodgers*, (Miss.) 31 South Rep. 581.

Ejection of passenger, not stopping at his destination, held not the proximate cause of injuries from exposure from a journey, unnecessarily taken at night, to reach destination, and no recovery was allowed therefor. *Chicago &c. R. Co. v. Spirk*, 51 Neb. 167.

The form of action does not change the rule of damage for an ejection before reaching destination, where plaintiff boarded the wrong train through a mistake of defendant's servant. *Pittsburg &c. R. Co. v. Reynolds*, 55 Oh. St. 370.

Where young lady was unlawfully obliged to either vacate the car or pay fare, the actual fare paid and the humiliation and mental suffering on account of the attention attracted to her, and being put under obligations to a stranger for the money, are subjects of recovery. *Willson v. Northern P. R. Co.*, 5 Wash. 621.

Damages for ejection, were not limited to amount necessary to repay fare, where reasonable investigation would have shown the conductor that it had been paid once. *Sprengr v. Tacoma T. Co.*, 15 Wash. 660.

#### (b). DETENTION.

Damages for illness caused by unheated depot where passenger was obliged to wait in order to take train, was subject of compensation. *Texas &c. R. Co. v. Mayes*, 15 S. W. Rep. 13.

Where a passenger given the alternative of leaving the train or paying fare chooses the former, he may recover for unused portion of ticket; inconvenience, loss of time and necessary expense incident thereto. *Houston &c. R. Co. v. Crone*, (Tex. Civ. App.) 37 S. W. Rep. 1074.

Where a passenger is ejected and arrested, imprisonment and detention are elements for consideration in determining the damages. *Gulf &c. R. Co. v. Conder*, (Tex. Civ. App.) 58 S. W. Rep. 58.

Where a steamer deviated from its course as stated upon the ticket, a passenger was allowed to recover for loss of time. *De'Colonge v. The Chateau Margaux*, 37 Fed. Rep. 157.

#### IV. Earnings and Profits.

Loss to the plaintiff, in his practice, if a professional man, may be shown. *Metcalf v. Baker*, 57 N. Y. 662, affirming judgment for plaintiff.

When the profits of a business are uncertain, proof of past profits is improper. *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; reversing judgment for plaintiff.

**From opinion.**—"I also think the judge erred in overruling the defendant's objection to the following question: 'About what had been your profits, year by year, in that business?' The plaintiff had testified that he was engaged in the tea importing and jobbing business, buying and selling teas, and had been for a great number of years. That he had a partner who attended to the sales, while he made the purchases. That in purchasing teas a high degree of skill was necessary, which the plaintiff possessed. That the business was extensive. That in consequence of the injury the plaintiff could not purchase teas, and there was a great falling off in the business of the firm. In *Lincoln v. Saratoga and S. Railroad Co.*, 23 Wend. 425, it was held, in an analogous case, that the plaintiff might prove that he was engaged in the dry-goods business, and its extent, but there was no attempt to prove the past profits of the business, with a view to show what the future would be. Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent. (*McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287; *Grant v. The City of Brooklyn*, 41 Barb. 381.) In *Nebraska City v. Campbell*, 2 Black. (U. S.) 590, it was held that proof that the plaintiff was a physician, and the extent of his practice, was competent. *Wade v. Leroy* (20 How. U. S. 34) held the same. In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages. In *Walker v. The Erie R. R. Co.*, (63 Barb. 260) it was held that proof of the amount of income derived by the plaintiff for the year preceding the injury, from the practice of his profession as a lawyer, was competent. This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the past practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business, may, I think, well be doubted. There is no such uniformity in the amount of different years, as a general rule, as to make such inference reliable."

See *Ehrgott v. Mayor*, 96 N. Y. 264, distinguishing this case, and largely limiting it. *Post*, p. 835.

Where loss of time is claimed as an item of damage from personal injury occasioned by negligence, if plaintiff fails to prove the value of



the time lost, or facts on which an estimate of such value can be founded, only nominal damages for that item can be given.

In such an action it was proved that plaintiff was engaged in business at the time of the injury, but had not been able to attend to it since; it was not shown what his business was, or the value of his time, nor any facts as to his occupation, from which the value could be estimated. *Leeds v. Met. Gaslight Co.*, 90 N. Y. 26.

**From opinion.**—"In very numerous actions for negligence, both those where death had resulted and which were prosecuted under the statute, and those for injuries not resulting in death, evidence showing the occupation or business of the injured party and tending to establish his earning power has been held competent and material. (*Grant v. City of Brooklyn*, 41 Barb. 384; *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; *Beisiegel v. N. Y. Central R. R. Co.*, 40 id. 10.) And that it is so because the element of damages which consists of lost time is purely a pecuniary loss or injury, and for such only fair and just compensation must be given and the jury have no arbitrary discretion, but must be governed by the weight of evidence. (*McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 289.) The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. (*Sedgwick on Damages*, chap. 2, p. 47; *Brantingham v. Fay*, 1 Johns. Cas. 264; *N. Y. Dry Dock Co. v. McIntosh*, 5 Hill, 290.) In the present case the jury knew simply that time was lost by reason of incapacity to labor."

See *People ex rel. Deverell v. Musical &c. Union*, 118 N. Y. 109.

A book canvasser was properly allowed to show his earnings for six or seven years before the accident. *Ehrgott v. Mayor &c.*, 96 N. Y. 264, aff'g judg't for pl'ff.

Distinguishing *Masterton v. Village of Mount Vernon*, 58 N. Y. 391.

**From opinion.**—"It would be quite difficult, if not impossible, to place before the jury the extent of the pecuniary loss, unless a plaintiff in such a case, could show how much he had been earning, and was capable of earning, in his usual vocation. In the case of a lawyer, if informed merely of the number of days he worked in a year, or of the number of clients he had, or of the number of cases he tried and argued; and in the case of a physician or dentist, if informed merely of the number of his patients, a jury would get a very inadequate idea of his earnings. It is certainly much better in such cases to place before the jury, the amount earned by the person in his profession during a series of years before the injury. That amount may vary in the past, and looking to the future, must be uncertain, and yet the proof will furnish to the jury the best possible basis to estimate the pecuniary loss. So here the plaintiff's income was not from capital invested, but solely from his personal skill and services; and his earnings for the six or seven years showed what his services were worth to himself, and what he was capable of earning, and thus gave the jury a basis from which to estimate his pecuniary loss. It would have aided the jury but very little to place before them the nature of his business, and the number of volumes of the cyclopedia sold. The question was how much did he earn, and how much was he capable of earning; and proof which would furnish answers to these questions would enable the jury to determine how much he had lost from

his inability to continue his vocation. There is abundant authority to justify the reception of this evidence. *Grant v. City of Brooklyn*, 41 Barb. 381; *Walker v. Erie R. Co.*, 63 id. 260; *Nash v. Sharpe*, 19 Hun, 366; *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287; *Kessel v. Butler*, 53 id. 612; *Wade v. LeRoy*, 20 How. (U. S.) 343; *Nebraska City v. Campbell*, 2 Black, 590; *Phillips v. Southwestern Ry. Co.*, L. R. 4, Q. B. Div. 406."

Where no evidence is given of the plaintiff's circumstances and condition in life, his earning power, skill and capacity, no damages for future loss is proper. *Staal v. Grand St. &c. R. Co.*, 107 N. Y. 625; rev'g s. c., 36 Hun, 208, and judg't for pl'ff.

Following *Leeds v. Metropolitan &c. Co.*, 90 N. Y. 26.

Where plaintiff was unable to attend to her duties as a school teacher for six weeks and thereby lost her salary, and on account of injury to her finger could not strike the keys of the piano, as it was necessary to do in giving music lessons, she was entitled to recover only nominal damages for such loss of wages on account of failure to give evidence thereof. *Baker v. M. R. Co.*, 118 N. Y. 533.

*Seitz v. Dry Dock &c. R. Co.* (N. Y. C. P.) 32 N. Y. St. R. 56.

To show losses from several days' absence from business, the plaintiff testified that his goods were in a safe; he had the combination and the clerks could not get in. Several customers called and he lost much profit, that he usually made from them. Evidence improper. *Phyfe v. Manhattan R. Co.*, 30 Hun, 377, rev'g judg't for pl'ff.

When earnings depend upon skill and capital combined, it is error to allow proof of them. *Johnson v. Manhattan R. Co.*, 52 Hun, 111, rev'g judg't for pl'ff.

Distinguishing *Ehrgott v. Mayor*, 96 N. Y. 265.

In an action for the death plaintiff may show what amount the deceased was earning at the time of his injury, and although his employers may have been accustomed to pay him more than they were under legal obligation to do, it is still pertinent to the question of the pecuniary loss which has been sustained. *Kimmer v. Weber*, 81 Hun, 599; s. c., rev'd on another point, 151 N. Y. 417.

The jury cannot capitalize the earnings of the injured person, that is, give him a sum the interest of which would be equal to what his earnings had been in previous years. *Gregory v. N. Y., L. E. & W. R. Co.*, 55 N. Y. 308.

Citing *Houston & Tex. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 369.

Damages for loss of fingers, includes loss of earning power occasioned thereby, but not loss of ability to do things at which no money is earned. *Freeland v. Brooklyn &c. R. Co.*, 54 App. Div. 90.

One supporting his family by peddling, may recover for loss of wages. *Feinstein v. Jacobs*, 15 Misc. 474.

No recovery allowed, where complaint alleged "incapacity from attending to business," but set out no impairment of income. *Brachfeld v. Third Ave. R. Co.*, 30 Misc. 425; rev'g s. c., 29 id. 586.

Prior earnings or profits may be shown as a basis upon which to admeasure damages, in cases of personal injury, where the profits are the result of the injured person's personal services. *Markowitz v. Metropolitan Street R. Co.*, 31 Misc. 175.

Decedent's experience in railroading, is an element in determining his earning capacity. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Recovery for permanent injuries, is not measured by rate of wages cut off. *Clare v. Sacramento Electric &c. Co.*, 122 Cal. 504.

A passenger was allowed to recover for inability to attend to his business, though there was no proof of earnings. *Storrs v. Los Angeles T. Co.*, 134 Cal. 91.

Wages paid for doing the work, plaintiff was customarily employed at, is evidence of loss by impaired earning power. *Finken v. Elm City Brass Co.*, 73 Conn. 423.

Elements of damages for personal injuries are, compensation for loss of time and wages, pain and suffering, medical supplies and assistance, future suffering and impairment of earning power. *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392.

See, also, *Strattner v. Wilmington &c. R. Co.*, 3 Penn. (Del.) 245; *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330; *Adams v. Wilmington &c. R. Co.*, id. 264; *San Antonio &c. R. Co. v. Keller*, 11 Tex. Civ. App. 569; *Galveston &c. R. Co. v. Hampton*, 24 id. 458.

What would have been earned in plaintiff's trade, as well as for pain and suffering and expenses of medical aid. *Washington &c. R. Co. v. Patterson*, 9 App. D. C. 423.

Present value of prospective earnings, is not the entire amount for the given number of years less seven per cent of the whole. *Macon &c. R. Co. v. Moore* 99 Ga. 229.

Recovery may be had for loss of earning capacity due to permanent injuries, though there is no proof as to prior earnings. *Augusta v. Owens*, 111 Ga. 464.

Reversible error, to leave the jury without rule for computing damages. *Southern R. Co. v. O'Bryan*, 112 Ga. 127.

Error to charge as to prospects of "increased earnings," neither alleged or proved. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

Where the injury is permanent, the mortality and annuity table may be admitted, as to the question of the value of the loss of wife's services. *Collins Park &c. R. Co. v. Ware*, 112 Ga. 663.

Business assistance during disability, is an element of damage. *North Chicago Street R. Co. v. Zeiger*, 182 Ill. 9; aff'g s. c., 78 Ill. App. 463.

Earnings in an employment abandoned five years before the injury, held not evidence on loss of earning capacity. *West Chicago Street R. Co. v. Maday*, 188 Ill. 308; aff'g s. c., 88 Ill. App. 49.

In an action for injuries, evidence of plaintiff's average earnings may be given, although at the time of the injury he was engaged in other work. *Galesburg v. Hall*, 45 Ill. App. 290.

Though at first not aware of serious injury, plaintiff was compelled to stop work on account of it. He recovered substantial damages. *Ripley v. Leverenz*, 83 Ill. App. 603; s. c. rev'd, 183 Ill. 519.

Proof of occupation and inability to work at it, is admissible under general allegations. *Swift & Co. v. O'Neill*, 88 Ill. App. 162; s.c. aff'd, 187 Ill. 337.

See, also, *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376; aff'g s. c., 93 Ill. App. 57.

In suit by minor, jury cannot consider impairment of earning capacity during minority. *Western Union Teleg. Co. v. Woods*, 88 Ill. App. 375.

Earnings before injury is evidence on impairment of earning capacity. *Kankakee v. Steinbach*, 89 Ill. App. 513.

See, also, *Elgin v. Anderson*, 89 Ill. App. 52.

Carefulness and competency of deceased, held elements of consideration for the jury in estimating damages. *Pittsburg &c. R. Co. v. Parish*, 28 Ind. App. 189.

A farmer incapacitated by injuries received may recover in damages for loss of time, suffering and medical attendance, but, *unless special damage is claimed*, not for injury to his business. *Homan v. Franklin County*, 90 Iowa, 185.

Opinions as to what plaintiff might have earned, at vocations at which he was never employed, held inadmissible. *Atchison &c. R. Co. v. Chance*, 57 Kan. 40.

Plaintiff may recover for loss of earning power, value of his time and labor to himself in conduct of his own business, but not speculative profits or profits on invested capital. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

See, also, *Chicago &c. R. Co. v. Scheinkoenig*, 62 Kan. 57.

Evidence of plaintiff's financial condition is inadmissible. *Ft. Scott &c. R. Co. v. Lightburn*, 9 Kan. App. 642.

Charge allowing for "earning capacity" of deceased, when he was only five years of age, was misleading and erroneous. *Smith v. Middleton*, (Ky.) 66 S. W. Rep. 388.

Defendant's circumstances may be an element of consideration, where injury was caused by his servant alone, and he was not personally at fault. *Loracano v. Jurgens*, 50 La. Ann. 441.

Loss of profits in conducting a business dependent upon the labor of

others is not an element of recovery, but the value of the services of the injured person in connection with such business. *Silsby v. Michigan Car Co.*, 95 Me. 204.

Definite and certain profits of an established business, but not speculative, are recoverable. *National &c. Board Co. v. Lewiston &c. Light Co.*, 95 Me. 318.

Damage to health and business proper for injury from sewage. *Allen v. Boston*, 159 Mass. 324.

Individual earning power is the measure of damage for loss of time; not market value of average wages of a man of plaintiff's average capacity. *Draithwaite v. Hall*, 168 Mass. 38.

Allowance of present value of an annuity for given time, at given per cent, as damages for loss of earning capacity, sustained. *Copson v. New York &c. R. Co.*, 171 Mass. 233.

The difference between actual earnings and probable earnings had the injury not happened may be awarded. *Gercke v. Grand Rapids &c. R. Co.*, 56 Mich. 589.

Plaintiff's physical condition, and the rate of his wages, before injuries were received, may be shown. *Gardiner v. Detroit St. R. Co.*, 99 Mich. 182; *Fordyce v. Withers*, 1 Tex. Civ. App. 540.

Recovery may be had for loss of earning power as manual laborer, though a non-lucrative employment, as a brain worker, may possibly be secured. *Ostrander v. Lansing*, 115 Mich. 224.

While the loss of profits is not an exact measure of damages for loss of earning power, it is some evidence. *Hart v. New Haven*, (Mich.) 89 N. W. Rep. 677.

In the absence of evidence of plaintiff's earning capacity or loss of earnings, such loss cannot be recovered. *O'Brien v. Loomis*, 43 Mo. App. 29.

Where plaintiff had no fixed salary but was working on commissions—his yearly average of earnings, held to be the measure for the value of a loss of time of salesman on commissions. *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500.

Where the nature of the employment is such that proof can be made of the value of lost time, it must be made. *Haworth v. Kansas &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 111.

Where no special damages are alleged, plaintiff cannot enhance his damages by showing his knowledge of a trade and employment at it. Loss of earnings is not a necessary consequence of an injury. *Krueger v. Chicago &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 220.

But the complaint need not allege the value thereof. *Mabrey v. Cape &c. Road Co.*, (Mo. App.) 69 S. W. Rep. 394.

Evidence of extra earnings, by selling rations to sub workmen, was admitted on the question of earning capacity. *Wilkie v. Raleigh &c. R. Co.*, 127 N. C. 203.

Proof of occupation and earnings therein, permitted under general allegations of damage. *Alliance v. Campbell*, 6 Oh. C. D. 762.

It is only the present worth of future earnings that can be recovered. The various elements that enter into an assessment of damages for loss of earning power are discussed at length in the opinion. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Annuity tables held inadmissible and Carlisle tables admissible, when accompanied by evidence of health and habits. *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98; *McKenna v. Celunus Nat. Gas Co.*, 198 id. 31.

Profits on invested capital is not, but profits due to personal management of business is, an element of damage for loss of earning power. *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127.

No damages are recoverable for loss of earning power, without evidence on the subject. *McKenna v. Citizens' Nat. Gas. Co.*, 198 Pa. St. 31.

In the absence of evidence that plaintiff's services were worth more than his present salary, it was held error to charge that the amount thereof was not conclusive on that question. *McKenna v. Citizen's &c. Gas Co.*, 201 Pa. St. 146.

Where a brakeman was paid by the mile his average daily mileage and number of days lost was admitted, on question of value of time lost. *Olson v. Burlington &c. R. Co.*, 12 S. D. 326.

Boy recovered for loss of three fingers, though he received more wages after than before the accident. *Central Man. Co. v. Cotton*, (Tenn.) 65 S. W. Rep. 403.

No recovery for loss of time unless there be evidence of its value or damages resulting from it. *International &c. R. Co. v. Simcock*, 81 Tex. 503; *Britton v. Grand Rapids R. Co.*, 90 Mich. 159.

Proper measure of damages as to decrease of plaintiff's earning capacity, is the difference between the wages he earned before his injury and those he was capable of earning thereafter. *Gulf &c. R. R. Co. v. Abbott*, (Tex.) 24 S. W. 299.

Where plaintiff is experienced in several occupations, loss of earning power in the particular one he was engaged in at the time of injury, is not the measure of damages. *Missouri &c. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345.

Mail clerk incapacitated for that service, was not limited in his recovery to the time when he expected to leave that occupation and enter another. *Houston &c. R. Co. v. McCullough*, 22 Tex. Civ. App. 208.

Recovery for value of time lost and compensation for loss of earning capacity, is not double damages. *Galveston &c. R. Co. v. Lynch*, 22 Tex. Civ. App. 336.

See, also, *Gulf &c. R. Co. v. Warner*, 22 Tex. Civ. App. 167; *Missouri &c. R. Co. of Texas v. White*, id. 424; *San Antonio &c. R. Co. v. Belt*, 24 id. 281.

Though admissible, proof of life expectancy is not essential to recovery for a personal injury. *International &c. R. Co. v. Elkins*, (Tex. Civ. App.) 54 S. W. Rep. 931.

Evidence that plaintiff is old, poor, and has to labor to support himself and dependent daughter, is inadmissible. *Belton v. Lockett*, (Tex. Civ. App.) 57 S. W. Rep. 687.

Plaintiff allowed to state what his time would reasonably have been worth, had he been in usual health. *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579.

Limitation of recovery for impaired capacity to the present worth of future earnings, on a 6% basis was improper. *Galveston &c. R. Co. v. Kief*, (Tex. Civ. App.) 58 S. W. Rep. 625.

Exact proof of loss of earning capacity, is not required. *De La Vergue &c. Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471.

Where plaintiff was unfitted to perform any but manual labor, evidence of wages of household servants was admissible. *San Antonio &c. R. Co. v. Skidmore*, (Tex. Civ. App.) 65 S. W. Rep. 215.

That one was earning \$1.25 a day at one trade at the time of injury, does not prevent his proving that he was capable of earning more at another. *Chicago &c. R. Co. v. Long*, (Tex. Civ. App.) 65 S. W. Rep. 882.

Keeper of a jail at \$35 per month, was not allowed to show his occupation as farm superintendent at \$700 yearly five years before. *Houston &c. R. Co. v. Gee*, (Tex. Civ. App.) 66 S. W. Rep. 78.

Allowance for mental and physical suffering and loss of earning power, held not double damages. *Galveston &c. R. Co. v. Jones*, (Tex. Civ. App.) 68 S. W. Rep. 190.

Where earning capacity is permanently limited, but not destroyed, mortality tables are applicable. *Missouri &c. R. Co. v. Scarborough*, (Tex. Civ. App.) 68 S. W. Rep. 196.

A convict, injured during imprisonment, cannot recover for his inability to labor during the term of his imprisonment. *Dalheim v. Lemon*, 46 Fed. Rep. 225.

Damages for nursing wife and doing her work are, value of competent servant to perform same duties, and not wages such as husband would have earned at his trade. *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152; *Salida v. McKinna*, 16 Colo. 523.

See *Barnes v. Keene*, 132 N. Y. 13.

The measure of damages for loss of earning capacity, is the cost of a life annuity equal to the amount of decrease in earning power. *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. Rep. 634.

Allowance of salary in present occupation that could be earned during the probable duration of future disability, held error. *Denver v. Sherret*, 88 Fed. Rep. 226.

In a statutory action for death, the measure of damages is what the life would have been worth to decedent; not to a beneficiary. Hence earning capacity during minority is excluded. *Linss v. Chesapeake &c. R. Co.*, 91 Fed. Rep. 964.

Plaintiff may show the character of his ordinary pursuits, and the effect of the injury in preventing his following them. *Southern P. Co. v. Hall*, 100 Fed. Rep. 760.

Jury authorized to take notice of general wage schedule of railroad foreman. *Missouri &c. R. Co. v. Elliot*, 102 Fed. Rep. 96.

Cost of keeping and schooling, inadmissible in action for services of minor. *Birkel v. Chandler*, 23 Wash. 241.

Plaintiff was allowed to show earnings in occupation abandoned three years before, on question of loss of earning capacity. *Peterson v. Seattle Co.*, 26 Wash. 615.

#### (a). HUSBAND AND WIFE.

In an action by a married woman to recover damages for personal injuries caused by the wrongful act of another, unless she is carrying on a trade or business, or performing labor or services on her sole and separate account, she is not entitled to recover consequential damages resulting from her inability to labor. Her services and earnings belong to her husband, and for loss of such service he may have an action. This right is not affected by the act of 1862 (chap. 172, Laws of 1862), amending the act concerning the rights and liabilities of husband and wife. (Chapter 90, Laws of 1860.) *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47.

Before the injury a married woman took charge of her family, and she *also* worked out by the day, earning \$1.25 per day. To the proof of this fact upon the trial the defendant objected on the ground that her time and services belonged to her husband. The court overruled the objection, and also refused to charge, that she could not recover for her time and services while disabled. No error; had the defendant requested a charge that *she could not recover for the loss of services to her husband in the discharge of her domestic duties*, the request could not properly have been refused, but the request proceeding upon the idea that *all* her time and services belonged to her husband was properly denied. *Brooks*



v. *Schwerin*, 54 N. Y. 343, aff'g judg't for pl'ff, distinguishing *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47.

Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson*, 64 N. Y. 589, rev'g judg't for pl'ff.

Distinguishing *Brooks v. Schwerin*, 54 N. Y. 343.

Unless the complaint shows that the plaintiff, a married woman, is entitled to the fruits of her labor or is in business on her own account, evidence thereof is error in action by her. *Uransky v. Dry Dock, E. B. & R. Co.*, 118 N. Y. 304; rev'g s. c., 44 Hun, 119, and judg't for pl'ff.

Distinguishing *Hartell v. Holland*, 19 W'kly Dig. 312; *Ehrgott v. Mayor &c.*, 96 N. Y. 275; and following, *Gumb v. Twenty-third Street R. Co.*, 114 id. 411.

A husband is entitled to the services of his wife in respect to *household duties*, and the right of action for an injury to her, which prevents her rendering such services, belongs to the husband; so, also, of wages earned outside the household duties from him by the wife, and where she had been accustomed to work for her husband *outside of her household duties* and to receive payment therefor from her husband, under agreement for compensation by which such pay became her own property, such earnings can not be considered by the jury in an action brought by her to recover for injuries preventing her further rendition of such services. *Blaehinska v. Howard Mission &c.*, 130 N. Y. 497; rev'g s. c., 56 Hun, 322.

Unless the complaint allege, that the married woman carried on a separate business, to her own profit, and special damages thereto by reason of personal injury, the presumption is, that damages arising from her diminished capacity belonged to her husband, and it is error to allow her to recover therefor. *Woolsey v. Trustees of the Village of Ellenville*, 61 Hun, 136, rev'g judg't for pl'ff.

See, also, *Mellwitz v. Manhattan R. Co.*, 62 Hun, 622; *Haden v. Clark*, 10 N. Y. Supp. 291.

Where the loss of a wife's services is claimed, the husband cannot recover substantial damages in absence of evidence as to value of services performed by the wife when in health, and of the character or extent of the work performed by her in keeping plaintiff's house. *Munk v. Watertown*, 67 Hun, 261.

*Klein v. Jewett*, 26 N. J. Eq. 481; *Ohio and Mississippi R. Co. v. Crosby*, 107 Ind. 32.

The court charged in an action by a husband to recover for injuries to his wife that if the jury found a verdict for the plaintiff they were confined to compensating him for the loss of his wife's services, together with the amount he paid a man hired to do the work which she had previously performed: error. *London v. Cunningham*, 1 Misc. 408.

Where husband and wife work for another and their joint earnings are used for the support of the family, the husband is entitled to recover for the wife's services, in the absence of a special contract that payment should be made to her individually. *Graf v. Feist*, 9 Misc. 479.

Inasmuch as a wife's earnings belong to her husband, her individual and personal damages in an action by herself can be "measured only by the enlightened conscience of an impartial jury." *Brunswick Light Co. v. Gale*, 91 Ga. 813.

In action by husband and wife for injuries to wife, judgment runs to both, being community property. *Griffen v. Lewiston*, (Id.) 55 Pac. Rep. 545.

Wife without separate employment, cannot recover for loss of time. *Denton v. Ordway*, 108 Iowa, 487.

Where a statute provides that wages due a married woman for her separate labor, shall constitute her separate estate, loss of earnings is proper evidence in an action for injuries. *Smith v. Chicago &c. R. Co.*, 119 Mo. 246.

Married woman cannot recover for expense of medical aid, in the absence of a special contract by her. *Toledo v. Duffy*, 13 Oh. C. C. 482.

See, also, *Atlantic &c. R. Co. v. Ironmonger*, 95 Va. 625.

Measures of damages to a widow, is the amount of her husband's earnings he would probably have contributed to her support. *Missouri &c. R. Co. v. Hines*, (Tex. Civ. App.) 40 S. W. Rep. 152.

## V. Husband and Wife.

In an action by husband and wife for injuries to wife, the measure of damages is compensation for her pain and suffering caused thereby, present, past and future; expenses of nursing and loss of services to husband are excluded. *Friedman v. McGowan*, 1 Penn. (Del.) 436.

See, also, *Louth v. Thompson*, 1 Penn. (Del.) 149.

### (a). ACTION BY HUSBAND.

The husband may recover damages for the loss of his wife's society. *Jones v. Utica & B. R. Co.*, 40 Hun. 349.

From opinion.—"At an early date, the remedy for such injuries was an action of trespass with force and arms, but later, an action on the case was held

appropriate, and it was said in such a case, though quite unnecessary for the decision, that if a husband loses the society and assistance of his wife by an accidental tortious act of the defendant, an action will lie. (*Winsmore v. Greenbank*, Willes, 577; *Baker v. Bolton*, 1 Camp. 493.) The action was for the recovery of damages for injuring the plaintiff's wife while traveling in defendant's stage coach, from the effects of which she died in about a month, and it was held that the husband could recover for the loss of his wife's society from the date of her injury to the date of her death.

*Lynch v. Davis* (12 How. Pr. 323), was an action by a husband to recover damages for unskillful practice of a physician, resulting in the death of plaintiff's wife, and the same rule was held on demurrer at special term. *Phillippi v. Wolff*, 14 Abb. (N. S.) 196, was an action by a husband to recover damages for an abortion produced by defendant upon plaintiff's wife, and resulting in her death, and the same rule was held in *Hopkins v. The Atlantic & St. Lawrence Railroad* (36 N. H. 9), the plaintiff's wife was injured on defendant's road, and it was held that an assessment of damages for the loss of the wife's services and society was proper.

In *Green v. Hudson River R. Co.*, (32 Barb. 25) the wife was instantly killed, and in *Blake v. Midland Ry. Co.*, (18 Q. B. 93), the husband died the day after the injury, and both actions were brought under statute.

*Cregin v. Brooklyn Crosstown Railroad*, (18 Hun, 368; s. c., 19 id. 341; s. c., 75 N. Y. 192; s. c., 83 id. 595) was an action by a husband to recover damages for injury to his wife while being carried by defendant. Before trial the husband died. The action was continued by the administrator, and it was held, (83 N. Y. 595) that the right to recover for loss of society did not survive, but it seems to be assumed that the husband might have recovered for this loss.

If a wife is injured by a carrier, the husband may recover for loss of service, expenses and for loss of society. (2 Wood's Ry. Law, 1245, sec. 317; 2 Rorer Ry. Law, 1094, 1095; 2 Thomp. Neg. 1240, and if the wife be intentionally injured, the husband may recover for loss of society. Sch. Dom. Rel., sec. 77.)

In an action by a husband to recover for a personal injury to his wife, the evidence tended to show that in consequence of the injury the wife had a miscarriage. The court erroneously permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring. *Butler v. The Manhattan Ry. Co.*, 143 N. Y. 417; reversing 4 Misc. 401.

Husband may recover for loss of wife's society through negligent act of defendant. *Ainley v. M. R. Co.*, 47 Hun, 206.

In action by husband for loss of services of wife, the ages of the parties and their conditions for enjoyment of life before and after the injury, are proper subjects for the consideration of the jury. *Zingrebe v. Union R. Co.*, 56 App. Div. 555.

Husband may recover for loss to him of services of wife, in care of children; but not for their loss of services of a mother. *Redfield v. Oakland &c. Street R. Co.*, 112 Cal. 220.

Estimate of damage for loss of service of wife may be made by the

jury, from their general experience. Wife's prior recovery does not bar husband's action. *Denver &c. T. Co. v. Riley*, 14 Colo. App. 132.

Elements of husband's damage for injury to his wife, are loss of services and society; as well as the expense of medical aid. *Washington &c. R. Co. v. Hickey*, 12 App. D. C. 269.

The measure of damages which a husband may recover for loss of his wife's services varies with the circumstances of each case; there need not be any express evidence of the value of those services. *Metropolitan &c. R. Co. v. Johnson*, 91 Ga. 466.

See *Lett v. St. Lawrence &c. R. Co.*, 1 Ont. 545; *Sloan v. N. Y. &c. R. Co.*, 4 Thomp. & C., (N. Y.) 135.

In an action by husband on account of injury to his wife, value of her domestic services and also as the manager of her husband's business, without contract or expectation of payment therefor by him, may be recovered. *Citizens' Street R. Co. v. Twinnane*, 124 Ind. 375.

On the question of what a wife's services were really worth, what the husband had really realized therefrom in the past is immaterial. *Indianapolis &c. R. Co. v. Robinson*, 157 Ind. 414.

The Iowa statute permits a husband to join claims in his own right, to a suit by husband and wife, for injuries to his wife. *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124.

A suit brought for wrongs done to the wife must be brought by the husband in his own name, who is head and master of the community into which the damages, when recovered, fall. *Fournet v. Morgan &c. R. Co.*, 43 La. Ann. 1202.

A husband can sue in his own name for loss of services of wife, and for any expense or loss resulting from defendant's negligence. *Blair v. Chicago &c. R. Co.*, 89 Mo. 334.

*Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *McKinney v. Stage Co.*, 4 Iowa, 420; *Hopkins v. R. Co.*, 36 N. H. 9; *McDonald v. R. Co.*, 20 Iowa, 124; *Smith v. City*, 55 Mo. 456; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329.

And this is true, notwithstanding the wife has an action for the injuries received. *Blair v. Chicago &c. R. Co.*, 89 Mo. 334.

*Woodward v. Washburn*, 3 Denio (N. Y.) 369.

Wife's capacity for usefulness, aid and comfort are subjects of recovery. *Furnish v. Missouri P. R. Co.*, 102 Mo. 669.

Recovery for loss of time in nursing wife, must be limited to the reasonable value thereof. *Freeman v. Metropolitan Street R. Co.*, (Mo. App.) 68 S. W. Rep. 1057.

Loss of services is confined to services as wife, and does not include services, to the proceeds of which she is entitled, though she was in the

habit of contributing them to the support of the family. *Riley v. Lidlke*, 49 Neb. 139.

Husband, not allowed to recover for loss of services and medical expenses for wife, due to sickness, caused by death of a child, through negligence of a physician. *Myers v. Holborn*, 58 N. J. L. 193; s. c., 30 L. R. A. 345.

Recovery for loss of service, not barred by statutory provision that neither husband or wife has any interest in the property of the other. *Baltimore &c. R. Co. v. Gleun*, 66 Oh. St. 395.

Recovery may be had for the loss of earning power of wife. *Readdy v. Shamokin*, 137 Pa. St. 98.

Mental suffering of a wife is a proper element of damages in an action by the husband for injuries to the wife. *Campbell v. Harris*, 4 Tex. Civ. App. 636.

See *Brown v. Sullivan*, 71 Tex. 470; *R. Co. v. White*, 80 id. 202; see, however, *Lett v. St. Lawrence &c. R. Co.*, 1 Ont. 545; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329.

Mental pain, anxiety and distress of wife, carried to wrong destination, may be recovered by her husband. *Texas &c. R. Co. v. Armstrong*, 93 Tex. 31.

Loss of wife's services and of husband's time in attending her, are elements of damage. *Fl. Worth &c. R. Co. v. Kennedy*, 12 Tex. Civ. App. 651.

And where he sues for injury to himself, her extra services in attending him. *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16.

A husband who has nursed his wife can recover the value of the services of a person competent to do that work, not the amount of wages which he might have earned at his trade. *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152.

*Barnes v. Keene*, 132 N. Y. 13.

#### (b). ACTION BY WIFE.

Where married woman was working for her husband for wages she cannot recover for loss of same. *Blaechinska v. Howard Mission*, 130 N. Y. 497.

Although a wife has been separated from her husband for twelve years, working out for her support, yet if, in absence of evidence of her husband's death, or that she had not heard from him, or that he had not assisted her, or of any agreement that she should have her earnings, she may not recover for her loss of time devoted to domestic services. *Thuringer v. N. Y. C. &c. R. R. Co.*, 71 Hun, 526.

Under the provisions of section 2 of chapter 90 of the Laws of 1860,

and of section 1 of chapter 381 of the Laws of 1884, if a married woman, with the knowledge of her husband, renders services to a third person, pursuant to a contract for compensation, she may maintain an action to recover the price agreed upon or the value of the services rendered.

The common-law presumption that the services of a wife belong to her husband exists notwithstanding the provisions of chapter 90 of the Laws of 1860, and chapter 381 of the Laws of 1884, but may be rebutted. *Stokes v. Pease*, 79 Hun. 304.

A married woman may not recover for loss of services or for medical expenses: but only for pain and physical impairment to herself. *Austin v. Bartlett*, 67 App. Div. 312.

A married woman, suing alone, cannot recover for her expenses without evidence that she actually paid or was liable therefor, unless separated from her husband. *Lewis v. Atlanta*, 77 Ga. 756.

See *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

Impairment of married woman's capacity to labor, together with pain and suffering, is recoverable by her and not by her husband. *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500.

A married woman, by statute, responsible for expense of medical assistance and entitled to earn money which is her own, is entitled to recover for loss of time and medical expenses. *West Chicago Street R. Co. v. Carr*, 67 Ill. App. 539.

See, also, *Hill v. Sedalia*, 64 Mo. App. 494; *Chacey v. Fargo*, 5 N. D. 173.

A wife, suing for personal injuries, cannot recover for medical attendance, or loss of time, unless presumptive right of the husband to recover for the same is rebutted. *Ohio &c. R. Co. v. Cosby*, 107 Ind. 52.

*Long v. Morrison*, 14 Ind. 595; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Baltimore &c. R. Co. v. Kemp*, 61 Md. 74; *Moody v. Osgood*, 50 Barb. (N. Y.) 628.

Where a wife incurs liability, or expends money for medical services in respect of injuries received by herself, she may recover for the same. *Shelby County v. Castetter*, 7 Ind. App. 309.

Where wife has become liable for medical treatment from her own separate means she may recover therefor. *Shelby County v. Castetter*, 7 Ind. App. 318.

A married woman cannot include in her recovery, an item for medical treatment. *Efroyunson v. Smith*, (Ind. App.) 63 N. E. Rep. 328.

A married woman cannot recover damages, in an action for personal injuries in her own name, for loss of time, unless she is carrying on a business of her own apart from her husband. *Thomas v. Brooklyn*, 58 Iowa, 138.

*Nichols v. Dubuque &c. R. Co.*, 68 Iowa, 732; *Tuttle v. Chicago &c. R. Co.*, 42

id. 518; *Hall v. Manson*, 90 id. 585; *Van Doran v. Marden*, 48 id. 188; *Fleming v. Shenandoah*, 67 id. 508. See following cases: *McWhirter v. Hatten*, 42 Iowa, 288; *Grant v. Green*, 41 id. 88; *Lyle v. Gray*, 47 id. 153; *Klein v. Jewett*, 26 N. J. Eq. 474.

A married woman cannot recover for loss of time due to an injury, if she is a mere housewife. *Fleming v. Shenandoah*, 67 Iowa, 508.

Membership in a church or society, is not an element of damage to wife for personal injuries. *Denton v. Ordway*, 108 Iowa, 181.

Married woman, living with her husband, cannot recover for loss of time, medical attendance or impaired capacity to labor. *Atchison &c. R. Co. v. McInnis*, 46 Kan. 109.

*Harmony v. Old Colony R. Co.*, 165 Mass. 100; s. c., 30 L. R. A. 658; *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 351.

A married woman, living apart from her husband, who supported herself for several years, was permitted to recover for medical attendance. *Lammiman v. Detroit &c. Street R. Co.*, 112 Mich. 602.

Otherwise, if she be living with him. *State v. Detroit*, 113 Mich. 643.

A married woman denied recovery for detention of her land, prior to her husband's death. *Smith v. White*, 165 Mo. 590.

Damages for personal injury are personal to the wife, although husband be nominal party. *Brown v. Hannibal &c. R. Co.*, 23 Mo. App. 209.

In an action by a married woman for injuries to her person, her age and condition in life are not to be considered. *Ross v. Kansas City R. Co.*, 48 Mo. App. 440.

Under statute permitting wife to recover for loss of services of husband, she may recover for prospective earnings, where his injury is permanent. *Clark v. Hill*, 69 Mo. App. 541.

In an action by husband and wife for injuries to her *before* her marriage, her loss of capacity to earn should be considered, although such damages accrued to her individually. *Reading v. Pa. R. Co.*, 32 N. J. L. 264.

The premature birth of a child, without proof of injury or pain on account of same, is not a subject of recovery. *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592.

## VI. Elements of Damage.

There is no rule of damages for personal injuries; their assessment is for the jury. *McLean v. Lewiston*, (id.) 69 Pac. Rep. 478.

Expense of watching the cattle, though exceeding the cost of fence was allowed, as damages for failure by railroad company to comply with fencing statute. *Atchison &c. R. Co. v. Billings*, 7 Kan. App. 399.

The effect of previous conditions on capacity to recover, cannot be considered. *Sullivan v. Marin*, (Mass.) 56 N. E. Rep. 600.

That plaintiff is poor, is not a consideration. *Southern R. Co. v. McLellan*, (Miss.) 32 South. Rep. 283.

Nor that he had wife and family. *Sykes v. St. Louis &c. R. Co.*, 88 Mo. App. 193; *Kansas City &c. R. Co. v. Eagan*, 64 Kan. 421.

But his condition in life, is an element for consideration. *Ward v. Steffen*, 88 Mo. App. 511.

Elements of damages for personal injuries are, expense incurred, loss of earning power and inconveniences and suffering, mental and physical. *Goodhart v. Pennsylvania R. Co.*, 117 Pa. St. 1.

See, also, *Galveston &c. R. Co. v. Waldo*, (Tex. Civ. App.) 32 S. W. Rep. 783; *San Antonio &c. R. Co. v. Weigers*, 22 Tex. Civ. App. 344.

In action for death, evidence of its effect on mother was excluded. *Norfolk &c. R. Co. v. Sterens*, 91 Va. 631.

That a man was married and had small children, is not an element of consideration. *Lester v. Rolfe &c. Co.*, (W. Va.) 41 S. E. Rep. 216.

#### (a). PHYSICAL AND MENTAL EFFECTS, LOSS OF TIME, &c.

Damages were allowed for miscarriage, resulting from a shock caused by a blow. *Jones v. Brooklyn &c. R. Co.*, 23 App. Div. 141.

Evidence of injury to eye was excluded, where the complaint, specific in other particulars, did not refer to it. *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. 369.

No recovery was allowed for dislocation of arm, where the only evidence thereof was non-use. *Haszlacher v. Third Ave. R. Co.*, 60 N. Y. S. 1001.

Pain and suffering, resulting from personal injury, is an element of damage. *Louisville &c. R. Co. v. Binion*, 107 Ala. 645.

Where the injury consists of loss of hearing, impairment of sight and nervous shock, the assessment of damages is in the discretion of the jury. There can be no direct evidence of value. *Clar v. Sacramento &c. R. Co.*, 122 Cal. 504.

See, also, *Dunn v. Northeast &c. R. Co.*, 81 Mo. App. 42; *Smitson v. Southern P. R. Co.*, 37 Or. 74.

The jury may consider his loss of time, pain and suffering, necessary expenses in being cured, and fact that he was permanently injured. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

*Morris v. Chicago &c. R. Co.*, 45 Iowa, 29; *Whalen v. St. Louis &c. R. Co.*, 60 Mo. 323; *Seaboard Man. Co. v. Woodson*, 98 Ala. 378.

Pain and suffering, mental and physical, is an element of considera-



tion. *Chicago City R. Co. v. Anderson*, 182 Ill. 298; aff'g s. c., 80 Ill. App. 71.

See, also, *Brown v. Green*, 1 Penn. (Del.) 535; *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181; *West Chicago &c. R. Co. v. Lups*, 74 id. 420; *Olmstead v. Distilling &c. Co.*, 35 Oh. L. J. 133; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; *Musick v. Latrobe*, 184 id. 375.

Damages for the loss of a leg, may be assessed by the jury, from general knowledge of the results of such injury. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159.

Admission of evidence of illness of wife, produced by the accident to husband for which he sues, was error. *West Chicago Street R. Co. v. Dougherty*, 89 Ill. App. 362.

Damages for pain are given in actions predicated upon negligence only for the bodily or physical pain of which the mind is conscious. *Chicago v. Gilford*, 99 Ill. App. 88.

Lack of personal enjoyment is not an element of recovery. *Columbus v. Strassner*, 124 Ind. 482.

Instruction to consider plaintiff's loss of time, pain and suffering, "and all other facts and circumstances bearing on his injuries," held proper. *Pittsburg &c. R. Co. v. Carlson*, 24 Ind. App. 559.

The business of fishing does not involve speculative profits, but the personal efforts of one engaged in it, the profits of which are considered earnings and loss of time, can be shown as loss of earnings. *Lund v. Tyler*, 115 Iowa, 236.

A passenger may recover damages for pain and suffering as the result of his injury. *Pence v. Wabash R. Co.*, (Iowa) 90 N. W. Rep. 59.

Expert testimony not required to show permanency, when it is apparent from the nature of the injury. *Missouri &c. R. Co. v. Fowler*, 61 Kan. 320.

The court can give the jury no standard of value to measure damages for pain. *Salina Mills &c. Co. v. Hoyne*, (Kan. App.) 63 Pac. Rep. 660; s. c., 10 Kan. App. 581.

In an action for personal injuries, loss of time, moneys necessarily expended, and suffering are proper elements of damage. *Central Passenger R. Co. v. Kuhn*, 86 Ky. 578.

Barrenness, resulting from the accident, is not an element of damage. *South Covington &c. R. Co. v. Bolt*, (Ky.) 59 S. W. Rep. 26.

Nervous shock, producing defective vision, is an element of damage. *Baltimore &c. R. Co. v. Baer*, 90 Md. 97.

Age, condition in life, extent of injuries, bodily pain, mental anguish, are proper elements of damage. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

*Wilson v. Pa. R. Co.*, 132 Pa. St. 27.

Proof, that injury by loss of toes, was enhanced by the fact that that leg was shorter than the other, was admitted. *Nebonne v. Concord R. R.*, 68 N. H. 296.

Evidence to show what a child without income or education would be worth as cook or field hand, was admitted in action by child. *Jeffries v. Seaboard &c. R. Co.*, 129 N. C. 236.

Aggravation of previous unhealthful condition, is an element of damage. *Gulf &c. R. Co. v. Reagan*, (Tex. Civ. App.) 34 S. W. Rep. 796.

One of unsound mind, may recover for lost time and labor and mental suffering. *Gulf &c. R. Co. v. Holtzheuser*, (Tex. Civ. App.) 45 S. W. Rep. 188.

Recovery for loss of time during total incapacity, and for impairment of capacity thereafter, is not double recovery. *Houston &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 48 S. W. Rep. 773.

Injury to eyesight, resulting from rupture, held an element of damage. *Missouri &c. R. Co. v. Hammig*, 20 Tex. Civ. App. 649.

Allegation of pain permits proof of both mental and physical pain. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

Physical and mental pain "must be considered" as an element of damages; held a proper charge. *Galveston &c. R. Co. v. Jenkins*, (Tex. Civ. App.) 69 S. W. Rep. 233.

A child may recover for loss of earning capacity, in addition to physical suffering. *Delaware &c. R. Co. v. Devore*, 114 Fed. Rep. 155.

Mental and physical suffering, loss of time, effect of injury upon life and capacity to earn a livelihood, are proper elements of damage. *Carpenter v. Mexico National R. Co.*, 17 Wash. L. R. 630.

*Howard Oil Co. v. Davis*, 76 Tex. 630.

Probable length of plaintiff's life may be considered. *Waterman v. Chicago &c. R. Co.*, 82 Wis. 613.

See *Atlanta &c. R. Co. v. Newton*, 85 Ga. 517.

Inconvenience is not included in compensatory damages. *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589.

Annuity tables admitted on question of damages for permanent injury, when accompanied with other evidence for the purpose of showing expectancy, but not of using its figures to calculate damage. *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196.

See, also, *McKeigue v. Janesville*, 68 Wis. 50; *Union P. R. Co. v. Yates*, 40 L. R. A. 553, note.

#### (b). MENTAL SUFFERING.

*Bodily or mental pain*, medical expenses, and the direct pecuniary loss from the privation of the use of the plaintiff's limbs are elements of

damage. *Ransom v. N. Y. & E. R. Co.*, 15 N. Y. 115; aff'g judg't for pl'ff.

**From opinion.**—"The established precedents in actions on personal injuries, invariably state that the party 'suffered and underwent great pain.' (2 Chit. Pl. 648, 710, 711, 851.) The systematic writers, so far as they have noticed the question, state that personal suffering is an element from which to estimate the damages. (2 Greenl. sec. 267.) In *Theobald v. The Railway Passenger Assurance Company*, (26 Eng. L. & Eq. R. 432), it was held that expense and pain and loss, were the proper, and the only proper subjects to be considered in assessing the damages. In *Blake v. The Midland Railway Company*, (10 Eng. L. & Eq. R. 437; s. c., 18 Adolph. & Ellis N. S. 93) the judge instructed the jury that the plaintiff had experienced a great deal of anxiety, and it was for the jury to consider whether they would confine themselves to the pecuniary loss. \* \* \* On appeal it was said that 'when an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can, with little difficulty award him a *solutum* for his mental sufferings, along with an indemnity for his pecuniary loss.' In *Seger v. The Town of Barkhamsted*, (22 Conn. 290, 298), the action was for an injury which the plaintiff had sustained in crossing a defective bridge. \* \* \* Storrs, J., in delivering the opinion of the court on appeal said that the plaintiff was entitled to be compensated for his actual personal injury. 'Such injury,' he said, 'is not confined to his wounds and bruises upon his body, but extend to his mental suffering.' He added, that 'to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be an affront to common sense.' In *Canning v. Inhabitants of Williamstown*, (1 Cush. 451), the action and the question were the same as in the last case, and the same judgment was given. It was held that the plaintiff's mental suffering from reasonable apprehension was a part of the injury for which he was entitled to damages. In *Lindsley v. Bushnell*, (15 Conn. 225) which was an action on the case for negligence in leaving an obstruction in the highway. \* \* \* the court, in laying down the rule of damages in such cases, stated that it included a compensation for bodily pain and mental anguish.

In this state, I believe I may say that, until recently, no doubt was ever supposed to exist but that the rule was as insisted upon by the plaintiff. The general prevalence of that opinion is, no doubt, the reason why no early adjudged cases upon the question can be found. It has always been assumed that personal suffering caused by the wrongful act of another was to be compensated in damages, in an action by the person injured, though the rule is different in actions for injuries to the relative rights of the plaintiff. *Cowden v. Wright*, (24 Wend. 429), was trespass by a father for assaulting and beating his son, *per quod servitium amisit*. The judge charged that the jury might take into consideration the feelings of the parents occasioned by the infliction of the injury upon their son. This was held to be wrong, and the judgment was reversed; but Chief Justice Nelson, in giving judgment, said: 'The child may also maintain an action in which the measure of redress depends upon the sound discretion of the jury, because his personal injury and *suffering* then constitute the gravamen of the suit.' More recently, however, since the courts have been much occupied in litigations between railroad companies, and passengers claiming to have been injured by negligence, the question has been frequently raised, and has, so far as I know, always been determined in accordance with the views which I entertain.

(*Morse v. The Auburn & Syr. R. R. Co.*, 10 Barb. 621; *Curtis v. The Rochester & Syr. R. R. Co.*, 20 id. 282.)

*Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Harding v. N. Y. & C. R. Co.*, 36 Hun. 72; (expulsion from car) *Quinn v. L. I. R. Co.*, 34 Hun. 332; *Matteson v. N. Y. & C. R. Co.*, 62 Barb. 364; s. c. aff'd, 35 N. Y. 487; *Seger v. Town of B.*, 22 Conn. 290.

Indignity of being ejected from a car, is an item. *Ray v. Cortland & C. R. Co.*, 19 App. D. 530.

Mental anguish from failure to reach a sick brother, on account of expulsion, held not an element of damage, in suit for the expulsion. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177.

See, also, *Texarkana & C. R. Co. v. Anderson*, 67 Ark. 123; *Peay v. Western & C. Teleg. Co.*, 64 id. 538.

Paroxysms, caused by the humiliation of being ejected from a train, are bodily injuries and an element. *Sloane v. Southern California R. Co.*, 111 Cal. 668.

Damages allowed, for "wounded sensibility or affection, and for sense of wrong and insult." *Thomas v. Gates*, 126 Cal. 1.

Mental suffering alone does not constitute cause of action, but is an element of damage when the proximate result of an actionable wrong. *Brush Electric & C. Co. v. Simonsohn*, 107 Ga. 10; See, also, *Gibney v. Lewis*, 68 Conn. 392.

In an action to recover damages for mental and physical pain, assessment may be left to the enlightened conscience and intelligence of the jury. *Southern R. Co. v. Gresham*, 114 Ga. 183.

Injured feelings resulting from, but not part of the pain, naturally attending the injury, held not an element. *Chicago & C. R. Co. v. Taylor*, 170 Ill. 49; aff'g s. c., 68 Ill. App. 613.

See, also, *Cicero & C. R. Co. v. Brown*, 193 Ill. 274.

Wounded pride and humiliation, caused by wrongful ejection from a train, is an item. *Chicago & C. R. Co. v. Adams*, 60 Ill. App. 571.

See, also, *West Chicago Street R. Co. v. James*, 69 Ill. App. 609; *Chicago & C. R. Co. v. Spurney*, id. 549; *Decatur v. Hamilton*, 89 id. 561.

Mental pain, not directly or necessarily connected with physical pain is not an element. *North Chicago & C. R. Co. v. Duebner*, 85 Ill. App. 602.

*Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; s. c. aff'd, 182 Ill. 298; *Chicago & C. R. Co. v. Canevin*, 72 Ill. App. 81.

Mental suffering, unaccompanied by physical injury, held no ground for recovery of compensatory damages, though sometimes allowed as punitive damages. *Kalen v. Terre Haute R. Co.*, 18 Ind. App. 202.

See, also, *Deming v. Chicago & C. R. Co.*, 80 Ill. App. 152.

Mental pain or distress is proper element of damage. *Webber v. Creston*, 75 Iowa, 16.

*Kennon v. Gilmer*, 131 U. S. 22.

Mental suffering is an element of damage for delay, in the shipment of a corpse. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

See, also, *Hale v. Bonner*, 82 Tex. 33.

Shame and mortification at having to use crutches, is an element. *Beath v. Rapid R. Co.*, 119 Mich. 512.

Suffering of mind is proper element of damage. *Felt v. Rich Hill &c. Co.*, 23 Mo. App. 216.

Apprehension of insanity, caused by mental disability resulting from injury is an element of damage. *Walker v. Boston &c. R. Co.*, (N. H.) 51 Atl. Rep. 918.

Where mental troubles are the proximate result of personal injuries, recovery may be had. *Consolidated T. Co. v. Lamberton*, 60 N. J. L. 457.

Passenger allowed to recover for indignity as well as personal injuries. *Rungan v. Central R. &c. Co.*, 65 N. J. L. 228.

Physical suffering, resulting from apprehension only of injury, is not sufficient. *Ward v. West Jersey &c. R. Co.*, 65 N. J. L. 383.

Mental suffering, resulting from physical injury, is an element. *North German Lloyd Ss. Co. v. Wood*, 18 Pa. Super. Ct. 488.

See, also, *Bamford v. Pittsburg &c. T. Co.*, 194 Pa. St. 17; *Schenkel v. Pittsburg &c. T. Co.*, id. 182; *Pittsburg &c. R. Co. v. Montgomery*, 152 Ind. 1; *Missouri &c. R. Co. v. Warren*, 90 Tex. 566; *Antonio v. Porter*, 24 Tex. Civ. App. 444; *Norfolk &c. R. Co. v. Marpole*, 97 Va. 594.

Mental suffering of widow, is not an element in statutory action for death. *Knorrville &c. R. Co. v. Wyrick*, 99 Tenn. 500.

Mental anguish, caused by being carried to wrong destination, held an element. *Texas &c. R. Co. v. Armstrong*, 93 Tex. 31.

Mental suffering from apprehension of inability to pay rent, was held not an element. *Planters' Oil Co. v. Mansell*, (Tex. Civ. App.) 43 S. W. Rep. 913.

Passenger allowed to recover for mental suffering, caused by vulgar, profane and indecent language of fellow passengers. *Houston &c. R. Co. v. Perkins*, 21 Tex. Civ. App. 508.

Jury may consider mental suffering as an element of damage, based on evidence of physical injuries, and special proof of such suffering is not necessary. *Missouri &c. R. Co. v. Cox*, (Tex. Civ. App.) 55 S. W. Rep. 354.

See, also, *International &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 996.

Jury were permitted to infer mental suffering from proof of physical injuries. *Southern &c. Teleg. Co. v. Clements*, 98 Va. 1.

Held error to admit evidence of worry and disappointment, in action for failure to transport passenger. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

### (c). MENTAL SUFFERING, DISFIGUREMENT.

Disfigurement is an element of recovery. *Birmingham v. Lewis*, 92 Ala. 352; *Giffen v. Lewiston*, (Id.) 55 Pac. Rep. 545; *Newbury v. Getchell &c. Lumber Co.*, 100 Iowa, 441; *Rockwell v. Eldred*, 7 Pa. Super. Ct. 95.

Mental pain caused by the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, held, too remote. *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; s. c. aff'd, 182 Ill. 298.

See, also, *Chicago &c. R. Co. v. Hines*, 45 Ill. App. 299.

Disfigurement or permanent annoyance caused by deformity, bodily and mental suffering, anxiety, are elements of damage. *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374.

Mental suffering and physical pain, held elements of damage to a small girl for permanent disfigurement. *Galveston &c. R. Co. v. Clark*, 21 Tex. Civ. App. 167.

Destruction of prospects of marriage of a five-year-old girl, is an element. *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783.

Mortification and exposure to the curiosity or ridicule of others, on account of mutilation of the body by injury, may be considered. *Heddles v. Chicago &c. R. Co.*, 77 Wis. 228.

### (d). MENTAL SUFFERING—IN CASE OF DEATH.

In a statutory action for death, the mental suffering of deceased, or of his widow, is not an element of damages. *Florida &c. R. Co. v. Foxworth*, 11 Fla. 1.

Sorrow is not a subject of recovery in action for death. *Chicago R. R. Co. v. Gillan*, 27 Ill. App. 386.

See, also, *Cerrillos Coal R. v. Deserant*, 9 N. M. 49; *Lake Shore &c. R. Co. v. Ehlert*, 19 Oh. C. C. 177.

In an action for injuries continued by an administrator after plaintiff's death, damages for mental and physical suffering of deceased were allowed. *Atchison &c. R. Co. v. Rowe*, 56 Kan. 411.

See, also, *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357.

In such case, the damages belong to the estate and not the widow and next of kin. *Missouri &c. R. Co. v. Bennett*, 5 Kan. App. 231; s. c. aff'd, 58 Kan. 499.

Where the action is for wrongful death, mental and physical suffering is not an element of damage. *Louisville &c. R. Co. v. Sander*, (Ky.) 44 S. W. Rep. 644.

But, where no motion is made to require plaintiff to elect, he was allowed to recover for such suffering as well as for the death. *Louisville &c. R. Co. v. Miniard*, (Ky.) 50 S. W. Rep. 962.

In action for death, grief or mental suffering are not subjects of recovery. *Baltimore &c. Road v. State, Grimes*, 71 Md. 573.

Mental suffering, injured feelings not recoverable for death. *Myuning v. Detroit &c. R. Co.*, 59 Mich. 257.

*Galveston v. Barbour*, 62 Tex. 172; *City of Chicago v. Scholten*, 75 Ill. 468; *Oldfield v. N. Y. &c. R. Co.*, 14 N. Y. 310; *Tilley v. Hudson R. Co.*, 29 id. 252; *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Hutchins v. St. Paul &c. R. Co.*, 44 Minn. 5; *Whitout v. Chicago &c. R. Co.*, 13 Wall. 270; but this does not seem to be the rule in Virginia, *Baltimore &c. R. Co. v. Noell*, 32 Gratt. 394. *Tiffany's Death by Wrongful Act* states that this principle is declared in nearly every case, when it is discussed, and cites many authorities.

In actions for death, wounded feelings, loss of companionship, pain and suffering are not recoverable. *Hutchins v. St. Paul &c. R. Co.*, 44 Minn. 5.

Evidence that deceased, killed in boiler explosion, was found 200 feet away dead, with blood escaping from mouth, nose and ears, held insufficient to sustain verdict for physical pain, under a statute permitting recovery therefor in actions for death resulting from injuries. *Hastings Lumber Co. v. Garland*, 115 Fed. Rep. 15.

In statutory action for death of son, evidence of nervous condition of mother, resulting therefrom, is inadmissible. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631; s. c., 46 L. R. A. 367.

#### (c). MENTAL SUFFERING—FAILURE TO DELIVER TELEGRAM.

Complaint in tort for mental suffering caused by delay in delivery of telegram, held demurrable on the ground that mental suffering is not an element of damage except when there is a right of recovery aside from such suffering. If breach of contract had been alleged and proved, the damages, though nominal would have been increased by the mental suffering. *Blount v. Western &c. Tel. Co.*, 126 Ala. 105.

Mental distress is not recoverable for failure to deliver a telegram apprising one of the sickness of a brother, whereby he was delayed in reaching him before his death. *Chapman v. Western Union Tel. Co.*, 88 Ga. 563.

Mental suffering on account of inability to attend the funeral of brother, through failure to deliver telegraph message, is not ground of recovery. *Western Union Tel. Co. v. Rogers*, 68 Miss. 748.

Mental distress cannot be recovered for failure to deliver a telegram, although company was advised that that would result from such failure. *Conuell v. Western Union Tel. Co.* (Mo.) 48 Alb. L. J. 74 (1893).

Where the telegram related to sickness, or death, it was held not necessary, in order to hold the company in damages for mental anguish for negligent delay, that the relation of the parties be disclosed to it. *Lynne v. Western U. Teleg. Co.*, 123 N. C. 129.

So, also, although the telegram was not signed by the sender, who was unknown to the company. *Laudie v. Western &c. Teleg. Co.*, 124 N. C. 528.

Damages allowed for mental anguish alone, in an action for negligence in delivering a telegram. A telegraph company, being a common carrier, its failure to duly carry is actionable aside from contract. *Cashion v. Western &c. Teleg. Co.*, 124 N. C. 459; s. c., 45 L. R. A. 160.

Failure to deliver telegram in case of death of father, whereby son is prevented from attending the funeral, held not to give right of action for mental anguish. *Kester v. Western Union Tel. Co.*, 29 Oh. L. J. 259.

But see *contra*, *Western Union Tel. Co. v. Nations*, 82 Tex. 539; *Western Union Tel. Co. v. Berringer*, 84 id. 38; *Reese v. W. U. Tel. Co.*, 123 Ind. 294; *W. U. T. Co. v. Henderson*, 89 Ala. 510; *Wadsworth v. Tel. Co.*, 86 Tenn. 695; *Young v. Tel. Co.*, 107 N. C. 370; *Western Union Tel. Co. v. Carter*, 85 Tex. 580; *Western Union Tel. Co. v. Startemeire*, 6 Ind. App. 125.

See cases collected under *Telegraph Companies*.

Notice, that telegram, giving notice of decease, is being sent to son-in-law, does not warrant recovery for mental anguish in action for delay in delivery. *Western &c. Teleg. Co. v. Gibson*, (Tex. Civ. App.) 39 S. W. Rep. 198.

No recovery allowed for mental anguish of father, at being unable to secure attendance of mother and daughter, due to delay in delivery of telegram notifying him of sickness of his child. *Weatherford &c. R. Co. v. Seals*, (Tex. Civ. App.) 41 S. W. Rep. 841.

Mental anguish from simple negligence in prompt delivery of a telegram is not recoverable. *Gahan v. Western Union Tel. Co.*, 59 Fed. Rep. 133.

*Newman v. Western Union Tel. Co.*, 54 Mo. App. 434; *West. U. T. Co. v. Wood*, 57 Fed. Rep. 471, and cases collected.



## (f). NURSING, MEDICAL TREATMENT, &amp;c.

Only nominal damages were allowed for medical services, past and future, in absence of proof of amount, nature, probable duration and value thereof. *Page v. Delaware &c. Canal Co.*, 34 App. Div. 618.

And evidence of the number of visits, without evidence of value, is insufficient. *Carter v. Nunda*, 55 App. Div. 501.

Reasonable physician's fees may be recovered. *Alabama &c. R. Co. v. Siniard*, 123 Ala. 551.

Damages for injuries may include expenses of a nurse and a ward in the hospital. *Montgomery Street R. Co. v. Mason*, (Ala.) 32 South. Rep. 261.

Reasonable attorney's fee held an item of damages in an action for violation of a statute requiring freight trains to carry passengers. *St. Louis &c. R. Co. v. Neal*, 66 Ark. 543.

That plaintiff was forced to get assistance of his neighbors, is not sufficient to import damage; there being no inference that he paid, or became obligated to pay therefor. *Southern R. Co. v. Ward*, 110 Ga. 193.

Specification of medical expense without stating the amount, renders complaint demurrable. *Western &c. Teleg. Co. v. Griffith*, 111 Ga. 551.

Attorney's fees were allowed where a hotel proprietor's refusal to deliver a baggage check, was purely arbitrary, and put a guest to unnecessary expense. *Carhart v. Wainman*, 114 Ga. 632.

Value of wife's services in nursing husband is not recoverable by him. *Peoria &c. R. Co. v. Johns*, 43 Ill. App. 83.

Liability for medical expenses, proved reasonable, though not yet paid, was an element of damage. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304.

See, also, *Abilene v. Wright*, 4 Kan. App. 708; *Hutchinson v. Van Cleve*, 7 id. 676; *Lanniman v. Detroit &c. Street R. Co.*, 112 Mich. 602; *Omaha Street R. Co. v. Eminger*, 57 Neb. 240; *Wilson v. Southern P. R. Co.*, 13 Utah 352.

The value of services to ameliorate the suffering of an injured person may be proven, although such services were voluntary. *Penn. R. Co. v. Marion*, 104 Ind. 239.

*Klein v. Thompson*, 19 Oh. St. 569; *Ferryboat D. S. Gregory &c.*, 2 Benedict. (U. S.) 226. See *Indianapolis v. Gaston*, 58 Ind. 224; *Oh. &c. R. Co. v. Dickerson*, 59 id. 317; *Ohliger v. Toledo*, 20 Oh. C. C. 142.

Services in nursing, gratuitously rendered by a member of the family, are recoverable. *Brosnan v. Sweetser*, 121 Ind. 1.

Amount charged, held not evidence of reasonable value. *Bedford v. Woody*, 23 Ind. App. 401.

See, also, *Bowsher v. Chicago &c. R. Co.*, 113 Iowa, 16.

No recovery is allowed for medical services where no evidence of their value is introduced. *Reed v. C. R. I. &c. R. Co.*, 57 Iowa, 23.

*Webster City &c. R. Co. v. Newson*, 70 Iowa, 355.

Minor, living with parents, cannot recover for medical attendance until he has personally paid the bill. *Newbury v. Getchell &c. Co.*, 100 Iowa, 441.

Not error to instruct, that plaintiff may recover for incidental expenses, if any were incurred, though there was no evidence that any had been. *Trumble v. Happy*, 114 Iowa, 624.

See, also, *Lamb v. Cedar Rapids*, 108 Iowa, 629.

Under a statute allowing attorney's fees to successful plaintiff, in an action for fire caused by locomotive, but one fee can be allowed, though the case is tried twice. *Clark v. Ellithorp*, 9 Kan. App. 503.

Doctor's bills paid are special damages and must be alleged. *Illinois C. R. Co. v. Hanberry*, (Ky.) 66 S. W. Rep. 417.

A reasonable amount may be allowed, though there is no distinct proof of the amount expended. *Scullane v. Kellogg*, 169 Mass. 544.

Expenses in going to a distant city for special treatment are recoverable. *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374.

No recovery by married woman for services of physician she has not paid or promised to pay for. *Rogers v. Orion*, 116 Mich. 324.

See, also, "Damages, Husband and Wife," *ante*, p. 844.

But where she has promised to pay for them, she may recover their reasonable value. *Vergin v. Saginaw*, 125 Mich. 499.

Injury due to failure to follow advice of physician, is not an element. *Zibbell v. Grand Rapids*, (Mich.) 89 N. W. Rep. 563.

A charge, that payment for services must have been made or agreed upon, objectionable as tending to mislead the jury to exclude the case of implied promise to pay in ordering and accepting the services. *Hart v. New Haven*, (Mich.) 89 N. W. Rep. 677.

No recovery for medical services, gratuitously performed, though their value be proved. *Morris v. Grand Ave. R. Co.*, 141 Mo. 500.

An express or implied contract must be shown; proof of the performance of service merely, is insufficient. *Robertson v. Wabash R. Co.*, 152 Mo. 382.

In case of injury to child, reasonable compensation for nursing may be recovered by parent. *Buck v. People's &c. R. Co.*, 40 Mo. App. 555.

*Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380. See *Bridger v. Ashville &c. R. Co.*, 27 S. C. 456.

If nothing was paid for medical services, etc., there can be no recovery. *Madden v. Missouri P. R. Co.*, 50 Mo. App. 666.

General allegations of expenses for medical attendance, admit proof of the amounts thereof. *Cooney v. Southern &c. R. Co.*, 80 Mo. App. 226.

Proof of liability, held inadmissible under an allegation of expense. *Muth v. St. Louis &c. R. Co.*, 81 Mo. App. 422.

Reasonable sums expended or incurred in medical aid, are an element of damages for personal injuries. *Fleming v. Kansas &c. R. Co.*, 89 Mo. App. 129.

See, also, *Emery v. Boston &c. R. Co.*, 67 N. H. 434; *Parker v. South Carolina R. Co.*, 48 S. C. 464.

Recovery allowed for care of horse, negligently poisoned. *Seavey v. Dennett*, 69 N. H. 479.

Plaintiff cannot recover for nursing and attendance of the members of his own household, unless they are hired servants. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Charge, allowing for future medical aid, sustained. *Baker v. Hagey*, 177 Pa. St. 128.

In the absence of evidence of what was paid for physician's services, or their reasonable value, the jury cannot estimate them as an element of damage. *Brown v. White*, (Pa. St.) 51 Atl. Rep. 962.

Necessary, reasonable and judicious expenditure in seeking a cure, recoverable. *Hart v. Charlotte R. Co.*, 33 S. C. 427.

Liability incurred for such services, is an item of damage. *Atchison &c. R. Co. v. Click*, (Tex. Civ. App.) 32 S. W. Rep. 226.

Proof of amounts charged, admitted, when their reasonableness was otherwise shown. *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

Though recovery was limited to amount claimed, plaintiff was allowed to testify that he actually spent more. *Galveston &c. R. Co. v. Eckles*, (Tex. Civ. App.) 60 S. W. Rep. 830.

Medical expense, not being a legal liability of a minor, cannot be recovered in suit by him. *Bering Man. Co. v. Peterson*, (Tex. Civ. App.) 67 S. W. Rep. 133.

Recovery cannot be had for disbursements and obligations for medical treatment without showing that they were reasonable and necessary. *Missouri &c. R. Co. v. Reasor*, (Tex. Civ. App.) 68 S. W. Rep. 332; *Missouri &c. R. Co. v. Belaw*, 22 id. 265.

See, also, *Texas &c. R. Co. v. Taylor*, (Tex. Civ. App.) 58 S. W. Rep. 844, rev'g s. c., id. 166; *International &c. R. Co. v. Sampson*, 64 id. 592.

But where the jury were specifically charged that they could not allow such sums, unless they were found to be reasonable, it was not error to allow them to be given in evidence. *Gulf &c. R. Co. v. Bell*, (Tex. Civ. App.) 58 S. W. Rep. 614.

Liability for reasonable expense for necessary treatment is an element of damage. *Denver &c. R. Co. v. Lorentzen*, 79 Fed. Rep. 291.

Evidence of amount charged for medical attendance allowed to go to the jury, without direct proof of reasonableness. *Western Gas Cons. Co. v. Danner*, 97 Fed. Rep. 882.

Father recovered for expense in caring for his child. *Trow v. Thomas*, 70 Vt. 580.

Husband recovered value of wife's services in nursing him. *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196.

Evidence of expense of an operation, two years after an accident, held inadmissible in absence of evidence that it was the proximate result of the accident. *Rhyner v. Menasha*, 107 Wis. 201.

#### (g). PROSPECTIVE DAMAGES.

The jury were permitted to infer permanent injury from evidence of symptoms of chronic irritation of the spinal cord, producing continuous suffering and unfitness for work for two years prior to trial, though no expert testimony was given. *Shaier v. Broadway Imp. Co.*, 162 N. Y. 641; aff'd s. c., 22 App. Div. 102.

But a charge, permitting recovery for probable future pain, was reversible error, where there was no evidence from which it could be inferred except occasional pain in the injured hand. *Webb v. Union R. Co.*, 44 App. Div. 413.

Evidence of a probable increase of permanent injuries was admitted. *Knoll v. Third Ave. R. Co.*, 46 App. Div. 527; s. c. aff'd, 168 N. Y. 592.

Charge allowing damages for "future prospective losses" to father, for loss of services of child, held reversible error, in absence of evidence of permanency of injuries. *Noonan v. Obermayer &c. Brew. Co.*, 50 App. Div. 377.

See, also, *Maimone v. Dry Dock &c. R. Co.*, 58 App. Div. 383.

Admission of testimony of a physician, that "the knee joint when once injured quite severely, is liable to chronic inflammation from subsequent slighter injuries," in explanation of his statement that the injuries might be permanent, held reversible error. *Streng v. Ibert Brew. Co.*, 50 App. Div. 542.

That plaintiff is still suffering from the shock of the fall, is insufficient to take the question of permanency to the jury. *Carter v. Nunda*, 55 App. Div. 501.

Proof of injuries amounting to concussion of the brain, loss of weight and pain, and buzzing in the head two years after, held sufficient to war-

warrant an instruction containing the rule as to future suffering. *Radjariler v. Third Ave. R. Co.*, 58 App. Div. 41.

Prospective damages for the disabling effects of an injury may be recovered. *Bay Shore R. Co. v. Harris*, 67 Ala. 6.

*South &c. R. Co. v. McLendon*, 63 Ala. 266; *Barbour County v. Horn*, 48 id. 566; *Pym v. Great Northern R. Co.*, 2 Best & Smith (Q. B.) 759; *Fair v. London &c. R. Co.*, 21 Law Times Rep. 326.

Damages for a permanent injury are general and not special. *County of Bibb v. Ham*, 110 Ga. 340.

See, also, *Bradbury v. Benton*, 69 Me. 194.

Amount of compensation for pain and suffering, cannot be measured by standards of value, and its assessment is in the discretion of the jury. *North Chicago Street R. Co. v. Fitzgibbons*, 180 Ill. 466; aff'g s. c., 79 Ill. App. 632.

There was sufficient evidence of permanency to warrant an instruction, where it appeared that both bones of a leg were fractured so that plaintiff would "never have a perfect ankle joint." *Donk Brothers Coal &c. Co. v. Peton*, 192 Ill. 41.

Future suffering is an element of damage, when alleged and proved. *Cicero &c. R. Co. v. Brown*, 89 Ill. App. 318.

See, also, *Jones v. Deering*, 94 Me. 165; *Plummer v. Milan*, 79 Mo. App. 439; *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 351; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240; *Smedley v. Hestonville &c. R. Co.*, 184 Pa. St. 620.

Shortening of life is not an element of damages, but evidence thereof is competent to show extent of injury. *Richmond Gas Co. v. Baker*, 146 Ind. 600; s. c., 36 L. R. A. 683.

See, also, *Wilberding v. Dubuque*, 111 Iowa, 484.

Under a conflict of testimony as to permanency of injury, it was held error to instruct the jury to allow damages for such pain and suffering "as may continue, as shown by the evidence." *Sanders v. O'Callaghan*, 111 Iowa, 574.

See, also, *Chicago &c. R. Co. v. Bailey*, 9 Kan. App. 207.

But an instruction, to allow damages for physical pain and mental anguish that plaintiff "will suffer in the future by reason of his injury, if any," was held proper. *Westercamp v. Brooks*, 115 Iowa, 159.

Evidence of value of services of school teachers in the locality, held admissible in action for death of girl. *Eginoire v. Union County*, 112 Iowa, 558.

Reasonable certainty, and not mere possibility of permanent injury, must be shown to warrant recovery. *Chicago &c. R. Co. v. Kennedy*, 2 Kan. App. 693.

See, also, *Edgerton v. O'Neill*, 4 Kan. App. 73; *L'Herault v. Minneapolis*, 69 Minn. 261.

Mortality tables are inadmissible, in the absence of proof of permanency of injury. *Leach v. Detroit &c. R. Co.*, 125 Mich. 373; *Haines v. Lake Shore &c. R. Co.*, (Mich.) 89 N. W. Rep. 349.

Tables were admitted, to be used by jury if they found permanent impairment, otherwise not. *Wilkins v. Flint*, (Mich.) 81 N. W. Rep. 195.

Prospective disablement may be inferred from the nature of the injury. *Cook v. Missouri Pac. R. Co.*, 19 Mo. 329.

*Tyson v. Booth*, 100 Mass. 258; *Russell v. Columbia*, 74 Mo. 480; *Chicago &c. R. Co. v. Warner*, 108 Ill. 538.

Jury were allowed to assess damages to father, for loss of earning capacity of son during minority, without direct proof of value. *Blackwell v. Hill*, 16 Mo. App. 46.

Expectancy of a minor should be reckoned from his age, and not his majority. *Swift & Co. v. Holowbek*, 55 Neb. 228.

It is not what is to be feared, but what is to be reasonably expected, as the probable result of accident, that the jury must consider. *O'Reilly v. Monongahela Street R. Co.*, 17 Pa. Super. Ct. 626.

Present damages for future consequences cannot be allowed unless the probability of their existing amounts to a reasonable certainty, and to more than mere speculation or hypothesis. *Mo. P. R. Co. v. Mitchell*, 75 Tex. 77.

See "Evidence," *post*, p 1223.

Allowance for loss of earning power if the injuries are permanent, as well as for present mental and physical pain and loss of time, is proper. *Galveston &c. R. Co. v. Hampton*, 24 Tex. Civ. App. 458.

Loss of capacity for pleasure is too vague. *Locke v. International &c. R. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 314.

Loss of earning capacity for two years, held sufficient basis for damages for future loss from that source. *International &c. R. Co. v. Locke*, (Tex. Civ. App.) 67 S. W. Rep. 1082.

Probable future pain and suffering from permanent injury, is allowable. *Denver &c. R. Co. v. Roller*, 100 Fed. Rep. 738; s. c., 49 L. R. A. 77.

Damages for loss of earning capacity "during the period of his incapacity and probable incapacity," allowed. *Svensen v. Bender*, 114 Feb. Rep. 1.

Weight of an artificial leg is an element of damage. *Carrow v. Barre R. Co.*, (Vt.) 52 Atl. Rep. 537.

Instruction permitting plaintiff to recover for pain he "may have to endure in the future," held error. *Raymond v. Keesberg*, 91 Wis. 191.

Admission of evidence of an expert that plaintiff was likely to be bothered with his injury for several years, and perhaps, always, at least under certain conditions, as over use, held error. *Collins v. Janesville*, 99 Wis. 164.

Error to give the rule as to future earnings in a charge, where there is no evidence on the subject. *La Fare v. Superior*, 104 Wis. 454.

#### (h). EXPOSURE.

The use, in a charge, of the word "inconvenience" of an injured party, criticised as somewhat vague and indefinite, as a basis for damages. *Root v. Des Moines &c. R. Co.*, 113 Iowa, 675.

Injury from exposure, proximately resulting from the expulsion of a passenger, may be recovered. *Serve v. No. P. R. Co.*, 48 Minn. 78.

See, also, injury from unheated depot, *Texas R. Co. v. Mayes*, 15 S. W. Rep. 43.

But the exposure must be the proximate result. No recovery was allowed for exposure of an unnecessary trip across a prairie by one wrongfully ejected from a train. *Chicago &c. R. Co. v. Spirk*, 51 Neb. 167.

See, also, *Houston &c. R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

Where a female walked four miles to a station from whence she came on account of unlawful expulsion, as there was no station house except a box car, of which she was ignorant, damages from exposure were recoverable. *Malone v. Pittsburg R. Co.*, 152 Pa. St. 390.

Damages for unnecessary violence in ejecting passenger from train cannot include inconvenience in making his way to the station in the night time, suffering or sickness from exposure. *Texas &c. R. Co. v. James*, 82 Tex. 306.

See *Ehrgott v. Mayor*, 96 N. Y. 264; *Childs v. N. Y., O. & N. R. Co.*, 77 Hun, 539; *post*.

Train failed to stop to take on passenger. No recovery for exposure from eight mile walk to destination, where lodging or private conveyance was available. *Gulf &c. R. Co. v. Cleveland*, (Tex. Civ. App.) 33 S. W. Rep. 687.

Recovery allowed for exposure of inmates, compelled to flee from burning building. *Scrappin v. Galveston &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 142.

No recovery for exposure due to delay in delivering freight, where carrier had no notice that all plaintiff's goods were in the car, and he was without means to buy more. *St. Louis &c. R. Co. v. May*, (Tex. Civ. App.) 44 S. W. Rep. 408.

Plaintiff may recover for exposure to the weather, incident to a collision of railroad trains. *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357.

Charge allowing jury to "take into consideration the plaintiff's personal inconvenience and loss of time," held proper. *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592.

(i). FRIGHT.

A woman was not allowed to recover for illness due to fright, caused by defendant's negligence. *Mitchell v. Rochester*, 151 N. Y. 107; s. c., 34 L. R. A. 781.

**From opinion.**—"Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence, which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon the question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. (*Lehman v. Brooklyn City R. Co.*, 47 Hun. 355; *Victorian Railways Commissioners v. Coultas*, L. R. [13 Appeal Cases] 222; *Ewing v. P. C. St. L. Ry. Co.*, 147 Pam. St. 40.) The learned counsel for the respondent in his brief, very properly stated that 'the consensus of opinion would seem to be that no recovery can be had for mere fright,' as will be readily seen by an examination of the following additional authorities. *Haile v. Texas & Pacific R. Co.* (23 Lawyers' Rep. 774); *Joch v. Dankwardt*, (85 Ill. 331); *Canning v. Inhabitants of Williamstown*. (1 Cush. 451); *Western Union Tel. Co. v. Wood*, (57 Fed. Rep. 471); *Reuner v. Canfield*, (36 Minn. 90); *Allsop v. Allsop*, (5 Hurl. & Nev. [N. S.] 534); *Johnson v. Wells, Fargo & Co.*, (6 Nev. 224); *Wyman v. Leavitt*, (71 Me. 227). If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question of whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. The opinion also intimates that negligence, causing fright; which produces a miscarriage, is not the proximate cause of the miscarriage."

Effects of fright are an item of damage, when accompanied by some physical injury as a violent fall and shock from an electric car. *O'Flaherty v. Nassau &c. R. Co.*, 34 App. Div. 74.

Error to instruct jury to allow for impairment of nervous system, resulting from nervous shock, in addition to pain and suffering. *Washington &c. R. Co. v. Dashiell*, 7 App. D. C. 507.

No recovery allowed for injury from fright, caused by injury to mother of plaintiff. *Mahoney v. Dankwardt*, 108 Iowa. 321.



Illness caused by fright, due to lawful ejection of another passenger, is not actionable. *Spade v. Lynn &c. R. Co.*, 112 Mass. 488; s. c., 43 L. R. A. 832.

See, also, *White v. Sanders*, 168 Mass. 296; *Smith v. Postal Teleg. &c. Co.*, 174 id. 576; *Berard v. Boston &c. R. Co.*, 177 id. 179.

Insulting and abusive language to plaintiff's husband gave her a nervous shock. There being no physical violence, no recovery was allowed. *Bucknam v. Great Northern R. Co.*, 16 Minn. 313.

No recovery for fright, not attended with physical injury. *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152.

See, also, *Cleveland &c. R. Co. v. Ebart*, 10 Oh. C. D. 291.

But where there is attendant physical injury, recovery may be had for impairment of health occasioned by consequent fright. *Consolidated T. Co. v. Lamberton*, 59 N. J. L. 291; s. c. aff'd, 60 id. 451.

See, also, *Buchanan v. West Jersey R. Co.*, 23 Vroom, (N. J. L.) 265; *Cleveland &c. R. Co. v. Ebert*, 10 Oh. C. D. 291; *Huffman v. Toledo &c. R. Co.*, 9 Oh. S. & C. P. Dec. 748.

Damages are not recoverable for mental suffering or fright where there is no physical injury, or injury to property, or other element of actual damage. *Gulf &c. R. Co. v. Trott*, 86 Tex. 412.

Fright and consequent impairment of health are subjects for damages, where plaintiff was carried by her station and compelled to alight under such circumstances as were calculated to cause fright. *Houston &c. R. Co. v. McKenzie*, (Tex. Civ. App.) 41 S. W. Rep. 831.

No recovery for being thrown into the water, or for fright caused by collision, where no subsequent harm resulted. *The Queen*, 40 Fed. Rep. 694.

Insanity resulting from shock and excitement, caused by railroad accident, no bodily injury being sustained, is not a subject of recovery. *Haile v. Texas &c. R. Co.*, 60 Fed. Rep. 551.

Where physical injury results from the fright, recovery may be had, though none attended the fright. *Gulf &c. R. Co. v. Hayter*, (Tex. Civ. App.) 55 S. W. Rep. 128.

In an action on contract for carrying a passenger past her station, recovery was allowed for fright without attendant physical injury. The court reconciles the apparently conflicting authorities on the subject (*Gulf &c. R. Co. v. Trott*, *supra*, denying recovery, and *Missouri &c. R. Co. v. Kaiser*, 82 Fed. Rep. 115, granting recovery, for fright unattended with physical injury) by the observation that the former was an action for tort and the latter was for breach of contract. *Texas &c. R. Co. v. Gott*, 20 Tex. Civ. App. 335.

Where bodily injury attended the fright, which results in disease, re-

covery was allowed. *Denver &c. R. Co. v. Roller*, 100 Fed. Rep. 738; s. c., 49 L. R. A. 77.

Injury from fright, to a person not physically struck, through the negligence of another, is not a subject of recovery. *Rock v. Denis*, 4 Montreal L. R. 356.

## VII. Damages to Parent for Injury to Child.

In an action for the loss of services of a minor, the jury may award the parent (1) for loss of service to the time of trial; (2) prospective loss during minority; (3) expenses incurred and immediately necessary, but not future *contingent* expenses. The child only, if anybody, can recover for such future contingent expenses. *Cuning v. B. C. R. Co.*, 109 N. Y. 95, rev'g judg't for pl'ff.

**From opinion.**—"Mother was allowed to recover for surgical expenses which have not been in fact incurred, and the incurring of which is not presently necessary, but which, in the opinion of experts examined on the trial, it will become necessary to incur in consequence of the injury at some time during the child's minority. The trial judge, with a view to the ascertainment of this item of damages, permitted a surgeon against the objection of the defendant, to testify that the expense of an operation, which, in his judgment, would become necessary at some remote period during the child's minority, would be \$300. In other words, the jury were permitted to include, as a part of the damages in the action, the value of *contingent and prospective surgical services*. This was error."

For injury to an infant four and one-half years old, the jury may, in its discretion, give damages *beyond the period of its minority*, and they may take into consideration all the probable, or even possible, benefits which might result to them from its life, modified, as in their estimation it should be by all the chances of failure or misfortune. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, aff'g 41 Hun, 464 judg't for pl'ff.

**From opinion.**—"The trial judge did not err in refusing to rule, upon the request of defendant's counsel, that the plaintiff was entitled to nominal damages only. The rule of damages in such cases is a difficult one to apply. The 'pecuniary injuries,' for which recovery only can be had, are always difficult of precise proof, uncertain and problematical, and what should be a proper compensation for them must always, upon such proof as can be made, be left to the judgment of the jury. The judgment is not an uncontrollable one, but is subject, if abused or not properly exercised, to be reviewed and modified in the court of original jurisdiction. Here there was proof of the circumstances of the plaintiff and his family, and the condition, character and sex of the child; and the authorities in this state would not justify a ruling that nominal damages only could be recovered. *Ihl v. Forty-second St., &c. R. R. Co.*, *supra*; *Houglkirk v. President &c. D. & H. Canal Co.*, 92 N. Y. 219."

In an action to recover for the loss of the services of a daughter, some

fourteen years of age, the court properly charged that the plaintiff, if entitled to recover, could recover for the loss of services, the result of the injury in the past, and also during the years of minority, and expenses necessarily incurred or which would be immediately necessary in consequence of the injury in the care of the child. *Dollard v. Roberts*, 130 N. Y. 269, aff'g judg't for pl'ff.

The father of an infant child, injured by the defendant's negligence, may recover the value of the services of the child while so incapacitated, and the reasonable expenses necessary to be incurred to restore the child to health.

The amount of the loss recoverable is not affected by the financial condition of the parent. *Burnes v. Keene*, 132 N. Y. 13, rev'g judg't for pl'ff.

In such an action it appeared that the father, who had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. Held, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto, what he might have made had he not abandoned the business engagement.

A parent may recover for the prospective loss of the services of a child beyond the time of trial. Refusal to charge that nominal damages only could be recovered was proper. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49, aff'g judg't for pl'ff.

A jury, acting on its own knowledge, may say that the services of a boy from eleven to twenty-one years of age would be worth \$1,500. *O'Mara v. H. R. R. Co.*, 38 N. Y. 445, aff'g 18 Hun, 192, and judg't for pl'ff.

The plaintiff's son, some six years old, was injured by the defendant's negligence and required nursing and medical attendance for several months. It was not shown that he had ever rendered his mother any service. Held, that the plaintiff's widowed mother could recover for doctor's bills, without proving that any actual loss of services has been sustained by her. *Kennedy v. N. Y. C. & H. R. R. Co.*, 35 Hun, 186, aff'g judg't for pl'ff.

An employer's liability act, giving right of action to party injured, does not enable a father to recovery for injury to child. *Woodward Iron Co. v. Cook*, 124 Ala. 349.

It is error to allow to a minor plaintiff damages for loss of time and earning power for the time during his majority. *Western &c. Teleg. Co. v. Woods*, 88 Ill. App. 375.

Loss of services of child, is an element of damage to the parent. *Adams Hotel Co. v. Cobb*, (Ind. Terr.) 53 S. W. Rep. 478.

Fair compensation for loss of service, taking account of age, health, habits and cost of maintenance of deceased, is the true measure of damages. *Benton v. Chicago &c. R. Co.*, 55 Iowa, 496.

The fact that the mother was in comfortable circumstances and did not profit by her son's earnings should diminish the recovery, where action was brought for death of son. *Atchison &c. R. Co. v. Brown*, 26 Kas. 443.

Impairment of earning capacity of infant who has never earned anything may be considered. *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9.

Liability for death by negligence, does not extend to recovery for the loss of a contract for support by deceased. *Brink v. Wabash R. Co.*, 160 Mo. 87.

A widowed mother may recover the amount of the loss of services, less the cost of the child's maintenance. *Matthews v. Missouri R. Co.*, 26 Mo. App. 75.

For injury to child father may recover for loss of services, care and expense resulting from the injury, for a time within its majority, medical attention, care, nursing and medicine. *Buck v. Peoples' Street &c. Co.*, 40 Mo. App. 555.

Reasonable compensation of father and mother for nursing child is recoverable. *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380.

Loss of services, past and future, up to a child's majority, as well as expense of medical attendance, are items of damage to the parent. *Meade v. Chicago &c. R. Co.*, 12 Mo. App. 61.

See, also, *Missouri &c. R. Co. v. Rogers*, (Tex. Civ. App.) 39 S. W. Rep. 383.

Speculative and uncertain earnings of a father, on account of his necessarily nursing his child, cannot be recovered. *Bridger v. Asheville &c. R. Co.*, 27 S. C. 456.

Consideration by the jury of a prior suit by the child, held misconduct requiring reversal of a verdict against the mother in a suit by her for the same injuries to the child. *Forsyth v. Central Man. Co.*, 103 Tenn. 197.

Diminution in child's capacity to earn money during the time intervening between the injury and his reaching his majority gives cause of action to the parents unless child had been emancipated by the parent. *Texas &c. R. Co. v. Morin*, 66 Tex. 225.

See *R. Co. v. Miller*, 51 Tex. 275; *Sawyer v. Sauer*, 10 Kas. 519; See *Jordan v. Bowen*, 46 N. Y. Supr. Ct. 355.

Minor living with his mother is not entitled to recover for loss of earning power for the period covered by the remainder of his minority. *Gulf &c. R. Co. v. Johnson*, 91 Tex. 569.

Minor is entitled, however, to recover for loss of earning power during such a period, when his mother has subsequently died without settlement with her therefor. *Missouri &c. R. Co. v. Tonahill*, 16 Tex. Civ. App. 625.

But damages for physical pain and suffering belong to the minor and not to his parent. *Texas &c. R. Co. v. Maloue*, 15 Tex. Civ. App. 56.

### VIII. Injuries Causing Death.

Upon the trial of an action brought to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the defendant, it is proper for the court to charge the jury, on the question of damages, that they may look ahead and consider what the deceased would have brought to the next of kin while he was living and what was their prospect of inheriting from him after his death. *Johnson v. The Long Island R. Co.*, 80 Hun. 306; *aff'd*, 144 N. Y. 719.

*Tiffany's Death by Wrongful Act*, sec. 171, states the rule as follows: "Where the evidence shows that it is probable that the decedent but for his death, would have accumulated property, which, if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss."

Citing several English authorities, and *Illinois Central R. Co. v. Barron*, 5 Wall. 90; *Lake Erie R. Co. v. Mugg*, (Ind.) 31 N. E. Rep. 564; *McAdory v. Louisville &c. R. Co.*, 10 South. R. 507; *Castello v. Landwehr*, 28 Wis. 522; *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282.

Under a statute, providing that the measure of damages is compensation for pecuniary loss to the beneficiaries, but that the proceeds must be divided as an unbequeathed personality, a childless widow was compelled to divide with father of deceased. *Snedeker v. Snedeker*, 164 N. Y. 58; *aff'g s. c.*, 47 App. Div. 471.

See, also, *Coghlan v. Third Ave. R. Co.*, 16 Misc. 677; *s. c. aff'd*, 7 App. Div. 724.

It is not necessary to show the condition and circumstances of the next of kin, nor in what proportions they are entitled. *Ingrafía v. Samuels*, 71 App. Div. 14.

In determining damages for the death of a husband, a business man,

61 years of age, but active and in good health, the jury may consider his earning capacity as evidenced by his actual earnings. But they are not absolutely bound by those figures: being at liberty to consider whether such capacity might have been increased or diminished. *Beecher v. Long Island R. Co.*, 53 App. Div. 324.

In an action for death, nominal damages, at least, are presumed, and a complaint not stating facts constituting damage, is not demurrable. *Pizzi v. Reid*, 72 App. Div. 162.

Disbursements for education of brother, and monthly investments in land, made from earnings, are to be considered in computing damage to next of kin. *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449.

In computing pecuniary loss to beneficiaries, the amount of earnings spent by decedent upon himself were deducted. *Alabama &c. R. Co. v. Jones*, 114 Ala. 519.

Damages to dependent next of kin are not confined to his probable contributions, where deceased was in the habit of saving part of his earnings. *Bessemer Land &c. Co. v. Campbell*, 121 Ala. 50.

The money value of intestate's life depends upon his expectancy of life, habits of industry, means, business, earnings, health, skill, and reasonable future expectations: and not what the heirs are likely to recover from his estate. *Tutwiler Coal &c. Co. v. Enslen*, 129 Ala. 336.

Where a statute, imposing liability on a railroad for negligent killing of passengers, is punitive in its nature, the measure of damages is the degree of culpability of the wrongful act, and not compensation to those pecuniarily injured. In an action under such a statute by an executrix, evidence of earning capacity of deceased is irrelevant. *Louisville &c. R. Co. v. Tegner*, 125 Ala. 594.

Pecuniary value of a life to the next of kin, is such as may result from a relation of dependency, or from the distribution of an estate, which it may reasonably be expected he would have accumulated had he lived. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Pecuniary value of loss of society of husband, was included. *Keast v. Santa Ysabel &c. Min. Co.*, 136 Cal. 256.

See, also, *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Age, ability, disposition to labor, and habits of living and expenditure, are elements entering into the consideration of what deceased would have earned during the remainder of his life, and left to his next of kin, had he lived. *Macrell v. Wilmington &c. R. Co.*, 1 Marv. (Del.) 199.

See, also, *Crocker v. Pusey &c. Co.*, 3 Penn. (Del.) 1; *Tully v. Philadelphia &c. R. Co.*, 50 Atl. Rep. 95.

— Full sum of the probable future earnings of deceased, taking into consideration his health, business capacity, habits, experience, and value

of his services in the care of the family," held erroneous. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Damages to next of kin of a minor, are not confined to loss of services during minority. *Baltimore &c. R. Co. v. Then*, 159 Ill. 535; aff'g s. c., 59 Ill. App. 561.

See, also, *West Chicago Street R. Co. v. Dooley*, 76 Ill. App. 424.

Lineal kindred, held entitled to nominal damage without proof of support, but collaterals, required to prove damage. *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495; aff'g s. c., 74 Ill. App. 356.

See, also, *Locher v. Kluga*, 97 Ill. App. 518.

The actual pecuniary loss, is all that can be recovered. And the fact that the distribution of the proceeds as unbequeathed personality gives a majority to those not in fact injured, is no excuse for enlarging the amount so that the share of the one pecuniarily injured under such a distribution, will be compensation for the loss suffered. *Falkenau v. Rowland*, 70 Ill. App. 20.

A complainant omitting allegation of survivorship of next of kin and pecuniary loss, held demurrable. *St. Luke's Hospital v. Foster*, 86 Ill. App. 282.

The loss to next of kin must be limited to what the evidence shows they have actually sustained. *McNulta v. Jenkins*, 91 Ill. App. 309.

Assessment of damages should proceed upon the anticipation of pecuniary benefit which the surviving next of kin are shown to have had reasonable ground to indulge. *Diebold v. Sharp*, 19 Ind. App. 474.

See, also, *Wabash R. Co. v. Cregan*, 23 Ind. App. 1.

Evidence that deceased was in the line of promotion and would have received greater wages, not admissible. *Brown v. Chicago &c. R. Co.*, 64 Iowa, 652.

Compensation to the estate is the measure, and not such a sum, interest on which during his expectancy would produce his probable future earnings. *Spaulding v. Chicago &c. R. Co.*, 98 Iowa, 205.

Life expectancy tables, beginning at the age of 30, admitted in action for death of one of 27. *Pearl v. Omaha &c. R. Co.*, 115 Iowa, 535.

Damages for death depend not only upon the character, habits and business capacity of deceased, but upon the age, sex and circumstances of the next of kin. *Missouri &c. R. Co. v. Moffatt*, 60 Kan. 113.

Where recovery is to be "part of the estate of the deceased person," it is unnecessary to allege survival of widow or child. *East Tennessee Teleg. Co. v. Simms*, 99 Ky. 401.

The measure is value of decedent's power to earn money, not value of his power to labor. *Louisville &c. R. Co. v. Ward*, (Ky.) 44 S. W. Rep. 1112.

In the absence of gross and willful negligence, the measure of damage was held to be compensation to decedent's estate for the loss of earning power. *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323.

See, also, *Louisville &c. R. Co. v. Eakins*, 103 Ky. 465; *Louisville &c. E. Co. v. Taaffe*, 106 Ky. 535; *Louisville &c. R. Co. v. Tucker*, (Ky.) 65 S. W. Rep. 453; *Chesapeake &c. R. Co. v. Lang*, 100 Ky. 221; *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42.

Age, health, earning capacity and expectation of life, are elements of consideration. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

See, also, *Chesapeake &c. R. Co. v. Dupree*, (Ky.) 67 S. W. Rep. 15.

Measure of damages, held to be compensation for loss of reasonably probable pecuniary benefit to next of kin. *McKay v. New England Dredging Co.*, 92 Me. 454.

See, also, *May v. West Jersey &c. R. Co.*, 62 N. J. L. 67; *Graham v. Consolidated Traction Co.*, 64 id. 10; *Hughey v. Sullivan*, 36 Oh. L. J. 247.

Evidence of deceased's habits of industry, ability to make money, and success in business, may be considered. *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103.

Evidence of what deceased earned the year before his death was excluded. *Hamman v. Central Coal &c. Co.*, 156 Mo. 232.

The value of decedent's estate, held immaterial. *Chicago &c. R. Co. v. Hambel*, (Neb.) 89 N. W. Rep. 643.

Expense of board, nursing, medical aid, loss of time, physical pain, distress or anxiety of mind in view of approaching death, experienced by person injured, are subjects of recovery. *Corliss v. Worcester &c. R. Co.*, 63 N. H. 404.

Elements of consideration include condition, health, habits, cost of living and usual expenditures. *Coley v. Statesville*, 121 N. C. 301.

Also his age, habits of industry, means and business qualifications. The present value thereof is to be determined by deducting such expenditures from his gross income and estimating the value of the accumulation of the balance, based on his expectancy of life. *Benton v. North Carolina R. Co.*, 122 N. C. 1007; *Mendenhall v. North Carolina R. Co.*, 123 id. 275; *Russell v. Windsor Steamboat Co.*, 126 id. 961.

Family can only recover for pecuniary loss, and not for suffering caused by the bereavement. *Lake Shore &c. R. Co. v. Ehler*, 19 Oh. C. C. 177.

It is error to instruct the jury that in estimating damages, "they may consider the opportunities of acquiring wealth or fortune, by change of circumstances in life." *Mausfield Coal &c. Co. v. McEnery*, 91 Pa. St. 185.

See *Penn. R. Co. v. Butler*, 7 P. F. Smith (Pa.) 335.



Under a statute permitting a jury to allow what they think proportioned to the injury to the beneficiaries, resulting from death, damages are not confined to pecuniary loss. *Strother v. South Carolina &c. R. Co.*, 47 S. C. 375.

Such a sum as would, at the present time, be compensation for the pecuniary loss to plaintiffs caused by the death. *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

See, also, *Houston &c. R. Co. v. Johnson*, (Tex. Civ. App.) 66 S. W. Rep. 72.

Reasonable expectation of pecuniary benefit is a proper element of damages, in a suit by the heirs, for injuries causing death. *Collins v. Davidson*, 19 Fed. Rep. 83.

*Chicago v. Keefe*, 114 Ill. 222; *Franklin v. South East. R. Co.*, 3 Hurl. & Nor. 211; *Dalton v. South East. R. Co.*, 93 Eng. C. L. 296; *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Potter v. Chicago &c. R. Co.*, 12 Wis. 372; *Ewen v. Chicago &c. R. Co.*, 38 id. 613; *Galveston &c. R. Co. v. Hughes*, 22 Tex. Civ. App. 134; *English v. Southern P. R. Co.*, 13 Utah, 407.

In case of collision due to mutual fault, half damages are recoverable for death of a member of the crew of one of the vessels. *The Job T. Wilson*, 84 Fed. Rep. 204.

In absence of proof of actual or probable pecuniary damage, collateral heirs of deceased were limited to nominal damage. *In Re California Nav. &c. Co.*, 110 Fed. Rep. 670.

Death alone, without pecuniary injury to next of kin, held not to give even nominal damages under a statute giving such damages as may have been suffered. *Lazelle v. Newfane*, 70 Vt. 440.

The manner of distribution of damages for death is exclusively for the jury. *Norfolk &c. R. Co. v. Stereus*, 97 Va. 631; s. c., 46 L. R. A. 367.

In an action for death it is not essential to introduce mortality tables. *Norfolk &c. R. Co. v. Phillips*, (Va.) 41 S. E. Rep. 726.

#### (a). FUNERAL EXPENSES.

In an action for death from negligence, the funeral expenses were properly recovered, when any of those for whose benefit the action is brought were legally bound to pay them. *Murphy v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 115, aff'g judgt for plff.

*Penn. R. Co. v. Bantom*, 54 Pa. St. 495; *Lehigh &c. Co. v. Rupp*, 100 id. 95; *Owen v. Brockschmidt*, 54 Mo. 285; *Roeder v. Ormsby*, 22 How. Pr. 270.

Defendant cannot show that he paid for maintenance of decedent after the injury, and for burial expenses except to show satisfaction of cause of action which must be pleaded. *Murray v. Usher*, 117 N. Y. 512.

Expenses incurred by person injured, for medical treatment between

time of injury and death are not recoverable in a statutory action. *Murray v. Usher*, *supra*.

Where child died several days after injury, the father recovered for loss of services and expenses of death and burial. *Augusta Factory v. Davis*, 87 Ga. 648.

Penn. Co. v. Lilly, 73 Ind. 252; Galveston v. Barbour, 62 Tex. 172; Little Rock Co. v. Barker, 33 Ark. 350.

Damages to the father, include funeral expenses of child. *Southern R. Co. v. Corenia*, 100 Ga. 46.

Funeral expenses, not included in recovery for death, by administrator. *Consolidated T. Co. v. Home*, 60 N. J. L. 444; rev'g s. c., 59 id. 275.

Funeral expenses are proper elements of damages. *Petrie v. Columbia R. Co.*, 29 S. C. 303.

Expenses of illness or burial of deceased are not recoverable under Or. Comp. 1887, Chap. 374. *Holland v. Brown*, 35 Fed. Rep. 43.

Under Act of Congress, Feb. 17, 1885, mental anguish is not item of recovery, but possible funeral expenses are. *Banyea v. Metropolitan R. Co.*, 18 Wash. L. R. 413.

## IX. Damages to Parent for Death of Child.

A child six or seven years of age was killed by the defendant's train. No proof of pecuniary damages was necessary. *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 319, aff'g judg't for pl'ff.

An action may be maintained by the administrator of an infant, killed by defendant's negligence, although he had no wife or family whom he was bound to support.

The interest of the mother in the damages which may be recovered in the suit, is one capable of assignment. It is to be received by her in the course of administration, and stands on the same footing as a distributive share in any other fund of the intestate's estate. *Quin v. Moore*, 15 N. Y. 432.

Request to charge that only nominal damages for death of child were recoverable was properly refused. *Prendegast v. New York & C. R. Co.*, 58 N. Y. 652, aff'g judg't for def't.

In an action to recover for the death of an infant, it was held that the jury could give damages within their own discretion, without evidence to support it, beyond the circumstances of age, condition, sex, &c. *Etherington v. Prospect & C. R. Co.*, 88 N. Y. 641, aff'g judg't for pl'ff.

Damages must not be wholly a matter of conjecture. *Houghkirk v. Prest. & C. D. & H. Canal Co.*, 92 N. Y. 249; reversing 28 Hun. 407, and judg't for pl'ff.

From opinion.—"The statute implies from the death of the person negligently killed damages sustained by the next of kin. (*Quinn v. Moore*, 15 N. Y.

432.) Recognizing the generally prospective and indefinite character of those damages, and the impossibility of a basis for accurate estimate, it allows a jury to give what they shall deem a just compensation, and limits their judgment to a sum not exceeding \$5,000. (*Tilley v. Hudson Riv. R. Co.*, 29 N. Y. 252.) But within that range the jury is neither omnipotent, nor left wholly to conjecture. They are required to judge, and not merely to guess, and, therefore, such basis for their judgment as the facts naturally capable of proof can give should always be present, and is rarely, if ever, absent. The pecuniary loss in any such case may be composed of very different elements. It may consist of special damages, that is of actual, definite loss, capable of proof, and of measurement with approximate accuracy; and also of prospective and general damages, incapable of precise and accurate estimate because of the contingencies of the unknown future."

The recovery by parents for the loss of a child, is the value of its services during minority, less the expense of support. *Schaffer v. Baker T. Co.*, 29 App. Div. 459.

Plaintiff, in an action for death of child, cannot show the wages he himself receives. *Terhune v. Cody &c. Co.*, 16 N. Y. Supp. 255.

It may be shown that deceased was unmarried and frugal; and that his mother was a dependent widow. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Where damages are claimed for the death of a child incapable of earning anything, the loss is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. *Little Rock &c. R. Co. v. Barker*, 39 Ark. 491.

See *Oldfield v. New York &c. R. Co.*, 3 E. D. Smith, 103; *Penn. R. Co. v. Bantom*, 54 Pa. St. 495; *Louisville v. Connor*, 9 Heisk. (Tenn.) 19; *Chicago v. Mayor*, 18 Ill. 349; *Chicago v. Scholton*, 75 id. 469; "Value of Children," 15 Cent. L. J. 286.

A parent is not limited to his actual pecuniary injury in an action for damages for the loss of child's services. *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320.

*Cook v. Clay Street Hill Co.*, 9 Pac. C. L. J. 605; but, see, *March v. Walker*, 48 Tex. 375.

Where action for death of a child is based on loss of services, no recovery can be had for death of a child, too young to render services. *Atlanta &c. Street R. Co. v. Arnold*, 100 Ga. 566; *Southern R. Co. v. Covenia*, id. 46.

The law of master and servant governs such cases. *Fraier v. Georgia &c. R. Co.*, 101 Ga. 70.

Parent was not allowed to recover, where the son was in the penitentiary not actually contributing to his support. *Smith v. Hatcher*, 102 Ga. 158.

Proof of contributions is insufficient; a state of dependency must appear. *Augusta &c. R. Co. v. McDade*, 105 Ga. 134.

And such dependency does not exist, when the parent can support himself, though not others dependent upon him. *Georgia &c. Co. v. Spinks*, 111 Ga. 571.

The law implies a pecuniary loss to a parent from the death of a minor child, for the loss of its services. *Stafford v. Rubens*, 115 Ill. 196.

*Atrops v. Costello*, 8 Wash. 149; *Holton v. Daly*, 106 Ill. 131; *Chicago &c. R. Co. v. Sweet*, 45 id. 197.

Where deceased is a minor, pecuniary loss was presumed. *Chicago &c. R. Co. v. Huston*, 196 Ill. 489; aff'g s. c., 95 Ill. App. 350; *West Chicago &c. R. Co. v. Seanlan*, 68 Ill. App. 626; s. c. aff'd, 168 Ill. 34.

In an action for the death of a minor child, the damages are the value of the services during minority, from which should be deducted the probable cost of support and maintenance. *Penn. Co. v. Lilly*, 73 Ind. 252; *Rockford Co. v. Delaney*, 82 Ill. 198.

Measure of parents' recovery for child's death is the value of child's services from the time of the injury until he would have attained his majority, in connection with his prospects in life, and expenses attending upon the injury, less support and maintenance. *Mayhew v. Burns*, 103 Ind. 328.

*Penn. R. Co. v. Lilly*, 73 Ind. 252; *Ohio &c. R. Co. v. Tindell*, 13 Ind. 366; *Walters v. Chicago &c. R. Co.*, 36 Iowa, 458; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Rains v. St. Louis &c. R. Co.*, 71 Mo. 164; *St. Louis &c. R. Co. v. Freeman*, 36 Ark. 41; *Benton v. Chicago &c. R. Co.*, 55 Iowa, 496. See *Kelly v. Central R. &c.*, 5 McCrary C. C. 653.

The action was not confined to the loss of services during minority. *Mo. Pac. R. Co. v. Perego*, 36 Kas. 424; *Gulf &c. R. Co. v. Compton*, 75 Tex. 667; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504. But see, *contra*, *St. Louis R. Co. v. Freeman*, 36 Ark. 41; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; *State v. Baltimore R. Co.*, 24 Ind. 84; *Cooper v. Lake Shore R. Co.*, 66 Mich. 261.

Recovery may be had for death of child after majority. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; *St. Louis &c. R. Co. v. French*, 56 id. 584.

Parents recovered for the loss of services, the support and comfort contributed, and pain and suffering of deceased. *Erslew v. New Orleans &c. R. Co.*, 49 La. Ann. 86.

Where a parent sues for the death of a son, jury may find damages from proof of the boy's age, and the condition in life of the father. *Grogan v. Broadway &c. Co.*, 87 Mo. 321.

*Nagle v. Missouri Pac. R. Co.*, 75 Mo. 653; *Owen v. Brockschmidt*, 54 id. 289; *International &c. R. Co. v. Kindred*, 57 Tex. 491.

The pecuniary loss of parents, is value of service, less cost of maintenance during minority, and what might reasonably be expected from him by them thereafter. *Fl. Worth &c. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435.

See, also, *Cole v. Parker*, (Tex. Civ. App.) 66 S. W. Rep. 135; *Freeman v. Carter*, 67 id. 527; *Texas &c. R. Co. v. Harby*, id. 541.

Not what they would probably receive had he not been killed, but the present value thereof. *Ft. Worth &c. R. Co. v. Morrison*, (Tex. Civ. App.) 56 S. W. Rep. 931; See, also, *Ft. Worth &c. R. Co. v. Morrison*, (Tex.) id. 735.

Evidence of pecuniary condition of parents, held admissible. *Houston &c. R. Co. v. White*, 23 Tex. Civ. App. 280.

Legal obligation to contribute to the support of parents is not essential. *Atchison &c. R. Co. v. Van Belle*, (Tex. Civ. App.) 64 S. W. Rep. 397.

Error to restrict damages to services during minority; reasonable expectation of pecuniary benefits voluntarily bestowed thereafter, is an item. *Texas &c. R. Co. v. Wilder*, 92 Fed. Rep. 953.

Recovery for loss of services by parent may be had in a statutory action for death, but not at common law. *Sternenberg v. Mailhos*, 99 Fed. Rep. 43.

See, also, *Railway Co. v. Beall*, 91 Tex. 310, "Death by Negligence," *post*, p. 942.

Father who abandoned his family, held not entitled to recover for loss of services of minor in statutory action for his death. *Thompson v. Chicago &c. R. Co.*, 104 Fed. Rep. 845.

Recovery allowed for death of an adult son, contributing pecuniary assistance. *Boydén v. Fitchburg R. Co.*, 70 Vt. 125.

#### (a). FATHER.

Jury may consider whether a son would not, after he became of age, have given his father pecuniary aid, by reason of natural love and affection. *Connaughton v. Sun &c. Asso.*, 76 N. Y. Supp. 755.

In the absence of proof other than that a boy about three years of age was in good health, only nominal damages were allowed. *Silberstein v. William Wicke Co.*, 29 Abb. N. C. 291.

Unless the deceased helped his father or the latter had reasonable expectation of pecuniary benefit, nominal damages are alone recoverable. *Fordyce v. McCants*, 51 Ark. 509.

Father may recover for the loss of services of minor child dying on account of injury, such damages only as accrued intermediate to the injury and the death. *Davis v. St. Louis &c. R. Co.*, 53 Ark. 117.

Upon its appearing that minor son had expressed an intention to contribute to his father's support after arrival at majority, a recovery therefor may be had. *St. Louis &c. R. Co. v. Davis*, 55 Ark. 462.

Damages for death of child rests in sound discretion of the jury. *Illinois Central R. Co. v. Slater*, 129 Ill. 91.

Loss of wages during minority, is not the sole measure of damages. *Illinois C. R. Co. v. Reardon*, 157 Ill. 372.

Jury may, in fixing damages to parents for death of minor son, consider reasonable expectation of pecuniary benefit beyond his majority. *McLain &c. R. Co. v. McVey*, 28 Ill. App. 158.

There is no rule governing damages allowable for death of young children. *Chicago &c. R. Co. v. Wilson*, 55 Ill. App. 346.

Mental suffering of parents for death of child is not recoverable. *Chicago &c. R. L. Co. v. Tietz*, 37 Ill. App. 599.

Evidence of physical condition of father, held inadmissible. *Illinois C. R. Co. v. Bandy*, 88 Ill. App. 629.

The condition of a family, with respect to a child killed, may be considered so far as it bears upon pecuniary loss. *Louisville &c. R. Co. v. Rush*, 127 Ind. 545.

Value of services during minority, less cost of maintenance, held measure of damages to father. Mental and physical condition of child and its usefulness in the family, are elements of consideration. *Elwood v. Addison*, 26 Ind. App. 28.

In absence of evidence of parents' pecuniary condition, or of past or probable future advantage to them from the continuance of the life of their son, only nominal damages are recoverable. *Cherokee &c. Co. v. Limb*, 47 Kas. 469.

No recovery allowed a parent for the expectation of pecuniary benefit from his son's life after he reached majority. *Agricultural & M. Ass'n v. State*, 71 Md. 86.

In an action for death of child, prospective pecuniary loss may be recovered. *Vicksburg v. McLain*, 67 Miss. 4.

Loss of society of child by father, or comfort in bringing him to manhood, cannot be considered. *Mobile &c. R. Co. v. Watley*, 69 Miss. 145.

No deduction should be made for the support of child subsequent to the injury. *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380.

Father was not allowed to recover for sickness and loss of service of mother, caused by death of child. *Myers v. Holburn*, 58 N. J. L. 193.

In an action for death of child, a father may recover what the child would probably have earned during his minority, with funeral expenses and the value of his time lost by reason of the accident, cost of maintenance of child. *Madara v. Pottsville Iron &c. Co.*, 160 Pa. St. 109.

Inconvenience to other members of the family, solely, is no part of the father's damages. *Woelckner v. Erie &c. Motor Co.*, 182 Pa. St. 182.

Recovery for chances of promotion of deceased may be considered. *St. Louis &c. R. Co. v. Johnston*, 78 Tex. 536.

Recovery allowed for reasonable expectation of benefits after majority. *Beaman v. Martha Washington Min. Co.*, 23 Utah, 139.

Reasonable expectation of pecuniary benefits from son's life beyond his majority may be considered in action by mother for his death. *Thompson v. Johnston Bros. Co.*, 86 Wis. 576.

In an action by a father for loss of minor child, pecuniary loss is presumed so far as services during minority is concerned. But benefits reasonably to be expected thereafter must be alleged and proved. Probability of child's illness during minority does not prevent recovery for loss of services. *Luessen v. Oshkosh Electric & Co.*, 109 Wis. 94.

### (b). MOTHER.

In an action under California Code Proc., sec. 377, by the personal representative of one killed by the negligence of another, the mother recovered pecuniary loss and for loss of society, support and protection of child, but not for sorrow, grief or mental suffering. *Munro v. Pacific Coast & C. R. Co.*, 84 Cal. 515.

Mother's damage is for pecuniary loss, and does not cover compensation for loss of society. *Wales v. Pacific & C. Motor Co.*, 130 Cal. 521.

Consideration of whether mother was dependent on her son, and how much he contributed to her support, was proper. *Mulhall v. Fallon*, 176 Mass. 266.

In an action by a married woman for the death of her son, where her husband has abandoned her and contributed nothing to her support, the jury were properly instructed that they might return a verdict for the amount that the father would have received from the son, if anything, and that the mother would have received, and apportion it between them. *Missouri & C. R. Co. v. Henry*, 75 Tex. 220.

No recovery allowed for effects of death of son upon mother. *Norfolk & C. R. Co. v. Sterens*, 97 Va. 631; s. c., 46 L. R. A. 367.

## X. Death of Parent, Husband or Wife.

In an action by a husband for the death of his wife, through the defendant's negligence, recovery can only be had for injury to next of kin, and *not for loss of services due* the husband and evidence of value of same is inadmissible. *Dickens v. N. Y. C. R. Co.*, 23 N. Y. 158; rev'g judg't for pl'ff.

In an action by husband, as administrator of his wife, who was killed by the defendant's negligence, leaving children, it was held (1) the jury might consider the nurture, instruction, physical, moral and intellectual

training that the mother would have given her children; (2) the damages were not necessarily confined to the children's minority; (3) the prospective losses might be considered; (4) the business capacity of the mother may be considered, as aiding the jury in determining the pecuniary benefit which the mother was to her children, and as to her capacity to give them such training and education as would be pecuniarily serviceable to them. The habitual employment and value of the earnings of the mother were competent to show general capacity. *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; aff'g judgt for plff.

S. C., 24 N. Y. 471, where judgment for plaintiff was reversed because jury were allowed to consider the value of her earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of their father.

It is proper, in estimating pecuniary damages to the next of kin for death of mother by negligence of defendant, to give such as arise from the loss of personal care, intellectual or moral training, which would have been received if the deceased had lived.

Deceased left three children, two sons and one daughter, all of them over twenty-one years of age, and living away from their mother. It was shown that she was in the habit of making articles of clothing and sending them to her children from time to time.

The question, "what did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate of the pecuniary loss sustained by the next of kin. *McIntyre v. N. Y. C. R. Co.*, 31 N. Y. 281; aff'g judgt for plff.

The fact that the children of a person killed through negligence are of full age and live away from the home of the deceased, and supported themselves, does not prevent recovery.

In such an action plaintiff was permitted to prove, under objection and exception, that the children of the deceased, all of whom were adults, had no property of their own, and that a daughter who lived with him, doing household work, receiving nothing therefor, and paying nothing for her board, was afflicted with some disease, in consequence whereof she was not as able to work as she otherwise would have been. Held no error. *Lockwood v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 523; aff'g judgt for plff.

A jury may not take into consideration that the plaintiff would receive property as the next of kin of deceased. *Terry v. Jewett*, 18 N. Y. 338; 17 Hun, 395.

Prospects of advancement and higher salary may be shown. *Geary v. Metropolitan Street R. Co.*, 73 App. Div. 441.

Damages include loss of mental, moral and physical training, but not



society and companionship. *Sternfels v. Metropolitan Street R. Co.*, 73 App. Div. 494.

Next of kin were allowed to show that deceased was laying up earnings for a house at the time of his death. *Louisville &c. R. Co. v. York*, 128 Ala. 305.

A widow allowed to testify, in an action for death, that her family consisted of herself and child only. *Louisville &c. R. Co. v. Banks*, (Ala.) 31 South. Rep. 573.

The pension of a husband and father killed, may be considered, but not the provision entitling the wife, without other means of support, to a certain pension for herself and her child. *St. Louis &c. R. Co. v. Maddy*, 57 Ark. 306.

In estimating damages jury may consider the injury sustained by a wife in the loss of her husband's society. *Beeson v. Green Mountain &c. Mining Co.*, 57 Cal. 20.

*Penn. R. Co. v. Goodman*, 62 Pa. St. 339; *Matthews v. Warner*, 29 Grattan. (Va.) 570; *B. & O. R. Co. v. Noell*, 32 id. 394.

Pecuniary loss is measure of damage. Loss of society not an element. *Burk v. Arcata &c. R. Co.*, 125 Cal. 364.

Loss to husband and children for death of wife and mother, includes the pecuniary loss suffered by them from the loss of her society and protection. *Green v. Southern California R. Co.*, (Cal.) 61 Pac. Rep. 4.

Income from his investments, is not an element of pecuniary loss in action for death of father. *Denver &c. R. Co. v. Spencer*, 25 Colo. 9.

In an action for the benefit of the husband, it may not be shown that he is again married. *Georgia R. Co. v. Garr*, 57 Ga. 217; *Davis v. Guarnieri*, 45 Oh. St. 410.

Or that he is engaged to be married. *Dimmey v. Wheeling R. Co.*, 27 W. Va. 32.

Where measure of damages recoverable by a child for death of parent, is the loss of support until its arrival at full age, such computation should begin from the death of the parent and not the date of the injury. *Atlanta &c. R. Co. v. Venable*, 67 Ga. 697.

That husband and wife were living separate at the time of death, does not effect the latter's right to the full value of the former's life. *Central &c. R. Co. v. Boud*, 111 Ga. 13.

See, also, *Boswell v. Barnhardt*, 96 Ga. 522.

Under Illinois statute, husband may recover for the pecuniary injury resulting to him, as husband, from wife's death. *Cleveland &c. R. Co. v. Baddeley*, 150 Ill. 328.

See *Falkenau v. Rowland*, 70 Ill. App. 20.

The damages to the widow depend upon the basis of the joint life of herself and her husband., *Prest. &c. v. State*, 71 Ind. 573.

Bereavement and pain, not an element of damage. *Commercial Club v. Hilliker*, 20 Ind. App. 239.

Nor is suffering of deceased. *Louisville &c. R. Co. v. Graham*, 98 Ky. 688.

Income of a professional man is to be ascertained by the testimony of witnesses who know his character and his professional reputation and extent of practice, not by experts. *State v. Cecil County*, 54 Md. 426.

Where no pecuniary damages were shown to the son there was no recovery, but the daughter with whom the deceased lived recovered. *Baltimore &c. R. Co. v. Mahone*, 63 Md. 135.

See *Dalton v. Southeastern R. Co.*, 93 Eng. C. L. 296.

In an action by a widow for the death of her husband, the jury may consider the probable duration of their lives when the injury occurred. *Baltimore &c. Road v. State*, 71 Md. 573.

Damages for failure of support by the death of parent are the costs and annuity which would furnish it. *Brockway v. Patterson*, 72 Mich. 122.

Loss of physical care and moral and mental training, held not an element of damage to children. *Walker v. Lake Shore &c. R. Co.*, 111 Mich. 518.

The jury cannot award damages for expectancy of widow and minority of children, without considering the possibility of a death or marriage. *Jones v. McMillan*, (Mich.) 88 N. W. Rep. 206.

Under Missouri statute, infants may recover \$5,000 for the death of a father through negligence, without proof of amount of his earnings. *McPherson v. St. Louis &c. R. Co.*, 97 Mo. 253.

Wife may prove the age and number of her minor children, in action for death of husband. *Fisher v. Central Lead Co.*, 156 Mo. 479.

Probable earnings, is not measure of damage to wife. Loss of society is not included. *Knight v. Suttler Lead &c. Co.*, 75 Mo. App. 541.

See, also, *Louisiana &c. R. Co. v. Carstens*, 19 Tex. Civ. App. 190.

Loss of services is an element of damage to husband, but not to next of kin during his life. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 63.

Husband need not show that he suffered pecuniary loss on account of wife's death. *Delaware &c. R. Co. v. Jones*, 128 Pa. St. 308.

Children held entitled to share in the recovery, in proportion to the amount of personal property they would receive in case of intestacy. *Allison v. Powers*, 179 Pa. St. 531.

Under Pennsylvania statutes, giving widow and children right to recover in damages for death of head of family, *solatium* is not a proper element of damage. *Penn. R. Co. v. Butler*, 7 P. F. Smith (Pa.) 335.

See *Penn. R. Co. v. Henderson*, 1 P. F. Smith, (Pa.) 315; *Same v. Keller*, 17 id. 300. See *Blake v. Midland R. Co.*, 18 Q. B. 93; *Franklin v. South-East R. Co.*, 3 Hurl. & Nor. 211; *Holton v. Daly*, 106 Ill. 131; *Chicago &c. R. Co. v. Morris*, 26 id. 400; *Chicago &c. R. Co. v. Shannon*, 43 id. 338.

Advice, counsel, comfort and enjoyment are not elements of damages in an action for death of husband. *Illinois &c. R. Co. v. Bentz*, 108 Tenn. 670.

Remarriage is no defense to an action for the death of a wife. Pecuniary condition of father held competent on question of injury to daughter for loss of mother. *Gulf &c. R. Co. v. Younger*, 90 Tex. 387.

Damage to an infant for death of its father, is not limited to age of majority. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

Adult children, receiving nothing from father, were not allowed to recover for his death. *St. Louis &c. R. Co. v. Bishop*, 14 Tex. Civ. App. 504.

Ability of mother in management of an estate, to which children were entitled on her death, held an element of damage. *San Antonio &c. R. Co. v. Long*, 19 Tex. Civ. App. 649.

Calculation of the present worth of future earnings upon a six per cent basis, held improper. *Galveston &c. R. Co. v. Johnson*, 24 Tex. Civ. App. 180.

That the times of gratuitous giving were irregular, does not prevent recovery. *Texas &c. R. Co. v. Martin*, (Tex. Civ. App.) 60 S. W. Rep. 803.

Present compensation for contributions reasonably to be expected, is the measure of damage to father for death of an adult son. *San Antonio &c. R. Co. v. White*, 94 Tex. 468.

Measure of damages for the loss of a father and husband, is not all the pecuniary benefit which would have been received had he not been killed. *Ft. Worth &c. R. Co. v. Sivells*, (Tex. Civ. App.) 67 S. W. Rep. 517.

See, also, *Railway Co. v. Morrison*, (Tex.) 56 S. W. Rep. 735.

Income from flowers and vegetables, raised by deceased, were considered by the jury. *Missouri &c. R. Co. v. Eyer*, (Tex. Civ. App.) 69 S. W. Rep. 453.

In an action by a wife, the jury may consider the husband's improved habits and pecuniary affairs since his marriage. *Simmons v. McConnell*, 14 Va. L. J. 106.

Physical, moral and intellectual training of children is an element of damage for death of their father. *Hoadley v. International Paper Co.*, 72 Vt. 79.

See, also, *Walker v. McNeill*, 17 Wash. 582.

In action on account of death of father, the physical and moral and intellectual training which would have been received from him should be considered. *Scarles v. Kannawha &c. R. Co.*, 32 W. Va. 370.

Probable duration of a parent's life but for the injury, reasonable expectation of increase of her property, and the pecuniary benefit to her children in their support or otherwise, held proper under Wisconsin Revised Statutes, 4256. *Tuteur v. Chicago &c. R. Co.*, 77 Wis. 505.

Damages to widow, limited to support, and such sums as could reasonably have been expected from deceased husband. *Rudiger v. Chicago &c. R. Co.*, 101 Wis. 292.

See, also, *Bauer v. Richter*, 103 Wis. 412.

Where a widow received a pecuniary provision through the death of her husband the jury were entitled to consider same in mitigation of damages. *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800.

See "Death from Negligence," *post*, p. 942. For damages in various states, see *Tiffany's Death by Wrongful Act*, secs. 129 to 154.

## XI. Private Premises.

### (a). TREES.

In an action to recover damages for an alleged negligence resulting in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff was allowed to show what the trees were worth at the time they were killed. Held, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees *connected with and dependent upon the soil*; that this was not a proper measure of damages. *Dwight v. The Elmira, C. & N. R. Co.*, 132 N. Y. 199, rev'g judgt for pl'ff.

Distinguishing *Whitbeck v. N. Y. C. R. Co.*, 36 Barb. 644.

**From opinion.**—"Where timber, forming part of a forest, is fully grown, the *value of the trees* taken or destroyed can be recovered.

In nearly all jurisdictions this is *all* that may be recovered, and the reason assigned for it is that the realty has not been damaged, because the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. *Sutherland on Damages*, vol. 3, page 374; *Sedgwick on Damages*, (8th ed.), vol. 3, page 45; *Single v. Schneider*, 30 Wis. 570; *Webster v. Moe*, 35 id. 75; *Webber v. Quaw*, 46 id. 118; *Haseltine v. Mosher*, 51 id. 443; *Tuttle v. Wilson*, 52 id. 643; *W. W. Co. v. U. S.* 106 U. S. 432; *Graessle v. Carpenter*, 70 Iowa, 166; *Ward v. Carson R. W. Co.*, 13 Nev. 44; *Tilden v. Johnson*, 52 Vt. 628; *Adams v. Blodgett*, 47 N. H. 219; *Cushing v. Longfellow*, 26 Me. 306.

In this state it is settled that *even where full grown timber is cut or destroyed, the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting, or*

*destruction complained of.* Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 id. 36; Easterbrook v. Erie R. Co., 51 Barb. 94.

The rule is also applicable to *nursery trees* grown for market, because they have a value for transplanting; the soil is not damaged by their removal, and *their market value* necessarily furnished the true rule of damages. Sedgwick on Damages, (8th ed.), vol. 3, page 48; Birket v. Williams, 30 Ill. App. 451.

*Coal* furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages where it has a value after removal, and the land had sustained no injury because of it. Sedgwick on Damages, (8th ed.), vol. 3, page 48; Sutherland on Damages, vol. 3, page 374; American & English Ency. of Law, vol. 5, page 36, note 2; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147-152; Dougherty v. Chestnutt, 86 Tenn. 1; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, (Tenn.) 479-488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell, 3 Adol. & Ellis, (N. R.) 278; Martin v. Porter, 5 M. & W. 351.

On the other hand, cases are not wanting where the value of the thing, detached from the soil, would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land.

*This is the rule where growing timber is cut or destroyed.* Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damages, therefore, necessarily extend beyond the market value of the trees after separation from the soil, and *the difference between the value of the land before and after the injury* constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibbard, 6 Cal. 162; Wallace v. Goodall, 18 N. H. 439-456; Hayes v. C. M. & S. P. R. Co., 45 Minn. 17-20.

In Wallace's case, (*supra*), the court said: 'The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may from their youth be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil.'

The same rule prevails as to *shade trees*, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell, 52 Hun. 353, and cases cited *supra*.

The current of authority is to effect that *fruit trees and ornamental, or growing trees*, are subject to the same rule. Montgomery v. Locke, 72 Cal. 75; Sedgwick on Damages, (8th ed.), vol. 3, sec. 933. ●

It is apparent from the authorities already cited, as well as those following, that in cases of injury, to real estate the courts recognize two elements of damages.

1. The value of the tree or other thing taken, after separation from the freehold, if it have any. 2. The damages to the realty, if any, occasioned by the removal. Ensley v. Mayor &c. 2 Baxter (Tenn.) 144; Striegel

v. Moore, 55 Iowa 88; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 490.

The question as to how much plaintiff's woodland was depreciated in value by the fire, and how much less it was worth by reason of its having been burned was properly rejected. The measure of the damages the plaintiff was entitled to recover was the difference in value of the timber land as it was before, and as it was after the fire. *Van Deusen v. Young*, 29 N. Y. 36; *Morehouse v. Mathews*, 2 Comst. 514; *Berier v. Delaware & H. Canal Co.*, 13 Hun. 254, 260, disapproving of *Whitbeck v. N. Y. Cent. R. Co.*, 36 Barb. 644.

The true measure of damages for the loss of standing fruit trees destroyed by fire is the depreciation in the value of the land upon which they stood by reason of their destruction.

Evidence of the value of standing trees destroyed through negligence is inadmissible in an action brought to recover damages for their destruction. *Haskell v. The Northern Adirondack Railway Company*, 74 Hun. 380; see 148 N. Y. 112.

Damages for loss of trees, is the difference in the value of the land before and after their destruction. *St. Louis &c. R. Co. v. Ayres*, 67 Ark. 371.

So, also, as to meadow land and orchard, *Chicago &c. R. Co. v. Davis*, 74 Ill. App. 595.

See, also, *Rowe v. Chicago &c. R. Co.*, 102 Iowa, 286; *Missouri P. R. Co. v. Haynes*, 1 Kan. App. 586; *St. Louis &c. R. Co. v. Hoover*, 3 Kan. App. 577.

So, also, of shade trees, shrubbery and grass. *Wichita Gas &c. Co. v. Wright*, 9 Kan. App. 730.

Where cultivated trees have been injured by fire, the proper measure is the difference in value of the trees themselves before and after injury. *Kansas City &c. R. Co. v. Rogers*, 48 Neb. 653.

See, also, *Railroad Co. v. Crum*, 30 Neb. 70; *Missouri P. R. Co. v. Tipton*, 61 Neb. 49.

#### (b). CROPS AND BUILDINGS.

Damages allowed for injury to salt products by dirt from operation of adjacent railroad. *Syracuse &c. Salt Co. v. Rome &c. R. Co.*, 43 App. Div. 203.

Value of plaintiff's services in fighting fire, held not an element of statutory damages for loss by fire. *Spencer v. Murphy*, 6 Colo. App. 153.

Damages for flooding of lands by railroad construction, is the difference in value before and after. *Lake Erie &c. R. Co. v. Purcell*, 75 Ill. App. 573.

The measure of damages for loss of a stack of straw, is the value thereof at the nearest market, plus the cost of cartage. *Chicago &c. R. Co. v. Gitchell*, 95 Ill. App. 1.

Measure of damages for the destruction of meadow and grass land, is the difference in its value before and after its destruction. That of hay and straw; the fair cash value at the time of destruction. *Baltimore &c. R. Co. v. Irwin*, 97 Ill. App. 337.

See, also, *Baltimore &c. R. Co. v. Perryman*, 95 Ill. App. 199.

Damage to land by the escape of fire from railroad, is the difference between its value just before and after such fire. *Baltimore &c. R. Co. v. Countryman*, 16 Ind. App. 139.

See, also, *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37.

Measure of damage of household goods and wearing apparel destroyed by fire, determined from a consideration of their original cost, extent of use, and present condition. *McMahon v. Dubuque*, 107 Iowa, 62.

Damages for the destruction of a hedge, is the difference in the value of the property with and without it. *Bradley v. Iowa &c. R. Co.*, 111 Iowa, 562.

See, also, *Swanson v. Keokuk &c. R. Co.*, (Iowa) 89 N. W. Rep. 1088; *Thompson v. Keokuk &c. R. Co.*, id. 975.

Value of barn when burned, is the measure of damages. *Atchison &c. R. Co. v. Huitt*, 1 Kan. App. 788.

See, also, *Matthews v. Missouri &c. R. Co.*, 142 Mo. 645; *Damman v. St. Louis*, 152 id. 186.

Value of personalty is to be determined as of the time and place of destruction. *Atchison &c. R. Co. v. Briggs*, 2 Kan. App. 154.

Actual value of personalty destroyed is the measure. *Wall v. Platt*, 169 Mass. 398.

See, also, *Cleveland &c. R. Co. v. McKelvey*, 12 Oh. C. C. 426.

In an action for burning grass, the correct measure, is the value of the grass as it stood upon the ground, and the difference, if any, in the value of the land, without considering the grass, immediately before the fire and immediately thereafter. *Gulf &c. R. Co. v. Reagan*, (Tex. Civ. App.) 32 S. W. Rep. 846.

See, also, *International &c. R. Co. v. Melver*, 40 id. 438.

Measure of damage for loss of personal property without market value, is the pecuniary loss to the owner, not the cost of replacing it. *Dallas v. Allen*, (Tex. Civ. App.) 40 S. W. Rep. 324.

Depreciation in value of the land by the burning of a fence, is to be considered. *International &c. R. Co. v. McIver*, (Tex. Civ. App.) 40 S. W. Rep. 438.

Damages for injury to house and land from cave of railroad cut, is the difference in value of the property, with a proper construction of the cut and that after the cave-in, with expense of repair and protection from further damage. *Nading v. Denison &c. R. Co.*, 22 Tex. Civ. App. 173.

Where land is leased for pasture, in suit by lessee for injury to turf, measure of damage is not the difference in value of land before and after injury, but compensation for injury to turf due to its diminished power to produce grass. *Texas &c. R. Co. v. Rice*, (Tex. Civ. App.) 59 S. W. Rep. 833.

And, when leased for tillage, its diminished power to produce succeeding year's crop. In absence of market value, particular purposes of plaintiff may be considered. *San Antonio &c. R. Co. v. Stone*, (Tex. Civ. App.) 60 S. W. Rep. 461.

Difference in value of property before and after injury, is measure of damages for negligent removal of lateral support. *Jones v. Seattle*, 23 Wash. 753.

#### (c). OTHER PROPERTY.

Damages for loss of personal baggage is its actual worth for use, and not its market value. *Simpson v. New York &c. R. Co.*, 16 Misc. 613.

Damages to violin was cost of repairs, loss of use during repair and difference in value before and after injury. *Schalscha v. Third Ave. R. Co.*, 19 Misc. 141.

Price of a new horse is not an item, where the old fully recovers. *Cady v. Third Ave. R. Co.*, 29 Misc. 741.

Damages for goods in cold storage, is the difference in market value, as they were and as they should have been delivered, less storage. *Western &c. Storage Co. v. Ermeling*, 13 Ill. App. 394.

Expense of care and attention of a mule during sickness, cannot be recovered, in addition to its value. *Cully v. Louisville &c. R. Co.*, 101 Ky. 319.

Where hay destroyed has no value for use to the owner, the measure of damage is market value at nearest market, less cost of cartage. *Watt v. Nevada C. R. Co.*, 23 Nev. 154.

Damages for injury of team, is the difference in value before injury and after cure, plus the expense of cure, and compensation for loss of use in the meantime. *Pittsburg &c. R. Co. v. Kelly*, 12 Oh. C. C. 341.

Cost of restoration to original condition, is measure for partial destruction of building. *Anderson v. Miller*, 96 Tenn. 35; s. c., 31 L. R. A. 604.

In action for hogs killed, no recovery was allowed for time spent for hunting stray hogs to secure their safety, or for feed of those penned



for same reason. *Harmon v. Callahan*, (Tex. Civ. App.) 35 S. W. Rep. 705.

Reduction in value of mares, is measure of damage for premature birth of colts. Error to admit evidence of market value of the colts. *Baker v. Mims*, 14 Tex. Civ. App. 413.

Damages for loss of a beast, is its value at the time of loss, with legal interest from such time. A statute prescribing a rule of damages for stock killed by railway companies, construed not to apply to street railways, or to the case of an animal killed by an electrical wire down across the tracks of a steam railway. *San Antonio &c. Street R. Co. v. Wray*, (Tex. Civ. App.) 37 S. W. Rep. 641.

As to rule of damages for destruction of a private yacht, see *The H. F. Dimock*, 77 Fed. Rep. 226.

## XII. Proximate Cause.

Although a person be in delicate health, yet she is not limited to damages that would have followed if she had been in good health. The injury is the proximate cause. *Tice v. Munu*, 94 N. Y. 621; aff'g judg't for pl'ff.

After the injury the plaintiff drove several miles, exposed to the rain, and caught cold and aggravated the injury. Such exposure was the natural result of the accident. *Ehrgott v. Mayor &c.*, 96 N. Y. 264; aff'g judg't for pl'ff and rev'g judg't general term.

**From opinion.**—"The judge charged the jury that the defendant was liable to the plaintiff, even if the disease from which he suffered were solely due to his exposure to the cold and rain after the accident, provided he was free from fault and negligence in the exposure. I am inclined to think that there was no error in this portion of the charge. The exposure was the direct and proximate result of the accident. The plaintiff and his family were unavoidably forced from his carriage into the rain and cold by the accident, and were thus exposed to those elements in consequence of defendant's wrong. It was in the night time, and they could not remain in the carriage, and he could not avoid the rain. He was bound to exercise reasonable prudence in taking care of himself and avoiding the consequences of the wrong done. He had the option to stand in the street where the accident had placed him, or to go home, exercising reasonable prudence and the best judgment he had. There is thus such a direct connection between the accident and the exposure as to make the defendant liable for the latter. It must, however, be admitted that there is considerable authority in opposition to these views. (*Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111; *McMahon v. Field*, 44 L. T. (N. S.) Ch. Div. 175; *Waller v. M. G. W. Railway Co.*, 12 Ir. L. T. 145; *Pullman Palace Car Co. v. Barker*, 4 Col. 344; *Indianapolis &c. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. L. Transfer Co.*, 5 Mo. App. 7.) But the views expressed are not condemned by any authority in this state, and are fairly sustained by the cases of *Williams v. Vanderbilt*, (28 N. Y. 217) and *Ward v. Vanderbilt*,

(4 Abb. Ct. of App. Dec. 521.) \* \* \* There were, according to the finding of the jury, two causes operating to produce plaintiff's injuries, each of which was essential to produce the results. The accident without the exposure, and the exposure without the accident, would not have caused them. This case then comes within the principle decided in *Ring v. City of Cohoes*, (77 N. Y. 83), where it was said: 'When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate—one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect;' and 'when several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened.'

Injury to product of salt works, by deposit of soot and dirt, held to be the natural and probable consequences of operation of an adjacent railroad. *Syracuse Solar Salt Co. v. Rome &c. R. Co.*, 43 App. Div. 203; s. c. aff'd, 168 N. Y. 650.

Where, through an error or mistake of an employé of a railroad company, a person has been left at a wrong station, such person may recover all damages naturally resulting from the corporation's fault and for any discomfort or inconvenience resulting to her therefrom; but such person should conduct herself prudently in the situation in which she is placed, so that the discomforts and inconveniences shall not be unnecessarily increased, and so that no danger shall be unnecessarily run by her. While the question of the plaintiff's negligence is usually for the jury, there are limitations to its power, and while the jury has a right to determine whether the injury from which the person is suffering is the natural result of an accident, that is not necessarily sufficient; it must find that the accident is the immediate or proximate cause of the injury.

Where a person knowing that any undue exercise or exposure will bring on a recurrence of a difficulty, is left by a railroad company by mistake in the evening and during a rain storm, at a station some two or three miles from her destination, it is her duty, before she undertakes to walk to her destination, to make some inquiries whether she can procure a conveyance, and if not, whether there is a convenient place in the vicinity where she can be cared for over night, and when, failing to make such inquiries, she blindly and heedlessly undergoes the fatigue of the journey by foot, and the exposure to the elements, when there are places near at hand where she can be cared for during the night, she is not entitled to recover damages from the railroad company for the injuries resulting from such exposure. *Childs v. The New York, Ontario & Western Ry. Co.*, 77 Hun. 539.

See *Ohio &c. R. Co. v. Burrows*, 32 Ill. App. 161; *Georgia &c. R. Co. v. Eskew*,

86 Ga. 641; *Serwe v. Mo. P. R. Co.*, 48 Minn. 78; *Texas &c. R. Co. v. James*, 82 Tex. 306.

Through the negligence of defendant's servant, the plaintiff, entering car, was injured, so that she miscarried, and there resulted retroversion of the womb. Request that, if subsequent exposure to the weather, which was calculated to aggravate her disorder, did "produce a subsequent development or condition of her disease which would not have existed but for that, then for that condition the defendant is not liable in any event," was refused. No error. Jury should say whether such exposure was negligent and whether, independently of injury, it caused her disorder. (*Vanderburgh v. Truax*, 4 Denio 464; *Pallett v. Long*, 56 N. Y. 200.) Charge that the test was, whether the plaintiff fairly acted in obedience to her own judgment as to what was prudent in going out. (*Sauter v. New York Central R. Co.*, 66 N. Y. 52.) LEARNED, J., dissents on the ground that the plaintiff should not act imprudently, although she regarded the act as prudent. *Hope v. T. & L. R. Co.*, 40 Hun, 438, aff'g judg't for pl'ff.

The court charged that the plaintiff might recover for injury, if she would suffer more from future ailments than she would have suffered if it had not been for the injury. The evidence was, if she were sick from other causes, this injury would complicate them, and the charge was correct. *Crank v. Forty-second Street R. Co.*, 53 Hun, 425, aff'g judg't for pl'ff; aff'd, 127 N. Y. 648.

A young woman, by stepping through a defective walk, sprained her ankle, and being advised so to do by the doctor, walked upon it and "induced a probably incurable inflammation." It appeared that she acted in good faith, and no medical evidence was given tending to show to what extent her conduct had aggravated the difficulty. The negligent condition of the walk was the proximate cause of the injury, and the defendant was liable for damages naturally following therefrom, if the injured person acted, in respect to the treatment, in good faith and without serious disregard of consequences. *Foels v. Town of Tonawanda*, 59 Hun, 567, aff'g judg't for pl'ff.

Citing *Hickinbottom v. D., L. & R. Co.*, 15 N. Y. St. R. 15; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Sauter v. N. Y. Cent. R. Co.*, 66 id. 50; *Radman v. Haberstro*, 17 N. Y. St. Rep. 497.

Expert testimony as to an injury to an organ, supported by evidence of pain therein, theretofore unknown, held to warrant an inference that it was caused by the accident. *Wolf v. Third Avenue R. Co.*, 67 App. Div. 605.

See, also, *Eichholz v. Niagara Falls &c. Co.*, 68 App. Div. 441; *Lindeman v. Brooklyn &c. R. Co.*, 69 App. Div. 442.

Plaintiff hired an office of the defendant, the lease containing a covenant by defendant to keep the roof in repair. The premises became damp by reason of leaks in the roof, and in consequence thereof plaintiff contracted pneumonia. Held, that an action for damages caused by such sickness could not be maintained; that such damages were too remote; were not within the reasonable contemplation of the parties, nor the immediate or natural result of the breach. *Eschbach v. Hughes*, 7 Misc. 172.

Failure to deliver trunk for shipment on a certain steamer, held not the proximate cause of expenses of owner pending departure of next steamer, but only repayment of passage money. *De Leon v. McKernan*, 25 Misc. 182.

Where the injured person was afterwards given poison by mistake, from the immediate effects of which he died, upon it appearing that the injury was sufficient to cause the death more quickly than the poison alone, the action was maintained. *Thompson v. Louisville &c. R. R. Co.*, 91 Ala. 496.

Failure to comply with directions of physician, prevents recovery for subsequent damage due to such failure. *Keyes v. Cedar Falls*, 107 Iowa, 509.

Failure to use ordinary care to properly diagnose plaintiff's condition, was held the proximate cause of breach of contract to marry. *Harriott v. Plimpton*, 166 Mass. 585.

Not error to refuse to charge that defendant would not be liable for blood poisoning unless it was the ordinary effect of such injury as plaintiff suffered. *McTarrahan v. New York &c. R. Co.*, 171 Mass. 211.

While one is bound to regulate his conduct only according to normal sensibilities, he is nevertheless liable for the consequences of a wrongful act, which is augmented by abnormal sensibilities. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488.

One already suffering from an injured ankle, may recover for the increase of pain, suffering and expense incurred, by a subsequent fall. *Schwiringschlegel v. Munroe*, 113 Mich. 683.

Whether the result was anticipated is immaterial, if the injuries are the direct consequences of the accident. *Watson v. Rhinderknecht*, 82 Minn. 235.

See, also, *Crouse v. Chicago &c. R. Co.*, 104 Wis. 473.

Recovery allowed for injury to dashboard caused by horse kicking, upon the buggy being wrenched, by catching on a railroad spike. *English v. Missouri P. R. Co.*, 73 Mo. App. 232.

That plaintiff would have fared better with a better physician was no

defense, where he used reasonable care in his selection. *New York &c. Teleph. Co. v. Bennett*, 62 N. J. L. 142.

Damages for malpractice, is reasonable for that excess of injury which would not have occurred with the use of ordinary skill. *Miller v. Frey*, 49 Neb. 412.

Profits, not allowed for failure to duly carry machinery. *Sharpe v. Southern R. Co.*, 130 N. C. 613.

Prospective damages are such as may be reasonably certain to follow. *Pennsylvania Co. v. Files*, 65 Oh. St. 403.

No recovery allowed, where injuries complained of, might have been the result of plaintiff's premature departure from hospital. *Richards v. Willard*, 176 Pa. St. 181.

Negligence in carrying passenger by station, not the proximate cause of mental suffering and delay in medical treatment for a sick child. *Chicago &c. R. Co. v. Boyles*, 11 Tex. Civ. App. 522.

Injury by sleeping on a neighbor's floor, was not the proximate result of the burning of plaintiff's dwelling by the defendant: nor is the loss of a dog in such dwelling. *Scrapina v. Galveston &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 142.

That decedent was a church member and not addicted to profanity, was too remote, in determining pecuniary loss in action for death. *Houston &c. R. Co. v. Lippscornb*, (Tex.) 64 S. W. Rep. 923; mod'g s. c., 62 id. 954.

Plaintiff not allowed to recover damages for suffering, which could have been prevented, by the exercise of reasonable care. *St. Louis &c. R. Co. v. Ball*, (Tex. Civ. App.) 66 S. W. Rep. 879.

Defendant is liable for indirect damages which are the natural consequences of its negligent act: and it is error to charge a jury that they are to award no damages for "hysteria not directly caused by the accident." *Metropolitan Street R. Co. v. Hudson*, 113 Fed. Rep. 449.

Druggist liable for poison, negligently mislabeled, sold to a customer, and taken as medicine by a third party. *Peters v. Johnson*, 50 W. Va. 644.

#### (a). PREDISPOSITION TO DISEASE.

An original break of a bone was the proximate cause of its rebreakage occurring by reason of turning over in bed upon becoming afflicted with nausea. *Postal Teleg. Co. v. Hutsey*, (Ala.) 31 South. Rep. 527.

Where through an injury the system is more susceptible to disease, and death results therefrom, it is attributable to such injury. *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346.

*Drake v. Kiely*, 93 Pa. St. 492; *Louisville &c. R. Co. v. Kelly*, 92 Ind. 371. See Wharton on Negligence, sec. 135, and notes.

Although the injury developed into a malady to which the person was predisposed, the person causing the injury is liable. *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409.

*Stewart v. Ripon*, 38 Wis. 584; *Oliver v. LaValle*, 36 id. 592; *Kellogg v. Chicago &c. R. Co.*, 26 id. 223; *Louisville &c. R. Co. v. Jones*, 7 West, (Ind.) 33; *Reading &c. R. Co. v. Eckert*, 2 Cent. (Pa.) 791; *Brown v. C. M. &c. P. Co.*, 54 Wis. 342. See following cases: *Baltimore &c. R. Co. v. Kemp*, 30 Alb. L. J. 92; *Murdock v. B. & A. R. Co.*, 133 Mass. 15; *Beauchamp v. Saginaw M. Co.*, 50 Mich. 163; *McNamara v. Clintonville*, 62 Wis. 297; *Jeffersonville &c. R. Co. v. Riley*, 39 Ind. 568; see, however, *Pullman Palace Car Co. v. Barker*, 4 Col. 344; *Louisville &c. R. Co. v. Kingman*, (Ky.) 35 S. W. Rep. 264.

Where an already existing disease is aggravated by the injury plaintiff is entitled to full compensation. *Chicago &c. R. Co. v. Hecht*, 115 Ind. 443.

See, also, *Denver v. Hyatt*, 28 Colo. 129.

No recovery allowed for fracture of leg, by fall, due to weakness of ankle, produced by accident, caused by defective street, in a statutory action against the municipality. *Raymond v. Haverhill*, 168 Mass. 382.

Previous habits, lessening probability of recovery, held immaterial. *Sullivan v. Marin*, 115 Mass. 422.

Where a latent disease, which might never have exhibited itself, was developed by an injury, it was a proper element of damage. *LaPleine v. Morgan's &c. Co.*, 40 La. Ann. 661.

Recovery may be had for actual damages for injuries, although there was a scrofulous difficulty which rendered it possible or even likely that a slight injury would aggravate. *Shumway v. Walworth*, 98 Mich. 411.

Susceptibility to suffering by reason of rheumatism, does not mitigate damage for suffering caused by the injury. *Hall v. Cadillac*, 114 Mich. 99.

Full recovery may be had although injured person was, on account of previous condition of life, predisposed to injury. *Purcell v. St. Paul &c. R. Co.*, 48 Minn. 134.

Under New Hampshire act of 1819, damages for injuries causing death include those only suffered by the decedent before death. *Clark v. Manchester*, 62 N. H. 511.

Erysipelas was, in the absence of evidence to the contrary, regarded as directly caused by the same injury which caused the wound. *Drexson v. Hollister*, 123 Pa. St. 421.

But there was no recovery to the representatives where the injury brought on insanity, and after eight months of suffering the person committed suicide. *Scheffer v. R. Co.*, 105 U. S. 249.

See *McDonald v. Snelling*, 14 Allen. 249.

If disability already existed, then the defendant is only liable for such

additional disability as resulted from the injury caused by him. *Whelan v. N. Y. & C. R. Co.*, 38 Fed. Rep. 15.

Plaintiff sustained no substantial damages by the fall; his detention in hospital being for rheumatism. No recovery. *The Ed. Roberts*, 93 Fed. Rep. 988.

Damage should not include the condition not caused by the injury but by a chronic physical weakness of the plaintiff. *Abbott v. Tolliver*, 71 Wis. 64.

Although the physical condition of the person injured may have aggravated the injury by negligence, recovery may be had therefor. *Vosburg v. Putney*, 86 Wis. 218.

#### (b). MEDICAL TREATMENT.

Plaintiff's intestate, at first, rejected the advice of his physician and refused to have his leg amputated; he died about ten days after the accident. The physician, being called as a witness, swore that amputation would have improved "S.'s" chances, but also said that, within his own experience, there had been cases where, under advice and in the face of such objection, amputation had been omitted and the limb saved. The refusal of "S." could not be said to be, as matter of law, negligence. *Sullivan v. Tioga R. Co.*, 112 N. Y. 643.

**MISTAKE OF PHYSICIAN.**—Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is unsuccessful, and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error, although the operation is the immediate cause of the death. *Sauter v. N. Y. C. & H. R. Co.*, 66 N. Y. 50.

**From opinion.**—"The employment of a surgeon was proper, and may be regarded as a natural consequence of the act, and the mistake which it is evident might be made by the most skillful, may be regarded of the same character. In *Lyons v. The Erie Railway*, (57 N. Y. 489) the Commission of Appeals held, if one who is injured by the negligence of another, acts in good faith under advice of a competent physician, even if it is erroneous, he may recover, and that the error is no shield to the wrongdoer. The rule is laid down in *Commonwealth v. Hackett*, (2 Allen, 137) that one who has willfully inflicted upon another a dangerous wound from which death ensued is guilty of murder or manslaughter, as the case may be, although, through want of due care, or skill, the improper treatment of surgeons may have contributed to the result."

Unskillful treatment does not affect recovery, where due care is shown in the selection of a physician. *Baker v. Borello*, 136 Cal. 160.

See, also, *McGarrahan v. New York & C. R. Co.*, 171 Mass. 211.

Increased injury, due to mistakes of physician, may be included in

recovery, provided plaintiff has used due care in his selection. *Chicago &c. R. Co. v. Cooney*, 196 Ill. 466; aff'g s. c., 95 Ill. App. 471.

See, also, *Columbia City v. Langohr*, 20 Ind. App. 395; *Heintz v. Cardwell*, 16 Oh. C. C. App. 630.

An injured person must use the care that a prudent person would use under the circumstances in employing medical aid. *Elgin v. Riordan*, 21 Ill. App. 600.

One who is injured by the negligence of another must use ordinary diligence in obtaining medical aid; and failure to do so should be taken into account in estimating damages. *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409.

*Tuttle v. Farmington*, 58 N. H. 13; *Boynton v. Somersworth*, id. 321, (see *Eastman v. Sanborn*, 3 Allen, 594; *Tuttle v. Holyoke*, 6 Gray, 447); *Osborne v. Detroit*, 32 Fed. R. 36; *Bradford v. Downs*, 126 Pa. St. 622.

Damages caused by plaintiff's negligence in the employment of medical aid, are not chargeable to defendant. *Crete v. Childs*, 11 Neb. 252.

And where plaintiff, or those in charge of him, disregarded the reasonable directions of a physician, there can be no recovery. *Potter v. Warner*, 91 Pa. St. 362.

Where due care was used in selecting a physician, improper treatment by him will not diminish the damages. *Loeser v. Humphrey*, 41 Ohio St. 378.

*Stover v. Bluehill*, 51 Me. 439, (see *Bardwell v. Jamaica*, 15 Vt. 438; *Collins v. Council Bluffs*, 32 Iowa, 324; *Rie v. Des Moines*, 40 id. 638; *Page v. Bucksport*, 64 Me. 51); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; *Page v. Sumpter*, 53 Wis. 652; *Texas &c. R. Co. v. Orr*, 46 Ark. 182.

Where reasonable care was used in selecting a physician, aggravation of the injury was no defense. *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

See, also, *Selleck v. Janesville*, 100 Wis. 157; s. c., 41 L. R. A. 563.

### XIII. Exemplary.\*

Exemplary damages may be allowed in actions based upon negligence, where such negligence is so gross and culpable as to evince utter recklessness.

Plaintiff was a passenger on a steamboat, an explosion of the boiler took place, and plaintiff was scalded. *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, aff'g judgment for plaintiff.

Exemplary damages are not allowed in a case where there has been

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\* NOTE.—As to Liability of Master for willful acts of agents: see "Agency: Willful and Malicious Acts of Agents," *ante*, p. 22; and "Carriers of Passengers," *ante*, p. 360.



no intentional offense committed, but where defendant has only done what he honestly believed to be his duty.

A person, having paid his fare, was transferred from one car to another, and upon his refusal to pay again was, without unnecessary force, ejected. The defendant was liable for compensatory, but not exemplary, damages. *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25, rev'g judg't for pl'ff.

Punitive damages are never given for the negligence of a servant, however gross or culpable, unless the act be reckless or of a criminal nature.

Such misconduct may be established, however, by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. *Cleghorn v. N. Y. C. R. Co.*, 56 N. Y. 44, rev'g judg't for pl'ff.

A master is not liable in exemplary damages for the act of his servant unless such damages would have been recoverable had the suit been against the servant. A railroad conductor, in the *bona fide* discharge of his duty, removed a passenger who refused to produce a ticket or pay the fare. The damages could only be compensatory, although removal was unlawful. *Townsend v. N. Y. C. & C. R. Co.*, 56 N. Y. 295, rev'g judg't for pl'ff; distinguishing *Caldwell v. N. J. S. Co.*, 47 id. 282; and following *Townsend v. N. Y. Central R. Co.*, 53 id. 25.

Punitive damage for negligence or willful act of defendant's servant cannot be given unless the defendant be guilty of gross negligence or misconduct. *Fisher v. Met. Elevated R. Co.*, 34 Hun. 433.

A person will not be permitted to recover exemplary damages against a master for the act or negligence of his servant, unless the master has authorized or ratified his servant's misconduct, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is shown to the master, and the like rule is applicable in an action against the master for the act of his servant, when the latter would not be chargeable with punitive damages if he were the party defendant. *Muckle v. Rochester Railway Co.*, 79 Hun. 32.

**From opinion.**—"The rule adopted by the courts of this state is such as not to permit the recovery of exemplary damages against the master for the act or negligence of his servant, unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is known to the master. *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44; *Hendricks v. Sixth Ave. R. R. Co.*, 12 J. & S. 8; *Murphy v. Central P. & E. R. Co.*, 16 id. 96; *Fisher v. M. E. R. Co.*, 34 Hun. 433; *Donivan v. M. Ry. Co.*, 49 N. Y. St. Rep. 722.

And the like rule is applicable in an action against the master for the act of the servant, where the latter would not be chargeable with punitive damages, if

he were the party defendant. *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Townsend v. N. Y. C. & H. R. R. Co.*, 56 id. 295.

It cannot be well claimed that the conductor who sought to eject the plaintiff from the car, would be chargeable with punitive damages. He did what appeared to him to be his duty, and, therefore, it may be assumed that he acted in good faith in the matter, and not wantonly."

Not allowed for throwing passenger to floor by sudden starting of a car before she was able to reach a seat. *Wigton v. Metropolitan Street R. Co.*, 38 App. Div. 207.

Nor for ejecting passenger in muddy street, with accusation of picking up the transfer he presented, on which a previous conductor mispunched the date. *Eddy v. Syracuse Rapid Transit R. Co.*, 50 App. Div. 109.

ALABAMA.—Exemplary damages may not be recovered for simple negligence. *Alabama &c. R. Co. v. Arnold*, 84 Ala. 159.

Even causing death. *Thompson v. Louisville &c. R. Co.*, 91 Ala. 496.

But the negligence must be willful, wanton or reckless. *Columbus &c. R. Co. v. Bridges*, 86 Ala. 448.

Or gross. *Patterson v. South &c. R. Co.*, 89 Ala. 318.

Or evince entire want of care. *Alabama &c. R. Co. v. Arnold*, 80 Ala. 600.

The injury need not be willful. *Wilkinson v. Scarey*, 76 Ala. 176.

*Leinkauf v. Morris*, 66 Ala. 406; *S. & N. &c. R. Co. v. McLendon*, 63 id. 266; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314.

Recoverable where train was run negligently past station, and conductor willfully compelled a passenger, with her child and baggage, to walk back several hundred yards in the rain. *Alabama &c. R. Co. v. Sellers*, 93 Ala. 9.

And where, through gross negligence, ties become rotten and rails old and worn. *Alabama &c. R. Co. v. Hill*, 90 Ala. 71; s. c., 93 id. 514.

And for assault on a trespasser upon a train, who refused to alight when the train was in motion. *Alabama &c. R. Co. v. Frazier*, 93 Ala. 45.

But not for failure to deliver a telegraph message, without malicious motive. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510.

Nor for mere breach of contract to send message. *Western U. T. Co. v. Way*, 83 Ala. 542.

May be recovered in a statutory action for death. *McGhee v. McCarley*, 103 Fed. Rep. 55.

Allowed for delivery of three telegrams, announcing death, addressed to different places, at one place. *Western &c. Tel. Co. v. Seel*, 115 Ala. 670.

Damages for death of a child by railroad, under Ala. Co. sec. 2589, are punitive and not compensatory. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509.

So, also, in an action for death caused by fall of public bridge. *Shannon v. Jefferson County*, 125 Ala. 384.

ARKANSAS.—Not allowed for injury from negligence in the absence of such willful or conscious indifference as imputes malice. *St. Louis &c. R. Co. v. Hall*, 53 Ark. 7.

CALIFORNIA.—Exemplary damages may be rendered against a landlord for an assault committed by his servants in ejecting a person from an inn. *Wade v. Thayer*, 40 Cal. 578.

Not allowed for gross negligence. *Yerian v. Linkletter*, 80 Cal. 135.

Not allowed for malicious ejection of passenger, without proof of authorization or ratification. *Warner v. Southern P. Co.*, 113 Cal. 105.

Nor for wanton negligence toward deceased in action for death. *Lange v. Schoettler*, 115 Cal. 388.

COLORADO.—Not allowed. *Greeley &c. R. Co. v. Yeager*, 11 Col. 345.

Not allowed for malicious ejection of passenger, without proof of authority or subsequent ratification. *Ristine v. Blocker*, 15 Colo. App. 224.

CONNECTICUT.—Not allowed against master, without proof of authority or ratification. *Maisencbacher v. Society Concordia*, 71 Conn. 369.

DELAWARE.—Allowed for gross negligence of servant. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88.

FLORIDA.—Allowed only for gross and willful negligence evincing a reckless disregard of human life. *Florida &c. R. Co. v. Mooney*, 40 Fla. 17.

GEORGIA.—Not allowed for negligence of carrier. *City &c. R. Co. v. Finley*, 76 Ga. 11. Even causing death. *Louisville &c. R. Co. v. Chaffin*, 84 Ga. 519.

Nor for gross negligence, unless there be willful misconduct or conscious indifference to consequences. *Chattanooga R. Co. v. Liddell*, 85 Ga. 482.

But allowed for the expulsion of a passenger, accompanied by insult. *Georgia R. Co. v. Olds*, 77 Ga. 673.

And where a passenger, without cause, was rudely assaulted and insulted, and threatened with shooting, etc. *East Tenn. &c. R. Co. v. Fleetwood*, 90 Ga. 23.

ILLINOIS.—A direction to allow such damages as will compensate plaintiff, does not permit punitive damages. *Salem v. Webster*, 192 Ill. 369.

But such damages as the jury think plaintiff ought to recover, does. *Galesburg &c. Co. v. Barlow*, 98 Ill. App. 334.

Allowed for willfulness, wantonness, or maliciousness. *Kirton v. North Chicago Street R. Co.*, 91 Ill. App. 554.

INDIANA.—Not allowed in Indiana. *Taber v. Hutson*, 5 Ind. 322; *Humphries v. Johnson*, 20 id. 190.

Not allowed for mistake of conductor inducing passenger to get off at wrong station. *Cleveland &c. R. Co. v. Quillen*, 22 Ind. App. 496.

IOWA.—Not allowed against a municipality. *Bennett v. Marion*, 102 Iowa, 425.

KANSAS.—Allowed for gross negligence amounting to wantonness or maliciousness in the failure to transmit a message. *West v. Western Union Tel. Co.*, 39 Kan. 93.

Not allowed for starting car while passenger was alighting, in absence of malice or willful disregard of her rights. *Atchison &c. R. Co. v. Stewart*, 55 Kan. 667.

Allowed for gross and wanton negligence in wrongful ejection of passenger. *Atchison &c. R. Co. v. Long*, 5 Kan. App. 644.

But not when no malice or wantonness accompanies the ejection. *Atchison &c. R. Co. v. Lamorane*, 5 Kan. App. 813.

KENTUCKY.—Exemplary damages allowed for carrying a female passenger beyond her station, with accompanying insults in words and manner. *Louisville &c. R. Co. v. Ballard*, 88 Ky. 159; and not allowed for mere indecorous conduct towards a female passenger. *Louisville &c. R. Co. v. Ballard*, 85 Ky. 307.

For gross negligence. *Louisville &c. R. Co. v. Mitchell*, 87 Ky. 327.

Not for killing a child through negligence of employes. *Gibbins v. Kentucky C. R. Co.*, 89 Ky. 231.

Allowed for injuries resulting from willful neglect of carrier, in carrying

passenger beyond his destination. *Memphis &c. Packet Co. v. Nagel*, 15 Ky. L. R. 742.

Not allowed, in absence of malice or wantonness. *McHenry Coal Co. v. Sheddon*, 98 Ky. 684.

Where conductor apologized for carrying a lady past her station and attempted to have her carried back from the next station, a charge, as to "willful misconduct" evincing reckless disregard of the consequences, held error. *Kentucky C. R. Co. v. Biddle*, (Ky.) 34 S. W. Rep. 904.

Exemplary damages permissible, where the negligence of servants shows a wanton disregard of human life. *Louisville &c. R. Co. v. Kingman*, (Ky.) 35 S. W. Rep. 264; *Louisville &c. R. Co. v. Kelly*, 100 Ky. 421.

See, also, *Louisville &c. R. Co. v. Simpson*, (Ky.) 64 S. W. Rep. 733.

Punitive damages recoverable in statutory action for death by negligence. *East Tennessee Teleg. Co. v. Simms*, (Ky.) 38 S. W. Rep. 131; 99 Ky. 404; *Louisville &c. R. Co. v. Kelly*, 100 Ky. 421; *Louisville &c. R. Co. v. Ward*, (Ky.) 44 S. W. Rep. 1112; *Cincinnati &c. R. Co. v. Cook*, 67 id. 383.

Use of insulting language and force, justified punitive damages. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Defendant held liable for punitive damages, for unjustifiable assault by conductor upon passenger. *Lexington &c. R. Co. v. Cozine*, (Ky.) 64 S. W. Rep. 848.

Allowed to passenger for gross negligence. *Louisville &c. R. Co. v. McClain*, (Ky.) 66 S. W. Rep. 391.

Allowed to traveler at crossing, for gross negligence, defined as failure to use slight care. *Chesapeake &c. R. Co. v. Dodge*, (Ky.) 66 S. W. Rep. 606.

LOUISIANA.—Not allowed against a railroad company. *Rutherford v. Schreerport R. Co.*, 41 La. 793; except in case of willful or outrageous negligence. *McFee v. Vicksburg R. Co.*, 42 La. Ann. 790.

MAINE.—*Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 228.

MARYLAND.—Not allowed for use of violence in ejecting passenger, not accompanied with malice. *Smith v. Philadelphia &c. R. Co.*, 87 Md. 48.

MASSACHUSETTS.—In Massachusetts, *quere*. *Austin v. Wilson*, 58 Mass. 273.

See *Murdock v. Boston &c. R. Co.*, 133 Mass. 15; *Barnard v. Poor*, 21 Pick. 378; *Hawes v. Knowles*, 114 Mass. 518; *Meagher v. Driscoll*, 99 id. 281.

MINNESOTA.—Not allowed unless there be malicious or wanton indifference to the rights of the person injured. *Hoffman v. Missouri P. R. Co.*, 45 Minn. 53.

Not allowed for negligence, not amounting to bad faith. *Peterson v. Western &c. Teleg. Co.*, 72 Minn. 41; s. c., 40 L. R. A. 661.

MISSISSIPPI.—Not allowed for mere negligence, although compensatory damages be allowed. *Alabama &c. R. Co. v. Purnell*, 69 Miss. 652.

Allowed a passenger not given a reasonable time to find his ticket, and expelled from train with abuse and insult. *Louisville &c. R. Co. v. Maybin*, 66 Miss. 83.

But not for negligence to allow a passenger to alight safely at a station, unless willfully or wantonly done. *Dorrah v. Illinois &c. R. Co.*, 55 Miss. 14.

Not allowed for willful act of servant, when master did not know him to be disqualified for service. *Southern Express Co. v. Brown*, 67 Miss. 260.

Defence of malicious act of servant, is sufficient ratification to charge master. *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782.

Not allowed for ejection of passenger riding on ticket, misdated by ticket agent in the confusion of hurried sale. *Illinois C. R. Co. v. Moore*, 79 Miss. 766.

Not allowed for four days delay, due to washouts, known when ticket was sold. *Illinois C. R. Co. v. Pearson*, (Miss.) 31 South. Rep. 435.

MISSOURI.—Allowed for ejecting a passenger, regardless of his safety. *St. Clair v. Missouri P. R. Co.*, 29 Mo. App. 76.

Allowed under Missouri statute for causing death by wrongful act. *Gray v. McDonald*, 104 Mo. 303.

Not allowed for wrongful expulsion of a passenger from a car, where carrier was not negligent in the selection of employes, or of directions and authority given them. *Rouse v. Metropolitan &c. R. Co.*, 41 Mo. App. 298.

Not allowed where teamster opened door of elevator shaft and was injured by stepping into it, negligence of owner not being willful nor gross. *Leahy v. Davis*, 121 Mo. 227.

See *Franz v. Hilterbrand*, 45 Mo. 121; *Graham v. R. Co.*, 66 id. 536; *Seibel v. Siemon*, 72 id. 526; *Brown v. R. Co.*, 89 id. 152; *Parsons v. R. Co.*, 94 id. 286.

Not allowed for mere refusal to carry, though informed of desire to reach death bed of brother. *Barnett v. Chicago &c. R. Co.*, 75 Mo. App. 446.

Under a statute permitting the jury to consider aggravating circumstances in an action for death, exposure to dangerous machinery was held an "aggravating circumstance." *Fischer v. Heitzberg Packing &c. Co.*, 77 Mo. App. 108.

Not allowed for throwing passenger to floor by sudden stop, in absence of malice or wantonness. *Dorsey v. Atchison &c. R. Co.*, 83 Mo. App. 528.

NEBRASKA.—Not allowed in Nebraska. *Boyer v. Barr*, 8 Neb. 68.

NEW HAMPSHIRE.—An insane person cannot be mulcted in exemplary damages in an action against him for negligence. *Jewell v. Colby*, 66 N. H. 399.

*Quare.* *Fay v. Parker*, 53 N. H. 342.

*Bixby v. Dunlap*, 56 N. H. 456.

NEW JERSEY.—Not allowed for use of necessary force in enforcing a rule of a carrier. *Bullock v. Delaware &c. R. Co.*, 61 N. J. L. 550.

Nor for wrongful arrest for riding beyond destination, on train not stopping there, and refusing to pay extra fare. *Cone v. Central R. &c.*, 62 N. J. L. 99.

Not allowed against master, without proof of authorization or ratification. *Forkmann v. Consolidated T. Co.*, 63 N. J. L. 391.

NEW MEXICO.—Allowed for aggravating circumstances, in statutory action for death. *Cerillos Coal R. Co. v. Descrant*, 9 N. M. 49.

NORTH CAROLINA.—Not allowed on account of expulsion from train, unless accompanied with rudeness, insult or other aggravating circumstances. *Rose v. Wilmington R. Co.*, 106 N. C. 168.

Nor, in absence of insult or malicious and willful wrong. *Tomlinson v. Wilmington R. Co.*, 107 N. C. 327.

Allowed for disregard of statutory duty to stop train at station as advertised, where there was opportunity to gather passengers. *Purcell v. Richmond R. Co.*, 108 N. C. 414.

Not allowed for failure to carry passenger on return trip, due to negligent defect in machinery. *Handlsey v. Jamesville &c. R. Co.*, 117 N. C. 565.

Not allowed for passing intending passenger at a flag station, unless engineer actually saw signal. *Thomas v. Southern R. Co.*, 122 N. C. 1005.

Not allowed in statutory action for death by malpractice. *Gray v. Little*, 127 N. C. 304.

OHIO.—A corporation may be subjected to exemplary damages for tortious acts of its agents or servants done within the scope of their employment, in all cases

where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages. *Atlantic &c. R. Co. v. Dunn*, 19 Oh. St. 162, 590.

May be awarded against a person actually guilty of malicious or wanton wrong. *Roberts v. Mason*, 10 Oh. St. 277.

Allowed for malicious ejection of passenger with intent to injure and humiliate. *Guy v. Pittsburg &c. R. Co.*, 6 Oh. N. P. 3.

See, also, *Pittsburg &c. R. Co. v. Ensign*, 6 Oh. C. D. 616.

Not allowed for exaction of illegal fare, in absence of such intention. *Carr v. Toledo T. Co.*, 19 Oh. C. C. 281.

OKLAHOMA.—Not allowed for injuries received while alighting from train on an unsufficiently lighted platform. *Atchison &c. R. Co. v. Chamberlain*, 4 Okla. 542.

OREGON.—Allowed for making a public wagon bridge unsafe for passage. *Hamerlunck v. Banfield*, 36 Or. 436.

PENNSYLVANIA.—Not allowable for ejection of passenger from train by mistake, but for malicious injury inflicted by servant. *Phila. T. Co. v. Orbann*, 119 Pa. St. 37.

Allowed for refusal to sell a ticket or check baggage to a regular station in wanton disregard of the rights of the passenger. *Pittsburg &c. R. Co. v. Lyon*, 123 Pa. St. 140.

RHODE ISLAND.—Unless proof implicates the principal, and, however wicked the servant, unless the former expressly or impliedly authorizes or ratifies the act, and the criminality of it is as much against him as any other member of society, exemplary damages not allowed. *Higgin v. Providence &c. R. Co.*, 3 R. I. 88, 91.

SOUTH CAROLINA.—Allowed against a railroad company for injuries caused by the malicious or reckless negligence of its servants, although not authorized or approved. *Quinn v. So. Car. R. Co.*, 29 S. C. 381.

Or for wanton or willful refusal to carry goods. *Aringer v. So. Car. R. Co.*, 29 S. C. 265.

Or for willfully carrying a passenger, who refused to pay his fare, away from his home and ejecting him at an improper place. *Hall v. So. Car. R. Co.*, 28 S. C. 261.

Or for reckless conduct of those in charge of train. *Hart v. Charlotte R. Co.*, 33 S. C. 427; *Mack v. South Bound R. Co.*, 52 id. 323; s. c., 40 L. R. A. 679.

Allowed for failure of conductor to hold train while passenger purchased a ticket, as promised. *Gillman v. Florida &c. R. Co.*, 53 S. C. 210.

Not allowed in statutory action for death by negligence. *Garriek v. Florida &c. R. Co.*, 53 S. C. 448.

Allowed for backing cars against train while passengers were alighting. *Glover v. Charleston &c. R. Co.*, 57 S. C. 228.

Error to charge that "the intentional doing of an unlawful act would be construed as malicious," so as to give right to punitive damages. *Kibler v. Southern R. Co.*, 62 S. C. 252.

But wanton, careless and reckless violation of an ordinance, warrants an award of punitive damages. *Brasington v. South Bound R. Co.*, 62 S. C. 325.

TENNESSEE.—Allowed in case of gross negligence. *Kansas City &c. R. Co. v. Daughtry*, 88 Tenn. 721.

Allowed for insulting conduct to passenger, though responsibility denied and act repudiated. *Knoxville T. Co. v. Lane*, 103 Tenn. 376.

Allowed for injury to traveler, due to trolley car, run at high speed over switches and curves, jumping the track. *Nashville Street R. Co. v. O'Bryan*, 104 Tenn. 28.

TEXAS.—Allowed where the injury arose from gross negligence. *Missouri P. R. Co. v. Johnson*, 72 Tex. 95; or from willful act of servant, *Int. R. Co. v. McDonald*, 75 Tex. 41; but not from mere negligent failure to send a telegraph message, the importance of which was not indicated. *McAllen v. Western Union Tel. Co.*, 70 Tex. 243.

Nor where a railroad company's only negligence consisted in calling name of station too soon and refusing to stop on learning that plaintiff had been left behind. *Gulf &c. R. Co. v. McFadden*, 25 S. W. (Tex.) 451.

Not recoverable at common law in an action for negligence. *Houston &c. R. Co. v. Baker*, 57 Tex. 419.

See *R. Co. v. Le Gierse*, 51 Tex. 203; *Campbell v. H. & T. &c. R. Co.*, 2 Pos. Unrep. Cas. 473; *Kentucky Central R. Co. v. Gastineau*, 83 Ky. 119; see *Ratteree v. Chapman*, 79 Ga. 574.

Allowed where driver of an express wagon, when asked to deliver a crate of chicken through side gate, threw it back into his wagon. *Gary v. Wells &c. Co.* (Tex. Civ. App.) 40 S. W. Rep. 845.

Not allowed where petition alleged negligence in employment and retention, but did not allege ratification or adoption of his acts. *Gulf &c. R. Co. v. Holzheuser*, (Tex. Civ. App.) 45 S. W. Rep. 188.

Allowed for collection of illegal fare by a carrier. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

Allowed for failure to provide statutory private crossing after notice. *San Antonio &c. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

Not allowed against corporation for act of servant, without showing that it was the act of the corporation by a controlling officer with authority. *Arkansas Const. Co. v. Eugene*, 20 Tex. Civ. App. 601.

UNITED STATES.—Exemplary damages are not allowed against a carrier for the illegal, wanton or oppressive conduct of a train agent towards a passenger.

Punitive or vindictive damages, or smart money, are not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.

A corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U. S. 101.

**From opinion.**—"In actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 16 U. S. 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 54 U. S. 13 How. 363, 371; *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 202, 213, 214; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 493, 495; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 521; *Barry*

v. Edmunds, 116 U. S. 550, 562, 563; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 609, 610; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 16 U. S. 3 Wheat. 546.

\* \* \* It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.' To the same effect are: *Radston v. The State Rights*, Crabbe, 42, 47, 48; *McGuire v. The Golden Gate*, McAllister, 104; *Wardrobe v. The California Stage Co.*, 7 Cal. 118; *Boulard v. Calhoun*, 13 La. Ann. 445; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Grund v. Van Vleck*, 69 Ill. 478, 481; *Becker v. Dupree*, 75 Ill. 167; *Rosenkrans v. Barker*, 115 Ill. 331; *Kirksey v. Jones*, 7 Ala. 622, 629; *Pollock v. Gantt*, 69 Ala. 373, 379; *Eviston v. Cramer*, 57 Wis. 570; *Haines v. Schultz*, 50 N. J. L. 481; *McCarthy v. DeArmit*, 99 Pa. 63, 72; *Clark v. Newsam*, 1 Exch. 131, 140; *Clisold v. Machell*, 26 Upper Canada, Q. B. 422. \* \* \*

No doubt a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Philadelphia, W. & B. R. Co. v. Quigley*, *Milwaukee & St. P. R. Co. v. Arms*, and *Denver & R. G. R. Co. v. Harris*, above cited; *Caldwell v. New Jersey S. B. Co.*, 47 N. Y. 282; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287; 4 L. T. N. S. 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. *Kennon v. Gilmer*, 131 U. S. 22; *Meagher v. Driscoll*, 99 Mass. 281, 285; *Smith v. Holcomb*, id. 552; *Hawes v. Knowles*, 114 id. 518; *Campbell v. Pullman Palace Car Co.*, 42 Fed. Rep. 484."

May be allowed for failure to stop a passenger train at station, as advertised. *Purell v. Richmond &c. R. Co.*, 47 Am. & Eng. R. Cas. 457.

Allowed against a principal, as a railroad company only when the act of the servant was authorized or ratified. *M. & St. R. Co. v. Arms*, 91 U. S. 489.

See, also, *Goddard v. G. T. R. Co.*, 59 Me. 203; *S. R. Co. v. Kendrick*, 40 Miss. 374; *Ogg v. Murdock*, 25 W. Va. 139; *Hagan v. P. & W. R. Co.*, 3 R. I. 88; *Lake Shore &c. R. v. Rosenzweig*, 113 Pa. St. 519; *R. Co. v. Reed*, 80 Tex. 362. See, however, *Hopkins v. A. & St. L. R. Co.*, 36 N. H. 9; *L. & N. R. Co. v. McCoy*, 81 Ky. 403; *Illinois Central R. Co. v. Crudup*, 63 Miss. 291; *International &c. R. Co. v. Garcia*, 70 Tex. 207; *Ricketts v. Chesapeake &c. R. Co.*, 33 W. Va. 433; *Donovan v. Mann. Rd. Co.*, 1 Misc. 368. Retention of an agent after knowledge of a willful and malicious insult to a passenger is not a ratification.



*Dillingham v. Anthony*, 73 Tex. 47. May be allowed for failure to stop train. *Pureell v. Richmond &c. R. Co.*, 47 Am. & Eng. Cas. 451.

Allowed where injury arose from electric light wire through the mischief or criminal indifference of the defendant's workmen, though known to them, or arising through negligence in their selection as skillful and careful persons. *Hemming v. Western Union Tel. Co.*, 41 Fed. Rep. 864.

Not allowed for unlawfully ejecting a passenger from a sleeping car, where it was done in good faith and not insultingly or maliciously. *Lemon v. Pullman P. C. Co.*, 52 Fed. Rep. 262.

Allowed for ejection of passenger riding on a ticket issued by authority of, but subsequently repudiated by a general passenger agent. *Winters v. Cowen*, 90 Fed. Rep. 99; s. c. aff'd, 96 id. 929.

Not allowed for death of child, which ran out on tracks when depot agent assaulted its mother. *McGhee v. McCurley*, 91 Fed. Rep. 462.

VIRGINIA.—Not allowed for dishonor of check due to mistake where defendant apologized and offered any assistance possible to remove any injurious consequences. *Wood v. American Nat. Bank*, (Va.) 40 S. E. Rep. 931.

VERMONT.—Not allowed against municipality. *Willet v. St. Albans*, 69 Vt. 330.

WASHINGTON.—Not allowed in Washington. *Spokane Truck Co. v. Hoefler*, 2 Wash. 45.

WEST VIRGINIA.—Allowed for wantonness, violence or oppression. *Downey v. R. Co.*, 28 W. Va. 732.

See *Frey v. Swartwout*, 10 Pet. 81; *P. R. Co. v. Brooks*, 57 Pa. St. 339.

Not allowed for wanton or malicious act of servant unless expressly or impliedly authorized or ratified. *Ricketts v. Chesapeake &c. R. Co.*, 33 W. Va. 433.

Not allowed in absence of malice or reckless indifference to rights of others. *Talbot v. West Virginia &c. R. Co.*, 42 W. Va. 560.

Allowed for refusal to honor a valid excursion ticket on return trip. *Scott v. Chesapeake R. Co.*, 43 W. Va. 484.

Not allowed, in absence of allegation of malice. *Davis v. Western &c. Teleg. Co.*, 46 W. Va. 48.

Nor for wrongful arrest of passenger, without malice. *Claiborne v. Chesapeake &c. R. Co.*, 46 W. Va. 363.

WISCONSIN.—Awarded for aggravated assault on passenger by conductor. *Hinkley v. Chicago &c. R. Co.*, 38 Wis. 194.

Not allowed against master for malicious act of agent, unless authorized or ratified. *Robinson v. Superior &c. R. Co.*, 94 Wis. 345; s. c., 34 L. R. A. 205; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

#### XIV. Nominal Damages.

A judgment entered on a verdict for nominal damages will not be reversed on the ground of the inadequacy of the damages, where, although the damages would be inadequate, if the plaintiff was entitled to recover, it appears from the plaintiff's evidence, that the defendant was not negligent, and that the accident was caused solely by the negligence of

the plaintiff and of the co-employé. *Alberts v. Bache*, 69 Hun, 255; aff'g judg't for def't; aff'g judg't for pl'ff for six cents damages.

See *O'Neill v. Brooklyn Heights R. Co.*, 71 Hun, 114, aff'g judg't for pl'ff for six cents damages, where plaintiff and his horse were injured by a street car, according to his evidence.

Proof of loss of time from injury, is ground for nominal damages, though no value be shown. *Niendorff v. Manhattan R. Co.*, 4 App. Div. 46.

See, also, *Pickett v. West Monroe*, 47 App. Div. 629.

Evidence of the bare killing and age of an employé justifies only nominal damages. *Louisville &c. R. Co. v. Orr*, 91 Ala. 548.

But where there was proof of his wages, more than nominal damages should be awarded. *James v. Richmond &c. R. Co.*, 92 Ala. 231.

Nominal damages only, for negligence in misquoting price of cotton in telegram, when no loss is shown to have resulted. *Western &c. Teleg. Co. v. Aubrey*, 61 Ark. 613.

Or for loss of time of passenger, carried by destination, in absence of proof of its value. *Tecarkana &c. R. Co. v. Anderson*, 67 Ark. 123.

Nominal damages only for ejection pursuant to orders of quarantine guard to allow no one within the quarantined district. *St. Louis &c. R. Co. v. Linam*, 68 Ark. 621; s. c., 60 S. W. Rep. 951.

A verdict for nominal damages for death of a human being, is inadequate. *Wolford v. Lyon Grand &c. Co.*, 63 Cal. 483.

See *Hall v. Bark Emily Banning*, 33 Cal. 522.

Where a holder of a ticket boards a car, under the apprehension that his ticket will not be accepted, for the purpose of being ejected, he can only recover nominal damages for the ejection. *Southern R. Co. v. Barlow*, 104 Ga. 213.

Nominal damages only for death, in absence of proof of pecuniary interest of brothers and sisters. *Falkenau v. Rowland*, 70 Ill. App. 20.

Nominal damages allowed, for failure of title searcher to return recorded mortgage, in search for holder of tax title. *Williams v. Hanly*, 16 Ind. App. 461.

Not error to refuse to charge, that only nominal damages can be recovered for the death of a female child. *Eginoire v. Union County*, 112 Iowa, 558.

When life of a person was of no pecuniary value to his next of kin nominal damages may be recovered. *Atchison &c. R. Co. v. Weber*, 33 Kas. 513.

No damages allowed for destruction by fire of a neglected orchard

which results in benefit to owner. *Bossu v. New Orleans &c. R. Co.*, 49 La. Ann. 1593.

Failure to ship goods by the route specified, is ground for nominal damages, though due delivery is made. *Commission Co. v. Nashville &c. R. Co.*, 64 Mo. App. 144.

Proof of loss from negligence is sufficient for nominal damages without proof of extent of loss. *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500.

A complaint alleging refusal to carry on coupon ticket, negligently made out by agent in wrong name, held not demurrable because no damage was alleged. *Holden v. Rutland R. Co.*, 72 Vt. 156.

## XV. Excessive Damages.

The Court of Appeals, in an action for negligence, cannot reverse judgment on account of excessive damages. *Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594; aff'g judg't for pl'ff.

Plaintiff recovered a verdict for \$5,000, which was set aside as excessive. Upon the second trial a verdict was recovered of \$4,000. The second verdict, rendered upon substantially the same facts as were presented to the first jury, was accepted as final. *Peck v. N. Y. C. & H. R. R. Co.*, 8 Hun. 286, aff'g judg't for pl'ff.

The following cases, selected from the large number existing, illustrate the holdings of courts on this subject:

### (a). VERDICTS NOT EXCESSIVE.

**Loss of or injury to hand.**—Five thousand dollars to a boy of 19, dependent on manual labor for a permanent impairment of the use of his hand, and a painful operation thereon. *Gray v. Commutator Co.*, 85 Minn. 463.

One thousand two hundred dollars, for permanent loss of use of left hand. *Harrard v. Stiles*, 54 Neb. 26.

Seven thousand dollars, to switchman of 31, earning \$75 to \$100 a month, for loss of his hand, causing great pain for four months. *International &c. R. Co. v. Bonatz*, (Tex. Civ. App.) 48 S. W. Rep. 767.

See, also, *Ft. Worth &c. R. Co. v. Bowen*, (Tex. Civ. App.) 68 S. W. Rep. 700.

Three thousand five hundred dollars, for mauling right hand, requiring its amputation. *Greenville Oil &c. Co. v. Harkey*, 20 Tex. Civ. App. 225.

**Loss of or injury to fingers.**—Plaintiff lost three fingers; hand did not get well in eight months; doctor probed and took out bone and some of the bone came out of the wrist. The hand continued stiff and plaintiff suffered pain, was nervous, excitable and delirious. Six thousand dollars not excessive. *Murtaugh v. N. Y. C. & H. R. R. Co.*, 49 Hun. 456, rev'g judg't for pl'ff on other grounds.

Three thousand five hundred dollars to tailor for injury to his thumb, interfering with his trade, and for spinal trouble. *North Chicago Street R. Co. v. Broms*, 62 Ill. App. 127.

Four thousand dollars to boy of 15, for loss of three fingers on right hand. *Burg v. Bousfield*, 65 Minn. 355.

Seven thousand five hundred dollars, to experienced switchman of 44, earning \$80 to \$90 a month, for loss of all fingers of right hand. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 33 S. W. Rep. 1010.

Five thousand dollars to a switchman of 44, earning \$80 per month, for loss of fingers of right hand, rendering him practically helpless. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 43 S. W. Rep. 1078.

Three thousand three hundred dollars to railroad section hand for loss of two of his fingers of the left hand and the permanent disability of the rest. *Chapman v. Southern P. Co.*, 12 Utah, 30.

**Loss of or injury to arm.**—Eight thousand five hundred and thirty-seven dollars for right arm and permanent injury to leg. *Barrett v. New York &c. R. Co.*, 45 App. Div. 225.

Eighteen thousand dollars for arm broken beyond healing, and fractured skull with nervous and other complications. *Stewart v. Long Island R. Co.*, 54 App. Div. 623.

One thousand dollars for broken arm. *Wahlgren v. Market Street R. Co.*, 132 Cal. 656.

Fifteen thousand dollars for loss of arm and consequent suffering. *Illinois C. R. Co. v. O'Connor*, 90 Ill. App. 142; s. c., rev'd, 189 Ill. 559.

Seven thousand dollars to a young man in a foundry, earning a few dollars a week extra as a musician, for the loss of an arm; cutting off both vocations and causing permanent suffering. *Gundlach v. Schott*, 95 Ill. App. 110.

Seven thousand five hundred dollars, to laboring man of 47, earning from \$1.25 to \$1.50 per day, for loss of arm. *Gibson v. Gligozinski*, 76 Ill. App. 400.

Twelve thousand dollars to street car conductor, for compound fracture of an arm; resulting in a permanent loss of almost its entire use. *North Chicago Street R. Co. v. Dudgeon*, 83 Ill. App. 528.

Four hundred dollars for scalded arm; preventing work for a month and requiring eight months to heal. *Regan v. Reed*, 96 Ill. App. 460.

Two thousand dollars for injury lowering one shoulder, causing loss of position as teacher. *Illinois C. R. Co. v. Mizell*, 100 Ky. 235.

Ten thousand dollars for loss of arm by boy belonging to the family of a laborer. *Ketchum v. Texas R. Co.*, 38 La. Ann. 777.

Four thousand dollars to boy of 14 for loss of an arm. He was poor, black, illegitimate and ignorant; but earned small sums about a barber shop, and as a bootblack. *Jackson v. St. Louis &c. R. Co.*, 52 La. Ann. 1706.

One thousand seven hundred and forty-one dollars and sixty-six cents to man of 51, for complete paralysis of right arm. *Hastings v. Stetson*, 91 Me. 229.

Three thousand five hundred dollars for a stiffened arm. *Detzur v. Stroh Brev. Co.*, 119 Mich. 282; s. c., 44 L. R. A. 500.

Seven thousand two hundred dollars, for total paralysis of left arm. *Schultz v. Faribault &c. Electric Co.*, 82 Minn. 100.

Two thousand nine hundred and fifty dollars, to man of 56, earning \$1.75 per day for loss of use of arm. *Toledo &c. Street R. Co. v. Rohner*, 9 Oh. C. C. 702.

One thousand two hundred dollars, for painful fracture of arm, made permanently weaker. *Toledo v. Higgins*, 12 Oh. C. C. 646.

Seven hundred and fifty dollars, for breaking an arm of a painter. *Ritt v. True &c. Co.*, (Tenn.) 69 S. W. Rep. 324.

Nine thousand one hundred and nineteen dollars to brakeman of 35, earning \$55 a month, for loss of forearm; causing great physical pain and mental anguish. *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528.

Ten thousand dollars, to brakeman of 43, for loss of right arm; besides other serious and permanent injuries. *Galveston &c. R. Co. v. Slinkard*, 17 Tex. Civ. App. 585.

Two thousand and twenty-three dollars, to a father and husband, for the permanent impairment of the use of the forearm of his wife, and for the straining of the elbows of his daughter; rendering one stiff and crooked.

One thousand five hundred dollars was allowed to the daughter. *Gulf &c. R. Co. v. Sandifer*, (Tex. Civ. App.) 69 S. W. Rep. 461.

Three thousand five hundred dollars, for loss of arm, to strong young man of 21, earning good wages, dependent on manual labor. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

One thousand three hundred and fifty, to married woman of 69, for painful and permanent injuries to arm and wrist. *Bading v. Milwaukee Electric R. &c. Co.*, 105 Wis. 480.

**Loss of or injury to foot.**—Where the plaintiff at the time of the accident was a young man of about twenty-three, and the injury rendered amputation of three toes of his left foot necessary, confining him to the house for five months and rendering him permanently lame and disabled, so as to be unable to work for more than three-fourths of his time, a verdict for \$8,500 is not excessive. *Comersford v. The Atlantic Ave. R. Co.*, 8 Misc. 599.

Twelve thousand five hundred dollars to a small child for the loss of one foot and two toes from the other. *Fullerton v. Metropolitan Street R. Co.*, 61 App. Div. 1; s. c. aff'd, 170 N. Y. 592; See, also, *Heldmaier v. Rehor*, 90 Ill. App. 96 (\$5,500). Also *Chipman v. Union P. R. Co.*, 12 Utah, 68.

Nine thousand dollars for two painful amputations of leg and reduction of earning capacity. *Manley v. New York &c. R. Co.*, 18 Misc. 502.

Nine thousand dollars to farmer of 40, making \$500 a year, for the loss of a foot. *Georgia &c. R. Co. v. Keating*, 99 Ga. 308.

Five thousand dollars to salesman, earning \$18 a week, for permanent injury to foot. *Grossman v. Cosgrove*, 75 Ill. App. 385; s. c. aff'd, 174 Ill. 383.

Five thousand dollars to a miner, earning from \$1.65 to \$1.70 per day, for loss of his right foot. *Consolidated Coal Co. v. Oeltjen*, 91 Ill. App. 123; s. c. aff'd, 189 Ill. 85.

Two thousand dollars for painful injury to foot, slightly crippling plaintiff for life. *Bowling Green Stone Co. v. Capshaw*, (Ky.) 64 S. W. Rep. 507.

Ten thousand dollars to boy of nine for loss of foot. *Chesapeake &c. R. Co. v. Davis*, (Ky.) 58 S. W. Rep. 698; s. c. aff'd, 60 id. 14.

Two thousand five hundred dollars to girl of 7, for permanent injury to her foot. *Dublin Cotton Oil Co. v. Jarrard*, (Tex. Civ. App.) 40 S. W. Rep. 531; s. c. aff'd, 91 Tex. 289.

Eight thousand dollars to healthy young man of 18, earning \$60 a month, for loss of foot, and loss of earning capacity at his employment. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

Fifteen thousand dollars to a railroad drawbridge tender, earning \$50 per month, for loss of one foot, and crippling of the other. *Galveston &c. R. Co. v. Newport*, (Tex. Civ. App.) 65 S. W. Rep. 657.

Sixteen thousand dollars to a railway engineer of 35, earning \$175 per month, for loss of foot at the ankle. *Galveston &c. R. Co. v. Abbey*, (Tex. Civ. App.) 68 S. W. Rep. 293.

**Loss of or injury to toes.**—Where plaintiff sustained injury to his side and foot, necessitating amputation of the large toe, a verdict of \$2,000 is not excessive, although he was not disabled thereby for more than two months and a half; especially where it appears that he still suffers occasionally and is at times temporarily disabled by reason of the injuries. *Reynolds v. Van Beuren*, 10 Misc. 703.

Five thousand dollars to boy of 14, for severe mutilations of foot and loss of two toes. *Galveston &c. R. Co. v. Kief*, (Tex. Civ. App.) 58 S. W. Rep. 625.

**Loss of or injury to leg or hip.**—One thousand five dollars to boy of 18 months. *Kolfur v. Broadway Ferry*, 34 App. Div. 267; s. c. aff'd, 161 N. Y. 660.

Ten thousand dollars to boy of 10. *Ramsey v. National Contracting Co.*, 49 App. Div. 11.

Twenty-two thousand five hundred dollars to a boy of 11, suffering two amputations. *Williamson v. Brooklyn &c. R. Co.*, 53 App. Div. 399.

Eleven thousand five hundred dollars to a roundsman of 54, earning \$10 a week for the loss of a leg at the knee. *Hill v. Starin*, 65 App. Div. 361.

Four thousand dollars to street sweeper, 73 years of age, for pain, shortening of one leg, and impairment of earning capacity. *Roche v. Redington*, 125 Cal. 174.

Five thousand dollars to brakeman for injury resulting in chronic hip joint disease. *Elgin &c. R. Co. v. Esclin*, 68 Ill. App. 96.

Ten thousand dollars for brakeman, earning \$60 a month, for loss of right leg by two amputations. *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207.

Four thousand five hundred dollars for permanent enlargement of knee. *Chicago v. Fitzgerald*, 75 Ill. App. 174.

Five thousand dollars to a strong healthy woman for painful injury to hip joint. *North Chicago Street R. Co. v. Brown*, 76 Ill. App. 654.

Three thousand dollars for a cut of the leg to the bone, resulting in permanent injury. *West Chicago Street R. Co. v. Johnson*, 77 Ill. App. 142; s. c. aff'd, 180 Ill. 285.

Three thousand dollars to child of five, for painful fracture of thigh bone, resulting in a shortening of the limb. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

Five thousand dollars to boy of fourteen for compound comminuted fracture of the leg, resulting in shortening. *North Chicago Street R. Co. v. Kaspars*, 85 Ill. App. 316; s. c. aff'd, 186 Ill. 246; *Chicago v. O'Malley*, 95 id. 355.

Three thousand dollars to a factory girl of sixteen or seventeen for a broken ankle bone, burned shin, resulting in a long continued suppurated wound, which left a scar, puffiness and swelling. *Western Screw Co. v. Johnson*, 86 Ill. App. 89.

Five thousand dollars for permanent lameness from a broken leg, leaving an enlarged and stiffened ankle. *Troquois Furnace Co. v. McCrea*, 91 Ill. App. 337.

Three thousand five hundred dollars to a photographer of 68, for the permanent shrinking and stiffening of his leg, requiring the use of crutches. *Joliet R. Co. v. McPherson*, 96 Ill. App. 286; s. c. aff'd, 193 Ill. 629. See, also, *Illinois Steel Co. v. Hanson*, 97 Ill. App. 469; s. c. aff'd, 195 Ill. 106 (\$5,000).

Fifteen thousand dollars to a railroad employé for a painful injury, resulting in three amputations, the last above the knee. *Chicago &c. R. Co. v. Spurney*, 97 Ill. App. 570; s. c. aff'd, 197 Ill. 471.

Ten thousand dollars for the loss of a leg a few inches below the knee. *Pennsylvania R. Co. v. Reidy*, 99 Ill. App. 477.

Nine thousand dollars for the loss of a leg of a fireman. *L. R. Co. v. Moore*, 83 Ky. 675.

One thousand six hundred and fifty dollars, for sprained ankle causing permanent weakness, diminishing working capacity. *Chesapeake &c. R. Co. v. Friel*, (Ky.) 39 S. W. Rep. 704.

One thousand two hundred dollars for permanent shortening of leg by breakage. *Rhoades v. Farney*, 91 Me. 222.

Three thousand dollars for serious injury to ankle joint. *Christian v. Minneapolis*, 69 Minn. 530.

Twelve thousand dollars to a girl of six for loss of right leg. *Stoniker v. Great Northern R. Co.*, 76 Minn. 306.

Seven thousand five hundred dollars, to a man of 40 for loss of right leg absolutely preventing his following his vocation. *Thompson v. Great Northern R. Co.*, 79 Minn. 291.

Five thousand one hundred and sixty-six dollars for broken leg permanently affecting its use. *Mciners v. St. Louis*, 130 Mo. 274.

Ten thousand dollars to brakeman of 32, earning \$65 per month, for loss of leg, requiring three amputations, causing long and severe suffering. *Hollenbeck v. Missouri &c. R. Co.*, 141 Mo. 97.

Five thousand dollars to a robust laborer of 40, for the fracture of both bones of the leg above the ankle, producing permanent injury and preventing his working for more than a week at a time. *Pauk v. St. Louis &c. Co.*, 166 Mo. 639.

Three thousand dollars to a boy of 12 for the loss of a leg. *Ornamental Iron &c. Co. v. Green*, (Tenn.) 65 S. W. Rep. 399.

Five thousand dollars to girl of eight, for broken leg, making her a permanent cripple, and liable to continual pain. *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 37 S. W. Rep. 771.

Eight thousand dollars to railroad employé for loss of leg. *Galveston &c. R. Co. v. Dehnisch*, (Tex. Civ. App.) 57 S. W. Rep. 64.

Sixteen thousand dollars to an engineer of 41, earning \$135 to \$150 per month, for the possibly permanent crippling of one leg. *San Antonio &c. R. Co. v. Connell*, (Tex. Civ. App.) 66 S. W. Rep. 246.

Seven thousand five hundred dollars, to man, earning \$200 a month, for five to seven-inch thigh wound, requiring skin grafting and crippling him for life. *Lowry v. Mt. Adams &c. R. Co.*, 68 Fed. Rep. 827.

Three thousand dollars to seaman of 20 for loss of leg. *The Iroquois*, 113 Fed. Rep. 964.

Two thousand five hundred dollars for a broken leg and much suffering. *Newport News &c. E. Co. v. Bradford*, (Va.) 40 S. E. Rep. 900.

Eight thousand dollars to girl of eight for shortening leg four to six inches. *Lorence v. Ellenburgh*, 13 Wash. 341.

Fifteen thousand dollars to boy of nine, for loss of leg. *Roth v. Union Depot Co.*, 13 Wash. 525.

Ten thousand dollars to night yard foreman, earning \$80 per month for loss of a leg. *Verkes v. Northern P. R. Co.*, 112 Wis. 184.

**Injury about head.**—Seven thousand dollars for permanent injuries about the head, causing unconsciousness for ten or twelve days and permanent injury. *Dolan v. Sierra R. Co.*, 135 Cal. 435.

Three thousand dollars for loss of eye by an engineer. *East St. Louis v. Dougherty*, 74 Ill. App. 490.

Two thousand five hundred dollars for permanent dislocation of collar bone, preventing performance of household duties. *Calumet &c. Street R. Co. v. Jennings*, 83 Ill. App. 612.

One thousand seven hundred dollars for a burn, destroying the hearing in one ear, and impairing the sight of one, and perhaps both eyes. *Illinois &c. Steel Co. v. Sitar*, 98 Ill. App. 300.

Three thousand three hundred dollars to a machinist of 36 for the loss of one eye. *Famous Man. Co. v. Harmon*, 28 Ind. App. 117.

Two thousand five hundred to a child of eight for the loss of his left eye and incidental pain. *Van Camp Hardware &c. Co. v. O'Brien*, 28 Ind. App. 152.

Two hundred and twenty dollars for laceration of lips and gums. *Glasgow v. Gillenwaters*, (Ky.) 67 S. W. Rep. 381.

Five thousand dollars for loss of eye. *Texas &c. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

Ten thousand dollars to healthy man of 28, earning \$80 to \$95 per month, permanently incapacitated from labor by the crushing in of the skull and the destruction of an eye. *Missouri &c. R. Co. v. Parker*, 20 Tex. Civ. App. 470.

Three hundred and thirty dollars for a broken nose and loss of front teeth. *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114.

Five thousand dollars to shipwright of 48, earning \$94 to \$96 per month, for loss of hearing of one ear and impairment of his working capacity. *The Pioneer*, 78 Fed. Rep. 600.

Six thousand dollars to long-shoreman of 29, earning \$3 per day for fracture of skull, resulting in paralysis and loss of earning capacity. *The Joseph B. Thomas*, 81 Fed. Rep. 578.

Three thousand five hundred dollars to a man of 44, capable of earning \$30 per month at ordinary labor, and \$75 at his trade, for fracture of bones of face, permanent injury to nerves and to the brain, preventing the pursuit of his trade. *Nicoud v. Wagner*, 106 Wis. 67.

**Loss of or injury to several members.**—Fifteen thousand dollars for injury to limb, back and nervous system of a doctor. *Woodbury v. District of Columbia*, 5 Macky, 127.

Two thousand five hundred dollars for loss of ear, causing deafness besides continued suffering in head and arm. *West Chicago Street R. Co. v. Lups*, 74 Ill. App. 420.

Eight thousand four hundred dollars to a man of 40, for the loss of his business, his sense of smell, one foot and the hearing in one ear, besides severe suffering for many months. *Central R. Co. v. Bannister*, 96 Ill. App. 332; s. c. aff'd, 195 Ill. 48.

One thousand five hundred dollars for a running sore, severe contusion of flesh, and bone of leg; resulting in permanent lameness, coughing and spitting of blood, pain in chest and leg and impairment of earning power. *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 518.

Seven thousand five hundred dollars to a healthy woman of 36, distortion of foot, hip and shoulder. *West Chicago St. R. Co. v. Tuerk*, 90 Ill. App. 105.



Two thousand five hundred dollars to a woman for permanent lameness in ankle and arm. *Lake Street &c. R. Co. v. Burgess*, 99 Ill. App. 499.

Four thousand dollars for sprain of ankle and injury to back (possibly permanent), causing miscarriage. *Corington v. Dicht*, (Ky.) 59 S. W. Rep. 492.

Two thousand five hundred dollars to a married woman for a double fracture of arm, fracture of two ribs, resulting in traumatic pleurisy, severe contusion of knee, resulting in synovitis and abrasion of the body. *Terhune v. Koellisch*, (N. J. L.) 43 Atl. Rep. 655.

Ten thousand dollars for permanent disability to perform manual toil, from fracturing and splintering of leg, resulting in an abscess, besides injury about the head and shoulder. *Lake Shore &c. R. Co. v. Starkey*, 18 Oh. C. C. 700.

Three thousand five hundred dollars to laborer whose lifting capacity is permanently impaired. *Ferries Co. v. White*, 99 Tenn. 256; s. c., 38 L. R. A. 427.

One thousand two hundred dollars for a broken nose and a cut head. *Walton v. Chattanooga Rapid Transit Co.*, 105 Tenn. 415.

Six thousand five hundred dollars to healthy man of 32 for the permanent impairment of mind, body and earning power, besides prospective suffering. *Atchison &c. R. Co. v. Click*, (Tex. Civ. App.) 32 S. W. Rep. 226.

Five thousand dollars to newsboy for a broken leg, making it shorter than the other; broken ribs, causing a curvature of the spine, and continual pain. *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Two hundred and fifty dollars each for physical pain and for a permanent injury to thumb of a child. *Texas &c. R. Co. v. Malone*, 15 Tex. Civ. App. 56.

Four thousand six hundred dollars to a fireman, earning \$75 to \$100 per month for injuries to back, side, elbow and shoulder, causing suffering and reducing earning capacity. *International &c. R. Co. v. Elkins*, (Tex. Civ. App.) 54 S. W. Rep. 931.

Ten thousand dollars to a brakeman of 28, earning from \$100 to \$125 a month, for loss of arm, permanent impairment of vision, fracture of collar bone, and probably a broken nose, causing great pain. *Galveston &c. R. Co. v. Collins*, 24 Tex. Civ. App. 143.

One thousand dollars for loss of front teeth, injury to knee, and loss of earning capacity for six or eight months. *Richmond &c. R. Co. v. Garthright*, 92 Va. 627; s. c., 32 L. R. A. 220.

Twelve thousand dollars for fractured ankle, dislocation of hip, strain in back and pelvis, partial paralysis of the leg and hands, miscarriage, injury to kidneys. *Durham v. Spokane*, 27 Wash. 615.

**Other bodily injury.**—A woman of twenty-seven years of age was run over by defendant's horse car and recovered a verdict of \$15,000. In consequence of accident she suffered a permanent injury. The trial was conducted in such a way as to arouse neither prejudice or passion against the defendant, and while the court considered the verdict large and would have been better satisfied had a less sum been awarded, it did not feel justified in setting it aside. *Mitchell v. Broadway & Seventh Ave. R. Co.*, 70 Hun, 387, aff'g judgt for pl'ff.

Where the injuries complained of consisted of an injury to plaintiff's side and a serious injury to his foot, causing loss of sensation and a partial loss of motion, and he was confined thereby to his house for six weeks and rendered unable to do hard work, a verdict for \$2,500 is not excessive. *Fox v. The Brooklyn City R. Co.*, 7 Misc. 285.

As plaintiff was leaving a street car it started up suddenly and threw her down in such a manner that her limb was badly bruised, the bruise resulting in a sloughing off of the integuments down to the muscles, rendering it necessary to graft pieces of skin from other parts of her body. She was confined to her bed for two weeks and to the house for four or five more, and remained lame for several months, and is still unable to walk as much as usual. Held, that a verdict for \$3,000 was not excessive. *Dedmon v. Brooklyn City R. Co.*, 8 Misc. 610.

Where the result of the injury is a contraction of the fingers of plaintiff's right hand caused by a permanent impairment of the nerves, so that there is a loss of muscular power in grasping with that hand, intense pain and an expense of \$175 for medical attendance, a verdict for \$3,250 is not excessive. *Wilson v. Broadway & Seventh Ave. R. Co.*, 8 Misc. 451.

One thousand dollars, where, though not visibly injured, there was conflict of expert evidence as to nature and permanence of injuries. *Simonsen v. Brooklyn &c. R. Co.*, 53 App. Div. 478.

Six thousand dollars to a girl of eight for permanent facial disfigurement, broken collar bone, fracture of four ribs and injury to pelvis. *Bennett v. Brooklyn &c. R. Co.*, 1 App. Div. 205.

Five thousand dollars for injury in the groin and abdomen, necessitating a surgical operation of six weeks' confinement in a hospital. *Niendorff v. Manhattan R. Co.*, 4 App. Div. 46.

Twenty-five thousand dollars to a strong, healthy man of 28, earning \$3,000 a year for broken arm and fracture of five ribs. *Dieffenbach v. New York &c. R. Co.*, 5 App. Div. 91.

One thousand one hundred dollars for a broken leg, kept in a plaster of paris cast for five weeks and causing discomfort for more than a year. *Stapleton v. Newburgh*, 9 App. Div. 39.

Six thousand dollars to a roof helper permanently disabled. *Bryer v. Foerster*, 9 App. Div. 542.

Five thousand dollars to a strong, healthy man of 38, earning \$18 a week for permanent incapacity to perform ordinary work. *Mayer v. Liebmann*, 16 App. Div. 54.

Twelve thousand five hundred dollars to a cab driver of 32, earning \$12 per week, for a compound fracture of jaw and a comminuted fracture of both legs. *McDonnell v. Elias Brew. Co.*, 16 App. Div. 223.

Seven thousand five hundred dollars to a gauger, earning about \$60 a month, for an injury shortening his leg and impairing his capacity in such business. *Thomas v. Union R. Co.*, 18 App. Div. 185.

Six thousand five hundred dollars for a badly broken jaw, permanently disfiguring and painful. *Miller v. Erie R. Co.*, 34 App. Div. 217.

Three thousand seven hundred and fifty dollars to a healthy woman for painful bruises and sprains, and injuries resulting in permanent female troubles. *Rippe v. Metropolitan Street R. Co.*, 35 App. Div. 321.

Seven hundred dollars to a woman for the fracture of a rib, causing permanent injury. *Ashen v. Charlotte*, 35 App. Div. 625.

Ten thousand dollars to a girl of five for injury resulting in chronic cystitis and concussion of the spine. *McTague v. Dowst*, 51 App. Div. 206.

Two thousand five hundred dollars to one able to earn \$11 a week, for fracture of three ribs, resulting in an adhesion, reducing his earning capacity to \$9 per week. *Kriffert v. Nassau &c. R. Co.*, 51 App. Div. 301.

Three thousand five hundred dollars to a man of 65, in good health, for injuries, resulting in insomnia, hernia and partial paralysis in left leg. *McCreedy v. Staten Island &c. R. Co.*, 51 App. Div. 338.

Seven thousand two hundred and fifty dollars to man of 47 for the loss of practically all the household services of a wife of 48. *Zingrebe v. Union R. Co.*, 56 App. Div. 555.

Twelve thousand seven hundred and fifty dollars to a capable woman of 31, for a sprained back and bad sprain of right ankle and laceration of its ligaments, three fractures of left ankle and a laceration, making victim permanently crippled, and crutches necessary. *Leonard v. Brooklyn &c. R. Co.*, 57 App. Div. 125.

Four hundred dollars to a man of 70, capable of supporting himself, for loss of earning capacity. *French v. Brooklyn &c. R. Co.*, 57 App. Div. 204.

One thousand nine hundred dollars for injury causing tumors and an injury at the place from which they were removed. *Jarvis v. Metropolitan Street R. Co.*, 65 App. Div. 490.

Three thousand five hundred dollars for the shortening of left leg, loss of cartilage of hip joint and the contracting of a permanent progressive disease. *Napier v. Brooklyn &c. R. Co.*, 68 App. Div. 200.

Four thousand dollars to a young man for the permanent crippling of his limb. *Bertsch v. Metropolitan Street R. Co.*, 68 App. Div. 228.

Four thousand five hundred dollars to a man of 45, earning \$10 a week, for fracture of four ribs, which were pushed in so as to cause permanent injury and constant pain in breathing and the loss of his earning capacity. *Perry v. Metropolitan Street R. Co.*, 68 App. Div. 351.

One thousand five hundred dollars to a washerwoman of 63, supporting herself and dependent daughter by her earnings of \$8 to \$11 per week, for injury rendering her bent, decrepit and dependent on another daughter. *Sidmonds v. Brooklyn &c. R. Co.*, 69 App. Div. 471.

One thousand two hundred dollars for fracture of bones of wrist cramping the fingers, requiring plaster for five weeks and a sling for two months and impairing its strength and lifting power. *Mohr v. Wetherill*, 33 Misc. 791.

Fifteen thousand dollars for the fracture of a hip bone, resulting in its permanent stiffening and shortening, besides impairment of health in general. *Southern R. Co. v. Crowder*, 130 Ala. 256.

Two thousand five hundred dollars for an assault upon passenger by conductor. *Birmingham R. &c. Co. v. Baird*, 130 Ala. 334; s. c., 54 L. R. A. 752.

Two thousand six hundred and twenty-five dollars for permanent injury to head, skull. *St. Louis &c. R. Co. v. Baker*, 67 Ark. 531.

Two thousand dollars for impairment of hearing in one ear, sight of one eye, of nervous system, and loss of earning power. *Clare v. Sacramento Electric &c. Co.*, 122 Cal. 504.

Five thousand dollars for injury to spinal cord, likely to cause permanent paralysis. *Chicago &c. R. Co. v. Blaul*, 70 Ill. App. 518.

One thousand dollars for serious and probably permanent injuries, causing considerable expense and loss of time. *St. Louis &c. R. Co. v. Rogan*, 75 Ill. App. 35.

Ten thousand dollars for permanently impaired vision, irregular heart action and nervous prostration. *Illinois C. R. Co. v. Trent*, 75 Ill. App. 327.

Two thousand five hundred dollars for permanent injury to spine. *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; s. c., aff'd, 175 Ill. 325.

Two thousand dollars for severe external and internal injuries, under circumstances justifying punitive damages. *Illinois C. R. Co. v. Davenport*, 75 Ill. App. 579; s. c. aff'd, 177 Ill. 110.

One thousand five hundred dollars for permanent injuries to strong healthy man of 33, confined to bed for five weeks and unable to work and suffering pain up to the time of trial, a year. *Spring Valley v. Garin*, 81 Ill. App. 456; s. c. aff'd, 182 Ill. 232.

Eleven thousand dollars to a strong healthy stone cutter of 44 years, earning from \$70 to \$75 a month for a rupture nearly 23 inches in circumference tending to grow larger and result in strangulation, attended with a hernia. *Chicago v. Gillett*, 91 Ill. App. 287.

Five thousand dollars to a healthy woman of 19 for displacement of internal organs, probably permanent, though possibly remediable by a dangerous operation, causing nervous weakness. *Chicago &c. R. Co. v. McDonnell*, 91 Ill. App. 488.

Two thousand five hundred dollars where plaintiff was confined to hospital for two months, and to crutches for four years; and where her ultimate recovery was doubtful. *Chicago &c. R. Co. v. Cooney*, 95 Ill. App. 471; s. c. aff'd, 196 Ill. 466.

Two thousand dollars to a bookkeeper of 33 for serious and permanent inguinal hernia. *Chicago &c. R. Co. v. Morse*, 98 Ill. App. 662.

Fifteen thousand dollars for permanent lameness, injury to spine and nervous centers, and disability as mother and wife. *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74.

One thousand dollars where the injury is serious and liable to be permanent. *Osborn v. Jenkinson*, 100 Iowa, 432.

Twelve thousand dollars for injury to spinal column causing great pain. *Louisville &c. R. Co. v. McEwan*, (Ky.) 51 S. W. Rep. 619.

Seven hundred and fifty dollars to a boy, seriously injured by falling from trolley car, where complete recovery is doubtful. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

Thirteen thousand five hundred dollars for permanent and progressive injuries to spine, impairment of memory, insomnia, hernia, loss of virility and incontinence of urine. *Fullerton v. Fordyce*, 144 Mo. 519.

Two thousand three hundred dollars to able-bodied woman of 59, for painful injuries impairing working capacity. *Hill v. Sedalia*, 64 Mo. App. 494.

Five hundred dollars where plaintiff was thrown from his bicycle by collision with horse car under circumstances justifying punitive damages. *Nashville &c. R. Co. v. O'Byran*, 104 Tenn. 28.

Five thousand dollars to salesman of 43 earning \$190 per month and expenses, for serious injuries impairing eyesight and earning capacity. *Missouri &c. R. Co. v. Huff*, (Tex. Civ. App.) 32 S. W. Rep. 551.

Ten thousand dollars to farmer of 30 earning \$75 per month for partial paralysis of lower limbs and internal injuries. *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Ten thousand dollars for permanent bodily injuries making plaintiff a mental wreck. *International &c. R. Co. v. Dalwigh*, (Tex. Civ. App.) 56 S. W. Rep. 136.

Twenty thousand dollars to a strong healthy man of 29, earning \$90 a month, for permanent injuries making him a physical and nervous wreck. *Galveston &c. R. Co. v. Nass*, (Tex. Civ. App.) 57 S. W. Rep. 910.

See, also, *Postal Teleg. & C. Co. v. Coote*, (Tex. Civ. App.) 57 S. W. Rep. 912.

Eight thousand four hundred and thirty dollars for permanent injury to woman's spine affecting her nervous system. *Missouri & C. R. Co. v. Nail*, 24 Tex. Civ. App. 114.

Five thousand dollars to a locomotive fireman for injuries requiring a serious operation in his side and the wearing of an abdominal support; and an abscess, which, at the time of the trial, had not healed. *Galveston & C. R. Co. v. Sanders*, (Tex. Civ. App.) 65 S. W. Rep. 889.

Ten thousand dollars to a girl of five for permanent disfigurement. *Smith v. Pittsburg & C. R. Co.*, 90 Fed. Rep. 783.

Twelve thousand dollars to young man having life expectancy, of 30 years, for injury causing permanent paralysis of lower limbs. *The Homer*, 99 Fed. Rep. 795.

Five thousand dollars to a child for double fracture of leg, injury to spine and probably permanent partial paralysis of lower limbs and organs. *Roanoke v. Shull*, 97 Va. 419.

Ten thousand five hundred dollars to woman of 38, earning \$75 per month, for permanent painful internal injuries; besides the possible necessity of amputation of a leg. *Smith v. Spokane*, 16 Wash. 403.

One thousand two hundred dollars to one stunned, bruised and otherwise injured in an explosion. *Rush v. Spokane Falls & C. R. Co.*, 23 Wash. 501.

Three thousand dollars for injuries from malpractice resulting in the loss of an ovary. *Allen v. Voje* (Wis.) 89 N. W. Rep. 924.

**Loss of time and loss or impairment of earning capacity.**—Two thousand dollars to a woman earning \$1.00 to \$1.50 per day, rendered unfit to perform her ordinary duties. *Colorado City v. Smith*, (Colo. App.) 67 Pac. Rep. 909.

Five thousand dollars for permanent disability in any remunerative employment. *Brush Electric & C. Co. v. Simonsohn*, 107 Ga. 70.

Three thousand dollars to law student of 23, permanently incapacitated for working mentally or physically. Had expended \$1,465.45 in trying to effect a cure. *Salem v. Webster*, 95 Ill. App. 120; s. c. aff'd, 192 Ill. 369.

Three thousand dollars for conversion of a strong healthy woman into a physical wreck. *De Kalb v. Ashley*, 61 Ill. App. 647.

Five thousand dollars to engineer earning \$125 per month for total incapacity for four months and permanent partial disability. *Illinois C. R. Co. v. Cole*, 62 Ill. App. 480.

Fourteen thousand dollars to baggageman of 34 years of age, in good health, and earning about \$58 per month, for injuries destroying his power of walking, shortening his life, and causing constant pain. *Chicago & C. R. Co. v. Swan*, 70 Ill. App. 331.

Six thousand dollars to brakeman of 32, earning about \$90 per month, incapacitated for physical labor. *Lake Shore & C. R. Co. v. Ryan*, 70 Ill. App. 45.

One thousand five hundred dollars to woman of 41, supporting herself and children by washing, which injuries render her unable to continue for any length of time without great pain. *Joliet v. Johnson*, 71 Ill. App. 423.

Seven thousand five hundred dollars to an able-bodied man of 42, earning \$12 to \$18 a week, disabled for life. *Alton Paving & C. Co. v. Hudson*, 74 Ill. App. 612; s. c. aff'd, 176 Ill. 270.

Sixteen thousand five hundred dollars to street car conductor of 45 years, earn-

ing \$80 to \$90 a month, for total loss of earning power in any capacity. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354.

Eight hundred dollars to boarding house keeper of 42 years, confined to bed for two months and causing a continuous decline in physical ability. *Lockport v. Richards*, 81 Ill. App. 533.

One thousand four hundred and seventy-five dollars to boy of 12 for cut on leg requiring 18 stitches and causing permanent impairment of earning capacity. *Illinois Iron &c. Co. v. Weber*, 89 Ill. App. 368.

Five thousand dollars for injuries resulting in alternative of loss of earning power or serious operation of doubtful efficacy. *Swift & Co. v. O'Neill*, 88 Ill. App. 162; s. c. aff'd, 187 Ill. 337.

Nine thousand dollars to a switchman under 50, in good health and earning from \$75 to \$80 per month for total incapacity since. *Chicago &c. R. Co. v. Rathburn*, 90 Ill. App. 238.

\$6,500 to strong and healthy farmer, permanently disabled to perform his work by injury to hip and spine. *Huntington County v. Bonebrake*, 146 Ind. 311.

One thousand dollars to woman of 48, in good health, for permanent incapacity to work and for constant pain. *Frankfort v. Coleman*, 19 Ind. App. 368.

Four thousand to stenographer of 21, averaging \$70 to \$75 a month, for probably permanent injury and pain. *Bryant v. Omaha &c. R. Co.*, 98 Iowa, 483.

One thousand seven hundred and fifty dollars for permanent disability. *Pence v. Wabash R. Co.*, (Iowa) 90 N. W. Rep. 59.

Six thousand six hundred and fifty dollars for commercial traveler over 50, and earning \$100 per month, for painful injury to knee resulting in reduction, if not destruction of his earning capacity. *Baltimore &c. R. Co. v. Hausman*, (Ky.) 54 S. W. Rep. 841.

Two thousand five hundred dollars for painful injury resulting in loss of power of locomotion. *Louisville &c. R. Co. v. Cooper*, (Ky.) 65 S. W. Rep. 795.

Two thousand and thirty-seven dollars and fifty cents to mill hand for being crippled for life by hot pulp and acid. *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268.

Six thousand five hundred dollars to an engineer of 31, earning \$100 per month, disabled from following his profession and probably from all work. *Woods v. Chicago &c. R. Co.*, 108 Mich. 396.

Fourteen thousand five hundred dollars for injuries to young man leaving him permanently a deformed and practically a physical wreck. *Howe v. Minneapolis &c. R. Co.*, 62 Minn. 71; s. c., 30 L. R. A. 684.

Four thousand five hundred dollars to conductor of 37, earning \$75 per month, for permanent incapacity to follow his calling and medical expenses of \$750. *Geary v. Kansas City &c. R. Co.*, 138 Mo. 251.

Eleven thousand four hundred dollars to expressman of 27 for compound fracture of skull making him a mental and physical wreck. *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609.

Two thousand dollars for permanent impairment of ability to labor, besides great bodily pain and mental suffering. *Correll v. Wabash R. Co.*, 82 Mo. App. 180.

Seven thousand two hundred and eight dollars to a school teacher of 48, earning \$450 a year for permanent injury causing confinement to bed for three months and the use of crutches thereafter, besides physical and mental pain and medical expense. *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

Five thousand dollars to a carpenter earning \$2.50 a day for injury to spine permanently affecting his ability to work at his trade. *Wheeling &c. R. Co. v. Suhrwiar*, 20 Oh. C. C. 558.

Two thousand nine hundred and fifty dollars to mechanic for injury preventing him from following his trade, at which he earned \$1.75 a day. *Street R. Co. v. Rohrer*, 6 Oh. C. D. 706.

Four thousand dollars to comparatively young man for injury lowering his earning capacity one-half; the injury also causing suffering and permanent disfigurement. *Packet Co. v. Hobbs*, 105 Tenn. 29.

Six thousand five hundred dollars to healthy railroad employe for impairment of health and earning capacity. *Galveston &c. R. Co. v. Waldo*, (Tex. Civ. App.) 32 S. W. Rep. 783.

Eight thousand dollars to bookkeeper of 18, earning \$50 a month, for loss of foot incapacitating him at his vocation. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

Eleven thousand five hundred dollars to a brakeman of 27, earning \$60 to \$75 per month, for permanent impairment of health and loss of earning capacity and suffering of considerable physical and mental pain. *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487.

Nine thousand dollars to printer 42 years of age and earning \$60 to \$125 per month for unusually severe, permanent injuries. *Houston City Street R. Co. v. Medlenka*, 17 Tex. Civ. App. 621.

Eleven thousand dollars to railway laborer of 46, earning \$1.50 per day, for practical loss of earning capacity. *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677.

Fifteen thousand dollars to healthy man of 37, earning \$1,800 to \$2,400 a year for total disability and severe pain. *Galveston &c. R. Co. v. Scott*, 21 Tex. Civ. App. 24.

Ten thousand dollars to railway switchman of 33 or 34, earning \$1,080 a year, for loss of earning capacity by amputation of leg. *Gulf &c. R. Co. v. Warner*, 22 Tex. Civ. App. 167.

Thirteen thousand five hundred dollars to a locomotive engineer of 45 for loss of earning capacity. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

Six thousand dollars to a healthy man of 44, earning three dollars per day, for reduction of earning capacity to very light work. *The Anchoria*, 113 Fed. Rep. 982.

**Pain, suffering and disease.**—One thousand dollars as damages to a man 56 years old, previous to his injury in good health and earning \$2 per day, and rendered practically unable to perform manual work by injury, was not excessive. *Soderman v. Troy Steel & Iron Co.*, 70 Hun, 449; aff'g judg't for plff; s. c. rev'd, 145 N. Y. 427.

Five thousand dollars for fracture of knee cap, one of the bones of the heel, and an injury resulting in a tumor and permanent kidney disease resulting in loss of earning capacity. *Kochue v. New York &c. R. Co.*, 32 App. Div. 419; s. c. aff'd, 165 N. Y. 603.

Three thousand five hundred dollars to a young man earning \$25 a week for loss of time during his two months' confinement in a hospital, severe pain and doctor's bill of \$290. *Williams v. Brooklyn*, 33 App. Div. 539.

Ten thousand dollars to young man with a wife and child for injury to hip joint and kidneys breaking down his health and rendering him permanently lame. *Boyer v. Shawangunk*, 40 App. Div. 593.

Eight thousand dollars for injuries to woman resulting in three months' confinement to bed, a year and a half of bad health which would probably continue longer. *Denning v. Terminal R. Co.*, 49 App. Div. 493.

One thousand and fifty-four dollars for injuries to a farmer resulting in pain, dizziness, and nausea, causing loss of earning power for one summer and partially for another. *Smith v. Nassau &c. R. Co.*, 57 App. Div. 152.

Three thousand dollars to a woman of 29, for injuries causing two and one-half years' pain, and requiring an operation on internal organs. *Wolf v. Third Avenue &c. R. Co.*, 67 App. Div. 605.

Six thousand dollars to a stoneman for an injury causing diabetes, resulting in loss of earning power. *Eicholz v. Niagara Falls &c. Co.*, 68 App. Div. 441.

Four thousand dollars for permanent curvature of the spine and permanent paralysis of the large muscle that caps shoulder. *Degman v. Brooklyn City R. Co.*, 14 Misc. 38.

Ten thousand dollars for loss of services of wife of 38, strong and healthy, made a confirmed invalid. *Cannon v. Brooklyn City R. Co.*, 14 Misc. 400.

One thousand five hundred dollars where there has been several months' medical treatment and there is likely to be permanent spine and liver trouble. *Ferguson v. Ehret*, 14 Misc. 454.

Two thousand dollars for abandonment by a physician of a case of child delivery at midnight causing physical and mental suffering. *Lathrop v. Flood*, (Cal.) 63 Pac. Rep. 1007.

Seven thousand dollars to strong active woman of 35, where for pain and impairment of her physical and nervous system. *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181.

Three thousand five hundred dollars to a laborer of 51, earning \$1.50 a day, for pain and division of earning capacity. *Frazer v. Schrader*, 60 Ill. App. 519.

Fifteen thousand dollars to a horse car driver for pain and permanent loss of earning capacity and physical suffering. *Chicago City R. Co. v. Taylor*, 68 Ill. App. 613; s. c. aff'd, 170 Ill. 49.

Five hundred dollars to one of 80 years of age, in good health and able to walk without a cane, for bruises from which he suffered pain for four days, required a physician for 16 and was confined for 90. *Underwood v. Vail*, 69 Ill. App. 679.

One thousand dollars for injury to child resulting in imbecility. *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283.

Four thousand two hundred and fifty dollars to a young woman for continuous suffering from nervous prostration for six or seven months. *West Chicago &c. R. Co. v. Lieserovits*, 99 Ill. App. 591.

Seven thousand dollars to a child for disfigurement, loss of earning capacity and pain and suffering was an element. *Allen v. Ames &c. R. Co.*, 106 Iowa, 602.

Five thousand six hundred and sixty-seven dollars for permanent injury causing long suffering. *Louisville &c. R. Co. v. Lyon*, (Ky.) 58 S. W. Rep. 434.

One thousand five hundred dollars for pain and suffering caused by broken leg confined plaintiff to bed for many weeks. *Shidet v. Dreyfuss Co.*, 50 La. Ann. 296.

Two thousand five hundred dollars for injury resulting in septicæmia. *Miller v. St. Paul City R. Co.*, 66 Minn. 192.



Six thousand five hundred dollars to strong laborer of 46, earning \$40 to \$45 per month, for permanent disease of the nervous system, and possibly loss of earning capacity. *Olson v. Great Northern R. Co.*, 68 Minn. 155.

One thousand dollars to woman for a nervous shock causing a general impairment of health. *Herbert v. St. Paul &c. R. Co.*, 85 Minn. 341.

Six hundred dollars to a young farmer for acute peritonitis, confining him to his bed for three weeks. *Mabrey v. Cape Girardeau &c. Co.*, (Mo. App.) 69 S. W. Rep. 394.

Nineteen thousand dollars to a railroad engineer of 34, earning \$110 a month, for pain and suffering, and loss of earning capacity. *Lake Shore &c. R. Co. v. Topliff*, 18 Oh. C. C. 709.

Two thousand five hundred dollars for ejection of passenger, feeble and subject to fits, intensifying a subsequent attack of pneumonia, and done under circumstances justifying punitive damages. *Nashville Street R. Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

Four thousand dollars for injury to back, resulting in traumatic fever for several weeks and a permanent disease of the spine. *International &c. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663.

Seven hundred dollars to female passenger for mental and physical suffering, caused by conduct of fellow passenger. *Texas &c. R. Co. v. Hughes*, (Tex. Civ. App.) 41 S. W. Rep. 821.

See, also, *Texas &c. R. Co. v. Sherbert*, (Tex. Civ. App.) 42 S. W. Rep. 639 (\$500).

Fifteen thousand dollars for shattering leg bone, requiring painful operations to remove many pieces, and leaving painful wound through which other pieces worked out. *Western &c. Teleg. Co. v. Engler*, 75 Fed. Rep. 102.

Five thousand dollars for injury resulting in incurable progressive paralysis. *McMahon v. Eau Claire Waterworks Co.*, 95 Wis. 640.

**Death.**—Verdict of \$5,000 for the death of a young unmarried man of twenty-five years, leaving parents and two brothers and one sister abroad, was not set aside as excessive. *Bierbauer v. N. Y. C. & H. R. R. Co.*, 15 Hun, 559, aff'g judg't for pl'ff.

Daughter was killed by the defendant's negligence; she was thirty-six years old and had contributed \$300 to \$400 per year for several years towards the support of her father, who was in infirm health. Her next of kin and heirs-at-law, were her father and his wife, aged 58, who were both without property. At the time of her death she was receiving \$8 or \$9 per week and had been for some years. Four thousand dollars was not an excessive verdict. *Boules v. Rome, W. & O. R. Co.*, 46 Hun, 324; aff'g judg't for pl'ff.

Five thousand dollars for death of a healthy woman of 63, who performed all the duties of a household, leaving husband and adult daughters. *Lyons v. Second Ave. R. Co.*, 89 Hun, 374.

One thousand five hundred dollars to woman of 72, leaving two children. *Walls v. Rochester R. Co.*, 92 Hun, 581.

One thousand three hundred and twenty-five dollars to a woman of 63, for being deprived of the support received from her son, and left dependent on charity of friends. *Dy Puy v. Cook*, 90 Hun, 43.

Three thousand dollars for the death of a sober industrious unmarried man of

26, earning \$400 a year, not contributing to support of relatives. *Kane v. Mitchell Co.*, 90 Hun, 65.

Three thousand five hundred dollars for the death of a bright, healthy boy of seven. *Heintz v. Brooklyn &c. R. Co.*, 91 Hun, 640.

Three thousand dollars for the benefit of a dependent man of 82, for death of his only daughter who comfortably supported him. *Pureell v. Lauer*, 14 App. Div. 33.

Eight hundred dollars for the death of a woman of 68, not in good health, dependent upon her children, with whom she lived, but capable of rendering material pecuniary aid. *Phalen v. Rochester R. Co.*, 31 App. Div. 448.

Nine thousand dollars for the death of one 43 years of age, in good health and earning \$1,250 a year, leaving five dependent children, ranging from a 10-year-old boy to a 21-year-old girl. *Wallace v. Third Avenue R. Co.*, 36 App. Div. 57.

Five thousand dollars for the death of a meat market employé of 19, unmarried, leaving father. *Twist v. Rochester*, 37 App. Div. 307.

Ten thousand dollars to a widow for death of her husband 61 years of age, in good health, earning \$1,070 per year. *Beecher v. Long Island R. Co.*, 53 App. Div. 324.

Seven thousand five hundred dollars for the death of a boy of 16, who was of valuable assistance in his father's business, which he was about to enter. *Morris v. Metropolitan Street R. Co.*, 63 App. Div. 78; s. c. aff'd, 170 N. Y. 592.

Fifteen thousand dollars for the death of a healthy working man of 36, leaving wife and seven children. *Reilly v. Brooklyn &c. R. Co.*, 65 App. Div. 453.

Six thousand dollars to widow and son for milk wagon driver. *Racine v. Erie R. Co.*, 69 App. Div. 437.

Five thousand dollars for a robust farmer of 50, expending \$1,000 a year in the maintenance of his household. *Buckley v. New York &c. R. Co.*, 73 App. Div. 587.

Twenty-five thousand dollars for a man of 62, having a life expectancy of 13 years, who had accumulated considerable property and spent \$5,000 a year on his family. *Sternfels v. Metropolitan Street R. Co.*, 73 App. Div. 494.

Five hundred dollars for pain and suffering, causing death and \$2,500 for children, where deceased was earning \$60 per month. *St. Louis &c. R. Co. v. McCain*, 67 Ark. 377.

Eight thousand dollars to invalid widow, with daughter, for death of her husband. *Cook v. Clay Street R. Co.*, 60 Cal. 604.

Seven thousand dollars to a widow and \$2,500 to each of four children for the loss of a father and the value of his mental and moral training to such children. *Galveston &c. R. Co. v. Davis*, (Tex. Civ. App.) 65 S. W. Rep. 217.

Two thousand five hundred dollars for death of a girl of 12, leaving father, brothers and sisters. *Baltimore &c. R. Co. v. Then*, 159 Ill. 535; aff'g s. c., 59 Ill. App. 561.

Three thousand dollars to adult sons for death of mother with whom they lived. *Chicago &c. R. Co. v. Placek*, 62 Ill. App. 375.

One thousand dollars for husband of 42, a farmer, the value of whose support amounted to from \$200 to \$300 a year. *Brown v. Butler*, 66 Ill. App. 86.

Five thousand dollars for death of a teamster of 27 years, leaving a wife and three children. *Louisville &c. R. Co. v. Patchen*, 66 Ill. App. 206.

Three thousand dollars to mother for death of a boy of five. *West Chicago Street R. Co. v. Waukata*, 68 Ill. App. 481; s. c. aff'd, 169 Ill. 17.

Two thousand five hundred dollars for a son of 21, who gave \$18 a week to father. *Webster Man. Co. v. Mulrany*, 68 Ill. App. 607; s. c. aff'd, 168 Ill. 311.

Five thousand dollars to widow and four children, eldest 14, youngest 3, dependent upon support of deceased. *Chicago Edison Co. v. Moren*, 86 Ill. App. 152; s. c. aff'd, 185 Ill. 575.

Five thousand dollars for employê of foundry, middle-aged, strong and healthy and earning \$3.50 per day, leaving wife and two children. *Economy Light &c. Co. v. Stephen*, 87 Ill. App. 220; s. c. aff'd, 187 Ill. 137.

Two thousand five hundred dollars to dependent son for the death of father; strong, healthy, in his prime, and able to earn good wages. *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13.

Five thousand dollars for boy of seven, leaving father, mother, and eight brothers and sister. *Cicero &c. R. Co. v. Boyd*, 95 Ill. App. 510.

Five thousand dollars for a postal clerk of 50, earning \$1,150, leaving a widow and two sons. *Mulott v. Shimer*, 153 Ind. 35.

Four thousand five hundred dollars for brakeman, 34 years, earning \$60 to \$75 a month and leaving a dependent mother. *St. Louis &c. R. Co. v. French*, 56 Kan. 584.

Ten thousand dollars for a brakeman, where negligence was willful. *L. R. Co. v. Brooks*, 83 Ky. 129.

Six thousand nine hundred and eight dollars and ninety-eight cents for father, with expectancy of 26 years, earning \$630 a year. *Louisville &c. R. Co. v. Graham*, 98 Ky. 688.

Twelve thousand dollars for willfully causing death. *Union Warehouse Co. v. Prewitt*, (Ky.) 50 S. W. Rep. 964.

Nine thousand dollars for a man of 32, of good habits and of good business ability. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Five hundred dollars for a man of 68 or 70, able to work. *Chesapeake &c. R. Co. v. Dupce*, (Ky.) 67 S. W. Rep. 15.

Two thousand five hundred dollars to father for son of good health and habits, and earning \$60 to \$70 per month. *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

Two thousand four hundred dollars for boy of 17, earning \$4 per day as a compositor, his father being poor and having four dependent children. *Post v. Olmsted*, 47 Neb. 893.

Two thousand eight hundred and fifty dollars for son of 10. *Omaha v. Richards*, 49 Neb. 244.

One thousand five hundred and twenty-five dollars to a mother for the loss of a boy of seven. *Omaha v. Bowman*, (Neb.) 88 N. W. Rep. 521.

One thousand dollars for boy of five. *Ashtabula Rapid-Transit Co. v. Dagenbach*, 11 Oh. C. D. 307.

Five thousand dollars reduced to \$3,500, to father for death of son of 22, one of eight children not contributing to his support. *Flaherty v. New York &c. R. Co.*, 19 R. I. 604.

Seven thousand five hundred dollars for son of 17, of excellent character and industrious habits. *Southern Queen Man. Co. v. Morris*, 105 Tenn. 654.

Sixteen thousand dollars to widow and children for an engineer. *San Antonio &c. R. Co. v. Harding*, 11 Tex. Civ. App. 497.

Eleven thousand dollars to wife and two children for death of locomotive hostler of 47, in good health and earning \$60 per month. *Tyler &c. R. Co. v. McMahon*, (Tex. Civ. App.) 34 S. W. Rep. 796.

Fourteen thousand dollars to mother, wife and child for death of fireman in good health, with expectancy of 35 years, earning \$80 per month. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

Five thousand dollars for death of healthy young man, supporting a family: fact that he was temporarily out of work immaterial. *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229.

Ten thousand dollars for brakeman of 43, of excellent habits and earning \$60 per month, which supported family. *Missouri &c. R. Co. v. Ransom*, 15 Tex. Civ. App. 689.

Two thousand dollars to a mother of 69, for a son, having an expectancy of 36 years, who contributed to her support \$20 to \$30 per month. *Gulf &c. R. Co. v. Royall*, 18 Tex. Civ. App. 86.

Two thousand dollars to parent for death of a seven-year-old son. *Missouri &c. R. Co. v. Gilmore*, (Tex. Civ. App.) 53 S. W. Rep. 61.

Eight hundred and seventy dollars to father and mother of 68 and 67 respectively for death of son of 35, contributing to their support. *Texas &c. R. Co. v. Spencer*, (Tex. Civ. App.) 52 S. W. Rep. 562.

Five thousand dollars to widow and same to boy of 10, by a divorced wife for death of father of 31, healthy and industrious, and earning \$60 per month. *Gulf &c. R. Co. v. Delaney*, 22 Tex. Civ. App. 427.

Ten thousand dollars for death of husband and father, a farmer of 39. *Missouri &c. R. Co. v. Ferris*, 23 Tex. Civ. App. 215.

One thousand seven hundred and seventy-seven dollars for death of son of eight. *Citizens' R. Co. v. Washington*, 24 Tex. Civ. App. 422.

Three thousand seven hundred and fifty dollars to parents for death of bright, healthy, industrious boy of seven. *Taylor &c. R. Co. v. Warner*, (Tex. Civ. App.) 60 S. W. Rep. 442.

Twenty-five hundred dollars for death of boy seven years old. *Johnson v. Chicago &c. Co.*, 64 Wis. 425.

Two thousand dollars for the killing of a boy eighteen months old. *Schrier v. Milwaukee &c. R. Co.*, 65 Wis. 457.

Two thousand dollars for death of unskilled laborer of fifty-five years. *Mulcaire v. Janesville*, 67 Wis. 24.

**Miscellaneous injuries.**—Fifteen thousand dollars for severe injuries from a fall caused by a shock of electricity. *Tedford v. Los Angeles E. Co.*, 134 Cal. 76; S. C., 54 L. R. A. 85.

Four hundred and fifty dollars for wrongful expulsion of passenger held up to ridicule as trying to steal a ride. *Southern R. Co. v. Wood*, 114 Ga. 110; S. C., 55 L. R. A. 536.

Eight hundred and fifty dollars for the bite of a vicious dog, confining plaintiff to the house for two months. *Chicago &c. R. Co. v. Kuckkuck*, 98 Ill. App. 252.

Two hundred and sixty dollars to a passenger wrongfully expelled, for exposure to rain and ridicule of employes. *Louisville &c. R. Co. v. Keller*, (Ky.) 47 S. W. Rep. 1072.

Five hundred dollars for ejection from train four or five miles from a station at night and in a dangerous locality, while in a weak physical condition. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Six hundred and fifty dollars to a passenger wrongfully ejected in presence of a crowd, and compelled to walk five miles. *Chamberlain v. Lake Shore &c. R. Co.*, 122 Mich. 477.

One hundred and fifty dollars to passenger wrongfully expelled with insulting language, and compelled to walk 10 miles on a cold night. *Gisleson v. Minneapolis &c. R. Co.*, 85 Minn. 329.

Two thousand dollars to man of 70, for painful permanent injury to arm and shoulder, not interfering with his occupation. *Fleming v. Kansas &c. R. Co.*, 89 Mo. App. 129.

Verdict not excessive because larger than the value of an annuity, yielding deceased's income during his expectancy. *Lake Shore &c. R. Co. v. Schultz*, 19 Oh. C. C. 639.

Ten thousand dollars on retrial after two years, excessive, because only \$5,000 was allowed on first trial before injuries had fully developed. *Wheeling &c. R. Co. v. Suhrwiar*, 22 Oh. C. C. 560.

One thousand five hundred and twenty-nine dollars and ninety-two cents for 50 acres of meadow land burned. *Gulf &c. R. Co. v. Jagoe*, (Tex. Civ. App.) 32 S. W. Rep. 1061.

One hundred dollars to passenger ejected without force and taken back when mistake discovered. *Gulf &c. R. Co. v. Burnett*, (Tex. Civ. App.) 34 S. W. Rep. 449.

One thousand dollars for an ejection by carrier of a woman compelled to walk two miles in a storm to reach her destination and contracting bronchitis as a result. *Texas &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 34 S. W. Rep. 1057.

One thousand two hundred and fifty dollars for ejection with violence and insult in presence of a crowd. *Gulf &c. R. Co. v. Moody*, (Tex. Civ. App.) 39 S. W. Rep. 987.

See, also, *Atchison &c. R. Co. v. Cumiffe*, (Tex. Civ. App.) 57 S. W. Rep. 692 (\$500).

Fifty dollars for being left behind while buying a ticket, pursuant to conductor's directions and compelled to walk 16 miles, resulting in suffering from a physical infirmity. *St. Louis &c. R. Co. v. Germany*, (Tex. Civ. App.) 56 S. W. Rep. 586.

One thousand two hundred dollars for the burning of pasture, resulting in a reduction monthly of rental value from \$60 to \$25. *San Antonio &c. R. Co. v. Hise*, (Tex. Civ. App.) 59 S. W. Rep. 564.

Two hundred and twenty-five dollars for improvements costing \$400 and shown not to have deteriorated much, though no witness testified that they were worth more than \$150. *Smith v. Frio County*, (Tex. Civ. App.) 66 S. W. Rep. 711.

#### (b). VERDICTS INADEQUATE.

One hundred and fifty dollars grossly inadequate for the death of a wife strong and healthy, and of help in her husband's milk business, besides attending to her household duties, plaintiff having already paid \$120 for funeral expenses. *Meyer v. Hart*, 23 App. Div. 131.

Verdict for nominal damages for injuries, causing unconsciousness, nervous-

ness, two weeks' confinement, and medical expense of \$150, set aside. *De La Torre v. Metropolitan Street R. Co.*, 48 App. Div. 126.

So of such a verdict for death of healthy, well educated son of 12. *Morris v. Metropolitan Street R. Co.*, 51 App. Div. 512.

One thousand dollars inadequate for loss of leg reducing earning capacity from \$20 to \$5 per month. *Eberhardt v. Metropolitan Street R. Co.*, 69 App. Div. 560.

Six hundred dollars to parent for the death of a child under six, held not inadequate. *Terhune v. Joseph W. Cody & Co.*, 72 App. Div. 1.

Six hundred dollars not inadequate for death of a bachelor son of 22, living with parents and giving them his wages of \$9 a week. *Swanton v. King*, 72 App. Div. 578.

Three hundred dollars to a mother for the death of a boy of six set aside as grossly inadequate, where special damage amounted to \$180. *Willson v. Metropolitan Street R. Co.*, 74 N. Y. Supp. 774.

Five dollars for a lacerated scalp. *Lerinson v. Bernheimer*, 31 Misc. 26.

Nominal damages, for injury, requiring amputation of thumb at a cost of \$35. *Aiello v. Aaron*, 33 Misc. 580.

Six cents for fracture of knee cap, causing great pain and permanent injury, and loss of 120 days' time, at \$1.50 per day. *Sloane v. McCauley*, 33 Misc. 652.

Two hundred dollars for son of six held grossly inadequate. *Gubbitosi v. Rothschilds*, 37 Misc. 99.

One cent for a dog, the value of which no one estimated at less than \$250. *Henderson v. Louisville & E. R. Co.*, (Ky.) 68 S. W. Rep. 645.

Nominal damages for broken skull, three weeks confinement with pain and suffering. *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257.

One dollar for substantial damage to person and property. *Carpenter v. Red Cloud*, (Neb.) 89 N. W. Rep. 637.

One thousand dollars for permanent injuries besides special damage of \$985. *McNeil v. Lyons*, 20 R. I. 672.

Verdict for amount less than the damage testified to by each and all of the witnesses, set aside. *Nadiny v. Denison & Co. R. Co.*, 22 Tex. Civ. App. 173.

See, also, *May v. Hahn*, 22 Tex. Civ. App. 365.

### (c). VERDICTS EXCESSIVE.

**Loss of or injury to hand.**—Eight thousand dollars was excessive where plaintiff, a cooper and teamster, had lost his left hand. Reduced to \$6,000. *Murray v. H. R. R. Co.*, 47 Barb. 200.

Eight thousand dollars loss of imperfect left hand. *Pittsburg & Co. R. Co. v. Blair*, 11 Oh. C. C. 579.

**Loss of or injury to fingers.**—Eight thousand dollars to a man of 43 years for loss of the middle finger, causing the stiffening of the joints and partial loss of the use of the first and third fingers. Reduced to \$5,000. *Borgeson v. United States Projectile Co.*, 2 App. Div. 57.

Four thousand two hundred and fifty dollars for the loss of three fingers, a portion of a fourth and the outside of the hand. Reduced to \$2,500. *Sawyer v. Rumford Falls Paper Co.*, 90 Me. 354.

One thousand eight hundred dollars to a boy of eight or nine, for the amputation of the two middle fingers of left hand near first joint. *Gahagan v. Aermotor Co.*, 67 Minn. 252.

Three thousand five hundred dollars to young man of 20 for loss of first finger of left hand, permanent injury to joints of second and injury to joints of thumb probably not permanent. Reduced to \$2,500. *Stiller v. Bohn Man. Co.*, 80 Minn. 1.

**Loss of or injury to arm.**—Four thousand five hundred dollars for small fracture of upper arm bone and rupture of ligaments of shoulder, resulting in stiffness of the joint. Reduced to \$2,000. *Joly v. New York &c. R. Co.*, 48 App. Div. 624.

The plaintiff was knocked down and run over and her right arm fractured in two places and she was laid up for nine weeks. It was claimed that her injuries were likely to be permanent, \$1,500 was held to be excessive and verdict reversed unless plaintiff stipulated to reduce it to \$500. *Diblin v. Murphy*, 3 Sandf. 19.

Twenty thousand dollars to man of 20, earning \$1 a day, for loss of right arm, subsequently employed at \$35 a month. *Chicago &c. R. Co. v. Kane*, 70 Ill. App. 676.

Thirteen thousand dollars to a man of 34, earning \$1 per day for the loss of an arm. *Louisville &c. R. Co. v. Lowe*, (Ky.) 66 S. W. Rep. 736.

Three thousand dollars for fracture of left arm, though the injury is permanent, and caused a considerable expense and loss of time. Reduced to \$2,500. *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36.

**Loss of or injury to toes.**—Two thousand five hundred dollars for loss of first joint on second and third toes of right foot and the severing of the under tendon of the big toe. Should be reduced to \$1,500. *Forske v. Commonwealth &c. Co.*, (Minn.) 90 N. W. Rep. 532.

**Loss of or injury to foot.**—In an action by a brakeman against his employer for negligence the court reduced the damages from \$13,500 to \$7,000, where it appeared he was fifty-nine years old and unmarried; that the injury, which was to his leg, healed in six months, but the leg was permanently shortened; that his physician's bill was nearly \$1,000. *Coppins v. N. Y. C. & H. R. R. Co.*, 48 Hun, 292.

Verdict for \$9,000 for the loss of a leg by a mason's tender, whose wages were \$2 a day, was excessive. *Morris v. Eighth Ave. R. Co.*, 68 Hun. 39.

Four thousand five hundred dollars to one whose legs were badly bruised, but no bones broken or any deformity or disfigurement aside from a scar. Reduced to \$2,000. *Meade v. Brooklyn &c. R. Co.*, 3 App. Div. 432.

Twenty-five thousand dollars to a man of 28, earning \$12 a week, for an injury requiring the amputation of a leg. Reduced to \$15,000. *Tully v. New York &c. Ss. Co.*, 10 App. Div. 463; aff'd, 162 N. Y. 614.

Fifteen thousand dollars to a dressmaker of 52, earning \$2 per day, for fracture of upper extremity of left thigh bone, constituting a permanent injury likely to impair her business capacity. Reduced to \$10,000. *Coshead v. Johnson*, 20 App. Div. 605; s. c. aff'd, 162 N. Y. 640.

Eight thousand dollars to a bachelor of 50, earning \$2.75, for contusion of back, and injury to knees. Reduced to \$6,000. *Campbell v. North American Co.*, 22 App. Div. 414.

Seven thousand dollars to a carpet sewer, earning \$8 per week, for fracture of

right fibula and a sprain of the ankle, attended with the swelling and discoloration, and giving rise to ankylosis. Reduced to \$5,000. *Downer v. Metropolitan Street R. Co.*, 54 App. Div. 315.

Eight thousand dollars was reduced to \$4,000 for injury to leg and knee not resulting in loss of use. *Austin v. Bartlett*, 67 App. Div. 312.

Six thousand dollars to keeper of a grocery store and livery stable; his leg was broken, causing curvature and permanent shortening and deformity. Reduced to \$4,000. *Clapp v. H. R. R. Co.*, 19 Barb. 461.

Plaintiff's knee-pan was broken, causing stiffness in the joint which, her physician said, would probably last two years but might possibly be permanent. She was three months in the hospital and underwent great pain, afterwards she was unable to return to her occupation of coloring photographs because it was painful for her to sit any length of time; \$6,000 was held excessive. *Langley v. Sixth Ave. R. Co.*, 48 N. Y. Super Ct. 542.

Five thousand dollars to a man of 67 for broken leg; reduced to \$2,500. *North Chicago Street R. Co. v. Wiswell*, 68 Ill. App. 443; s. c. aff'd, 168 Ill. 613.

Six hundred dollars to a strong, healthy woman for painful injury to knee, requiring use of plaster cast and confining her to the house. *Belvidere v. Crichton*, 81 Ill. App. 595.

Five thousand dollars to farmer for an incomplete fracture of the left leg bone, causing two months' confinement. *Chicago &c. R. Co. v. Stickman*, 95 Ill. App. 4.

Fourteen thousand five hundred dollars to a brakeman of 39 for loss of leg six inches below the knee; reduced to \$8,000. *Wimber v. Iowa C. R. Co.*, 114 Iowa. 551.

Ten thousand dollars for brakeman's leg, in the absence of evidence of his earning power, &c. *Missouri R. Co. v. Dwyer*, 36 Kas. 58.

Seventeen thousand dollars to conductor of electric car, of 23, earning \$480 a year for loss of leg below knee. Reduced to \$10,000. *Stucke v. Orleans R. Co.*, 50 La. Ann. 173.

Eight thousand five hundred dollars for loss of leg. Reduced to \$6,000. *Conway v. New Orleans &c. R. Co.*, 51 La. Ann. 146.

Ten thousand dollars to a brakeman. Reduced to \$6,000. *Bell v. Globe Lumber Co.*, 107 La. 725.

Two thousand dollars for sprained ankle. Reduced to \$1,250. *Bennett v. Backus Lumber Co.*, 77 Minn. 198.

Twenty-five thousand dollars to switchman. Reduced to \$18,000. *Galveston &c. R. Co. v. Bernard*, (Tex. Civ. App.) 57 S. W. Rep. 686.

Seven hundred dollars to boy of 15 for bruises of the hip, causing temporary lameness but no disease. Reduced to \$400. *Durose v. St. Paul City R. Co.*, 80 Minn. 512.

Fifteen thousand dollars to a boy of 14 for a leg crushed, shortened, deformed but used in walking by padding. Reduced to \$10,000. *Chitty v. St. Louis &c. R. Co.*, 166 Mo. 435.

Two thousand eight hundred dollars for simple fracture of the small bones of the ankle, not affecting earning capacity, after \$1,700 was held excessive on former appeal. *Collins v. Janesville*, 111 Wis. 348.

**Injury about head.**—Seven thousand dollars reduced to \$3,000 for permanent facial scars from burning and from nervousness. *Kilmer v. Reckitt & Sons*, 77 N. Y. Supp. 395.



Five thousand dollars, reduced to \$2,500, where permanent brain trouble was claimed. *Anderson v. Man. R. Co.*, 1 Misc. 504.

Thirty-seven thousand five hundred dollars for loss of eyesight. *Deep Min. &c. Co. v. Fitzgerald*, 21 Colo. 533; *De La Verne &c. Mach. Co. v. Stahl*, (Tex. Civ. App.) 60 S. W. Rep. 319 (\$8,000 to man of 24).

Fifteen thousand dollars for loss of sight of one eye, reducing earning capacity from \$1.60 per day to \$15 or \$20 per month. Reduced to \$10,000. *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401; s. c., 48 L. R. A. 649.

**Loss of or injury to several members.**—Where it was shown that the plaintiff's leg was injured to the extent requiring its amputation about eight inches below the knee, and that his right arm, and leg above where it was amputated, were cut, and that his knee joint stiffened, and he was suffering pain from his injuries down to the time of the trial, the court held, that the plaintiff, who had formerly been a brakeman on a railway was not in the human estimation for damages entitled to a verdict of \$16,000, and reduced the same to \$9,000. *Bailey v. Rome &c. R. Co.*, 55 Hun, 509.

Twenty-five thousand dollars to a workman for loss of his right arm, half way up to the elbow. Reduced to \$15,000 and again to \$10,000. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307.

One thousand dollars to dressmaker for sprained ankle. Reduced to \$500. *Corcoran v. Ulster &c. R. Co.*, 40 N. Y. Supp. 1117.

Forty thousand dollars to child of two and one-half, for loss of both hands and one foot. *St. Louis &c. R. Co. v. Warren*, 65 Ark. 619.

Two thousand five hundred dollars for sprained wrist, black and blue marks on one thumb, back and sides, and resulting pain. *Lake Street El. R. Co. v. Johnson*, 70 Ill. App. 413.

Seventeen thousand five hundred dollars, compensatory damages, to a woman of 35 for fracture of skull and hip and impairment of health. *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42.

Five thousand five hundred and twenty-five dollars, where a woman had been injured by the upsetting of a carriage, and part of her eye, and of the flesh about it, torn away and her sight permanently injured, and she was disfigured and her body otherwise bruised. *Gleason v. Brennan*, 50 Me. 222.

Four thousand dollars for dislocation of shoulder, cut in the ear, temporarily affecting hearing, and confinement to bed for four weeks. Reduced to \$2,500. *Lammers v. Great Northern R. Co.*, 82 Minn. 120.

Eight thousand dollars to switchman for loss of one foot and four toes of the other. Reduced to \$4,000. *Wood v. Louisville &c. R. Co.*, 88 Fed. Rep. 44.

Twenty thousand dollars to a boy of 16, earning \$1 a day for the loss of one arm and the permanent impairment of the other. Reduced to \$12,000. *Renne v. United States Leather Co.*, 197 Wis. 305.

**Other bodily injury.**—Twenty-five thousand dollars for loss of use of arm, painful operation and impairment of health. Reduced to \$15,000. *De Wardner v. Metropolitan Street R. Co.*, 1 App. Div. 240.

Twenty-eight thousand five hundred dollars for injuries resulting in premature confinement, and paralysis of side. *Fairclay v. Brooklyn &c. R. Co.*, 64 App. Div. 418.

One thousand five hundred dollars for facial bruises, discoloration, and a slight jar from a fall. *Dixon v. Scott*, 74 Ill. App. 277.

Fifteen thousand dollars to a stenographer, earning \$4 per week for severe nervous shock. Within a year she was able to ride a bicycle three miles. *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178.

Six thousand dollars for injuries, not permanent. Reduced to \$3,000. *Chicago &c. R. Co. v. Murphy*, 99 Ill. App. 126.

Nine thousand dollars to a woman for the permanent dislocation and probable injury to internal organs. *Chicago v. Doolan*, 99 Ill. App. 143.

Ten thousand dollars where plaintiff is confined for but three weeks, and the only evidence of permanency, is a slight stiffness. *Louisville &c. R. Co. v. Mattingly*, (Ky.) 38 S. W. Rep. 686.

Nine thousand dollars as compensation for damages where plaintiff recovered from effects of a fall within three weeks. *Covington &c. Bridge Co. v. Goodnight*, (Ky.) 60 S. W. Rep. 415.

Three hundred and fifty dollars for some contusions and lacerations but no broken bones, sprains or loss of time from business. Reduced to \$200. *Weiner v. Minneapolis Street R. Co.*, 80 Minn. 312.

Twenty thousand dollars to a married woman of 32 for internal complications which though painful are curable. Reduced to \$7,500. *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 351.

Eight thousand dollars to a machinist of 29, earning \$47 to \$75 per month for fractured skull from fall of 30 feet, resulting in injuries as to permanency of which there was conflict of evidence. Reduced to \$6,000. *McKenna v. North Hudson Count R. Co.*, 64 N. J. L. 106.

One thousand seven hundred dollars though reduced from \$2,500, to girl of 13, for broken leg, fully healed. *Collins v. Janesville*, 107 Wis. 436.

**Loss of time and loss or impairment of earning capacity.**—Eight thousand dollars to a strong, healthy switchman 32 years old, for a rupture, reducing earning capacity by \$25 per month, reduced to \$5,000. *Bosworth v. Standard Oil Co.*, 92 Hun, 485.

Four thousand three hundred dollars to a boy for painful injuries, curable in three or four years, reducing earning capacity one half. Reduced to \$3,300. *Loritt v. Nassau &c. R. Co.*, 14 App. Div. 83.

Fifteen thousand dollars to a school teacher for permanent impairment of health and earning capacity and loss of position as superintendent. Reduced to \$7,000. *Kraemer v. Metropolitan Street R. Co.*, 51 App. Div. 475.

Five thousand dollars for injuries not affecting earning capacity. Reduced to \$2,500. *Kaplan v. Metropolitan Street R. Co.*, 52 App. Div. 296.

See, also, *Sullivan v. Metropolitan Street R. Co.*, 54 App. Div. 632.

Six thousand five hundred dollars to fireman for permanent curvature of the spine not affecting earning capacity for more than two months. Reduced to \$4,000. *Mullady v. Brooklyn &c. R. Co.*, 65 App. Div. 549.

See, also, *Shortsleeves v. New York &c. R. Co.*, 40 N. Y. Supp. 1105. One thousand seven hundred and twenty-five dollars under similar circumstances. *Louisville &c. R. Co. v. Banks*, (Ky.) 33 S. W. Rep. 627.

Fifteen thousand dollars to one earning \$12 per week, for permanent impairment of use of leg. Reduced to \$8,000. *Chapman v. Atlantic Arc. R. Co.*, 14 Misc. 404.

Seven thousand dollars, reduced to \$3,500 to a woman of 59, earning \$12 to \$15 per week, nursing, whose injuries, except temporarily, were wholly of the

subjective sort. *Chicago &c. R. Co. v. Anderson*, 182 Ill. 298; aff'g s. c., 80 Ill. App. 71.

Ten thousand dollars for aggravation of infirmities causing suffering and incapacity to work, though not incurable. Reduced to \$5,000. *Missouri &c. R. Co. v. Turley*, (Ind. T.) 37 S. W. Rep. 52.

Eight hundred dollars, where plaintiff was struck on the head by a piece of ice and laid up only three weeks, though judgment was entered on voluntary remittance of half. A new trial was ordered. *Atchison &c. R. Co. v. Plunkett*, 61 Kan. 297.

See, also, *Forhman v. Consolidated Traction Co.*, (N. J. L.) 46 Atl. Rep. 783.

Six thousand three hundred dollars to a farmer of 24, where for laceration of heel and loss of year's time. Reduced to \$5,000. *Fremont &c. R. Co. v. French*, 48 Neb. 638.

**Pain, suffering and disease.**—Ten thousand dollars for pain and suffering, not permanent. Reduced to \$4,000. *Becker v. Albany &c. R. Co.*, 35 App. Div. 46.

Seven thousand five hundred dollars for confinement for three weeks and nervousness of probably a year's duration. Reduced to \$3,500. *Henn v. Long Island R. Co.*, 51 App. Div. 292.

Fifteen thousand dollars, reduced to \$7,500 for injury attended with bruises and pains, and resulting in nervous disorder, impaired knee and kidney trouble. *Quirk v. Siegel-Cooper Co.*, 26 Misc. 244.

Four thousand dollars for pain and suffering where the interval of conscious suffering before death was momentary. *St. Louis &c. R. Co. v. Dawson*, 68 Ark. 1. See *The Robert Graham Dun*, 70 Fed. Rep. 270 (\$3,500, reduced to \$350.)

Four thousand dollars to woman of 75 for broken ankle, causing constant pain and requiring permanent use of crutches. Reduced to \$2,500. *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; s. c., 36 L. R. A. 586.

Ten thousand dollars to a woman of advanced age, though her injuries are painful and probably permanent. Reduced to \$7,000. *Taylor v. Chicago &c. R. Co.*, 103 Wis. 27.

**Death.**—Evidence that the deceased was unmarried, aged thirty-three, of good habits and industrious; that he lived on his father's farm and had since boyhood, and that he had two brothers living with the father on the farm—not a large farm; that deceased drove a team; age of father, &c., not appearing; held, not to be enough to sustain verdict for \$4,000. *Carpenter v. B. & N. Y. & P. R. Co.*, 38 Hun. 116, rev'g judg't for pl'ff.

Six thousand dollars for daughter of 19, earning and giving to mother's family \$7 a week. Father was 61. Reduced to \$4,000. *Secley v. New York &c. R. Co.*, 8 App. Div. 402.

Four thousand dollars for daughter of 16, keeping house for her father, of 55. Reduced to \$2,500. *Hinnihan v. Lake Ontario &c. Co.*, 8 App. Div. 509.

Ten thousand dollars, a man 53 years, earning \$2.50 per day. Reduced to \$7,500. *Taylor v. Long Island R. Co.*, 16 App. Div. 1.

Fifteen thousand dollars for a locomotive fireman of 34, earning \$2 a day, leaving a widow of 32, a son of 10 and a daughter of 8. *Cooper v. New York &c. R. Co.*, 25 App. Div. 383.

Six thousand dollars for a son of eight and a half. Reduced to \$3,000. *Schaffer v. Baker T. Co.*, 29 App. Div. 459.

Seven thousand dollars was excessive for a street sweeper. Reduced to \$5,000. *O'Connor v. Union R. Co.*, 67 App. Div. 99.

Twelve thousand dollars for a boy of 12, earning three dollars per week, which was given to his mother. Reduced to \$7,500. *McDonald v. Metropolitan Street R. Co.*, 36 Misc. 703.

Six thousand dollars for a boy of four and one-half. *Fox v. Oakland &c. R. Co.*, 118 Cal. 55.

Four thousand dollars for a man of 68, with annual income above expenses of \$1,000. *Denver &c. R. Co. v. Spencer*, 27 Colo. 313.

Four thousand one hundred and forty dollars for an adult daughter who had never given her parents more than \$75 a year. *Armour v. Csischki*, 59 Ill. App. 17.

Five thousand dollars to parents over 70 for death of a bachelor son of 33, who supported them. Reduced to \$3,000. *Leiter v. Kinnarc*, 68 Ill. App. 558.

Three thousand five hundred dollars for child of four. Reduced to \$2,000. *West Chicago Street R. Co. v. Scanlan*, 68 Ill. App. 626; s. c. aff'd, 168 Ill. 34; *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42 (\$10,500.); *Rice v. Crescent City R. Co.*, 51 La. Ann. 108 (\$12,500); *Graham v. Consolidated T. Co.*, 64 N. J. L. 10 (\$5,000).

Five thousand dollars for husband and father of four grown children, who had not lived with or contributed to the support of his family. *Chicago &c. R. Co. v. Downey*, 96 Ill. App. 398.

One thousand five hundred dollars for a man of 81. *Chicago &c. R. Co. v. Helbreg*, 99 Ill. App. 563.

One thousand dollars for a capable woman of 59, mother of five children, not shown to be dependent upon her. *St. Louis &c. R. Co. v. Blinn*, 10 Kan. App. 468.

Fifteen thousand dollars for a girl of 14. *Board &c. v. Moore*, (Ky.) 66 S. W. Rep. 417.

Two thousand and thirty-one dollars and eighty-one cents for a man of 64, not earning more than \$150 a year over and above his support. Reduced to \$1,250. *Ward v. Maine C. R. Co.*, 96 Me. 136.

Nine hundred dollars for boy of 16 where father had not supported him for the past five years. Reduced to \$500. *Grieve v. North Jersey Street R. Co.*, 65 N. J. L. 409.

Five thousand dollars to husband and two grown sons. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 63.

Three thousand dollars for son of fifteen, a farm hand, earning \$20 per month. Reduced to \$1,500. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 67.

Two thousand five hundred dollars for woman of 68, frail and suffering from an organic disease. *Bond Hill v. Atchison &c. R. Co.*, 16 Oh. C. C. 470.

Five thousand dollars for son of 22, contributing nothing to parents. Reduced to \$3,500. *Flaherty v. New York &c. R. Co.*, 19 R. I. 604.

Nine thousand dollars for death of son. *Houston v. Couser*, 57 Tex. 293.

Ten thousand dollars to widow and \$5,000 each to two children. *Galveston &c. R. Co. v. Miller*, (Tex. Civ. App.) 57 S. W. Rep. 702.

Seventeen thousand five hundred dollars for husband and father, an engineer of 46 or 47. *Galveston &c. R. Co. v. Johnson*, 24 Tex. Civ. App. 180.

One thousand five hundred dollars for husband of fifty, deaf mute, separated from wife, in poor health, in debt, supported by friends, and earning \$8 per

month. Reduced to \$500. *International &c. R. Co. v. Jones*, (Tex. Civ. App.) 60 S. W. Rep. 978.

Eight thousand dollars for the death of a son, where the father and mother, his beneficiaries, were respectively of the age of 64 and 50. Reduced to \$4,000. *Atchison &c. R. Co. v. Van Belle*, 64 S. W. Rep. 397.

Twenty thousand dollars for death of a brakeman of 29, earning \$70 to \$150 a month, though he turned over all his earnings except \$67 to the support of his wife and child. *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

One thousand dollars to a mother of 73, for the death of a married son who contributed \$50 a month to her support; where she lived with her married daughter. *Southern P. Co. v. Winton*, (Tex. Civ. App.) 66 S. W. Rep. 477.

Thirteen thousand dollars, though deceased was a healthy man of 38, and earned \$50 per month, which he contributed to the support of his family; (wife and seven children; the eldest being 17). Reduced to \$10,000. *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155.

Forty thousand dollars for death of a railroad engineer, though in good health with an expectancy of 38 years and earning \$150 a month. Reduced to \$25,000. *Walker v. McNeill*, 17 Wash. 582.

Three thousand five hundred dollars to a woman of 54 for the death of an unmarried son paying her \$5 a week, (she having six others from 12 to 22 years of age). Reduced to \$1,500. *Imes v. Milwaukee*, 103 Wis. 582.

**Miscellaneous injuries.**—Where a portion of the verdict was limited so as to come within the measure of damages proved, a new trial was properly refused. *Central R. Co. v. Crosby*, 74 Ga. 737.

Two hundred and fifty dollars for carrying a young lady by her station, entailing a loss of only three hours, comfortably cared for and politely treated. *Southern R. Co. v. Bryant*, 105 Ga. 316.

Five hundred dollars under similar circumstances where passenger walked back causing slight illness. *Southern R. Co. v. Humphries*, 108 Ga. 591.

Question of the weight of evidence and the reasonableness of the damages, belong to the appellate court. *Chicago &c. R. Co. v. O'Connor*, 119 Ill. 586.

Two thousand dollars for loss of services of a boy of 13 or 14 by the loss of a leg. *Baltimore &c. R. Co. v. Keck*, 89 Ill. App. 72.

Three hundred dollars for indignities suffered in being ejected from a train, without unnecessary violence. *Atchison &c. R. Co. v. Hogue*, 50 Kas. 40.

Five hundred dollars for ejection where there was no physical injury, insult or loss of time. *Louisville &c. R. Co. v. Breckinridge*, 99 Ky. 1; \$225 for an ejection of a passenger, where there was no force or wrongful intent and only a loss of seven or eight hours. Reduced to \$125. *Klaren v. Great Northern R. Co.*, 70 Minn. 79; \$400 for ejection from a train where there is no violence or indignity and only a loss of a day's time and expense of \$2 or \$3. *Louisville &c. R. Co. v. Blair*, 104 Tenn. 212.

Two hundred and fifty dollars where, as the result of defendant's failure to hold a train, plaintiff's delay was only for a night. He lacked no comfort and his only expense was \$22.50. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

Verdict based on testimony as to what an untrained horse would be worth properly trained, should be regarded as excessive. *Illinois C. R. Co. v. Radford*, (Ky.) 64 S. W. Rep. 511.

Two hundred and fifty dollars where a child, set off at the wrong station, but was delayed only a few hours, and was well cared for during the time. *Louisville &c. R. Co. v. Jordan*, (Ky.) 66 S. W. Rep. 27.

One thousand six hundred and forty dollars for a few hours' delay in the shipment of a corpse. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

Seven hundred and fifty dollars to a man of 63 for an ejection 40 miles from home; where most of the injuries were due to unnecessary exposure. Reduced to \$250. *Bader v. Southern P. R. Co.*, 52 La. Ann. 1060.

One hundred dollars to one whose ticket had been declared forfeited; when, though spoken harshly to by the conductor, it was not within the hearing of the other passengers. Reduced to \$50. *Mueller v. Chicago &c. R. Co.*, 75 Minn. 109.

One hundred dollars for a horse, the amount asked, where the value is shown to be only \$30 to \$50. (Being evidently a mistake.) *Vicksburg &c. R. Co. v. Lawrence*, 78 Miss. 86.

Two hundred and fifty dollars for medical aid where the evidence only disclosed \$50 spent. \$200 taken off. *Cullar v. Missouri &c. R. Co.*, 84 Mo. App. 347.

Trial judge has authority under 1 S. C. R. S. 1893, secs. 2315-16, to grant a new trial where the verdict is excessive. *Stuckey v. Atlantic Coast-Line Co.*, 57 S. C. 395.

New trial is not necessary to reduce a verdict so grossly excessive as to indicate prejudice. *Western Union Tel. Co. v. Frith*, 105 Tenn. 167.

Two hundred dollars for failure to stop for an intending passenger who thereupon walked to his destination instead of hiring a conveyance or staying all night. *Gulf &c. R. Co. v. Cleveland*, (Tex. Civ. App.) 33 S. W. Rep. 687. See, also, *Gulf &c. R. Co. v. Gardecke*, 39 id. 312.

One hundred and fifty dollars for refusal to sign and stamp a return trip ticket for a passenger for whom a friend bought another ticket. *New York &c. R. Co. v. Leander*, (Tex. Civ. App.) 46 S. W. Rep. 843.

Five hundred dollars actual and \$1,500 exemplary damages for exacting extortionate fare of \$.50 and for rudeness. Reduced to \$250 and \$500 respectively. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

## XVI. Mitigation of Damages.

That plaintiff refused to submit to an operation recommended by his physicians did not affect his recovery, where he acted as a reasonably prudent man. He is not required to submit blindly, being only bound to the exercise of ordinary care. *Williams v. Brooklyn*, 33 App. Div. 539.

See, also, *Blate v. Third Ave. R. Co.*, 44 App. Div. 163.

Damages for death were reduced by widow's pension from fire department. *Geary v. Metropolitan Street R. Co.*, 73 App. Div. 441.

Refusal to receive goods from a carrier did not mitigate damage for total loss. *Brand v. Weir*, 27 Misc. 212.

No recovery for injury that could have been prevented by exercise of reasonable care by plaintiff after becoming aware of it. *Hartford Deposit Co. v. Calkins*, 186 Ill. 104; rev'g s. c., 85 Ill. App. 627.

Failure to at once secure medical aid did not prevent recovery where

the injuries were apparently slight. *Kennedy v. Busse*, 60 Ill. App. 440.

Plaintiff is bound only to exercise of ordinary care in treatment of injury. *Mt. Sterling v. Crummy*, 13 Ill. App. 512.

See, also, *Fullerton v. Fordyce*, 144 Mo. 519; *Webb v. Metropolitan Street R. Co.*, 89 Mo. App. 604.

But if he fails to use reasonable effort to prevent further injury he cannot charge the consequences to defendant as the natural and probable result of the injury. *Scherer v. Baltzer*, 84 Ill. App. 126.

No recovery for continued suffering, if a slight surgical operation attended with no danger, would have cured the injury. *Bailey v. Centerville*, 108 Iowa, 20.

An injured person is held only to use of ordinary care to prevent further injury. He need not use the utmost care. *Illinois &c. R. Co. v. Gheen*, (Ky.) 68 S. W. Rep. 1081; modifying s. c., 66 id. 639.

No mitigation of damage for being carried by destination because passenger did not at once get off and return instead of going further where she had friends. *Airey v. Pullman Palace-Car Co.*, 50 La. Ann. 648.

Consignee cannot refuse to receive damaged goods and sue carrier for total loss. *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785.

Failure of physician to give best treatment will not reduce damages where plaintiff used reasonable care in his selection. *Reed v. Detroit*, 108 Mich. 224.

Owner of stock killed must use ordinary care to reduce his damage by selling it for beef. Where defendant took and disposed of it he recovered full value. *Clem v. Wabash R. Co.*, 12 Mo. App. 433.

Expense of reasonable efforts to mitigate damage is recoverable. *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36.

Remarriage of widow does not reduce damage for death of first husband. *Philpott v. Philadelphia T. Co.*, 175 Pa. St. 570.

Nor does distributive share of child in estate of parent. *Stahler v. Philadelphia &c. R. Co.*, 16 Montg. Co. L. Rep. 198.

Where a surgical operation was reasonably necessary, it was plaintiff's duty to procure it. *Mattis v. Philadelphia T. Co.*, 6 Pa. Dist. 94.

Contributory negligence held only to mitigate damages for violation of a statute requiring those in charge of a train to look for, and take precautions against collision with, obstructions on railway tracks. *Artenberry v. Southern R. Co.*, 103 Tenn. 29.

Defendant negligently failed to deliver telegram, forbidding sheriff to sell plaintiff's land. His failure to employ counsel to set aside the sale for lack of means was held not a violation of his duty to lessen his loss. *Western &c. Teleg. Co. v. Wofford*, (Tex. Civ. App.) 42 S. W. Rep. 119.

Passenger is not under obligation to prevent or lessen his damage by the payment of an extra fare. *Gulf &c. R. Co. v. Copeland*, 17 Tex. Civ. App. 55.

Plaintiff delayed seeking medical assistance and subjected himself to severe physical strain. He was not allowed to recover for aggravation of injury thus caused. *Texas &c. R. Co. v. White*, 101 Fed. Rep. 928.

#### (a). INSURANCE.

Recovery of insurance on life destroyed by the defendant's negligence, does not diminish the damages. *Althorf v. Wolfe*, 22 N. Y. 355, aff'g judg't for pl'ff.

*Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72, aff'g recovery by pl'ff; *Terry v. Jewett*, 78 id. 338.

Same as to inquiry to property. Insurance received cannot be proved. *Briggs v. N. Y. C. & H. R. R. Co.*, 12 N. Y. 26, aff'g judg't for pl'ff.

Citing *Merrick v. Brainard*, 38 Barb. 589, aff'd 34 N. Y. 208, aff'g judg't for pl'ff; *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503.

In an action to recover the value of property destroyed by a fire occasioned by the negligence of the defendant, the fact that the property was insured and that the insurance company has paid the loss, cannot be given in evidence in mitigation of damages. *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503, rev'g judg't for pl'ff.

Where the claim is that the injury disables from work, the defendant may show the plaintiff to have been so drunken, before the accident, as to disqualify him for work independently of injury. *De Voe v. Van Franken*, 29 Hun, 201, rev'g judg't for pl'ff.

Damages not reduced by payment on an accident insurance policy. *Cox v. Chicago*, 83 Ill. App. 540.

See, also, *Louisville &c. R. Co. v. Caruthers*, (Ky.) 65 S. W. Rep. 833.

Nor on a fire insurance policy. *Allen v. Barrett*, 100 Iowa, 16.

Nor of sick benefits. *Baltimore &c. R. Co. v. Baer*, 90 Md. 91.

See, also, *Matthews v. Missouri P. R. Co.*, 142 Mo. 645; *Lake Erie &c. R. Co. v. Falk*, 62 Oh. St. 297.

A statute permitting deduction of fire insurance from damages by fires set by locomotives, held not retroactive. *Wild v. Boston &c. R. Co.*, 111 Mass. 215.

A statute imposing liability for fires set by railroads upon railway companies and permitting the reduction of damages by the amount of insurance less cost of premium and recovery, construed to apply to insurance issued prior to statute. *Lyons v. Boston &c. R. Co.*, (Mass.) 64 N. E. Rep. 404.



Damages not reduced by life insurance. *Houston &c. R. Co. v. Weaver*, (Tex. Civ. App.) 41 S. W. Rep. 846; *Houston &c. R. Co. v. Lippscomb*, (Tex.) 64 S. W. Rep. 923; modifying s. c., 62 id. 954.

Nor accident insurance. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185; *Missouri &c. R. Co. v. Rains*, (Tex. Civ. App.) 40 S. W. Rep. 635.

#### (b). MONEY EXPENDED FOR INJURED PERSON.

It is improper in an action for death by the defendant's negligence, to show pecuniary aid or valuable services rendered the deceased after his injury, or even \$2,000 expended for his comfort and support by defendant. *Murray v. Usher*, 46 Hun. 404, aff'g judg't for pl'ff; distinguishing *Littlewood v. Mayor &c.*, 89 N. Y. 24.

##### *Payment of, by employer.*

If the plaintiff's employer paid his wages, while he was sick from an injury by another, it is proper in a reduction of damages. *Drinkwater v. Dinsmore*, 80 N. Y. 390, reversing 16 Hun. 250, and judg't for pl'ff.

Distinguishing *Yates v. White*, 4 Bing. (N. S) 272; *Althorf v. Wolfe*, 22 N. Y. 355; *Harding v. Townsend*, 43 Vt. 536.

### XVII. Interest.

Interest is added to the verdict for death, under the statute in force when the verdict was rendered. Sec. 1 of chap. 538, L. 1871, exempting from the act contracts, etc., made before the act, does not apply to tort created by the statute. *Salter v. U. & B. R. Co.*, 86 N. Y. 401; affirming 13 Hun. 187.

Overruling *Erwin v. Neversink S. Co.*, 23 Hun. 578.

Denial of motion to strike out interest added to judgment by clerk, sustained though the jury stated in court that they included interest in their verdict. *Manning v. Pt. Henry Iron Co.*, 91 N. Y. 664; rev'g s. c., 27 Hun. 219.

Although the jury may consider the time elapsed since death in fixing damages, they cannot fix upon a sum and add interest from death. Chap. 78, L. 1870, does not affect actions pending at its enactment. *Cook v. N. Y. C. & H. R. R. Co.*, 10 Hun. 426, rev'g judg't for pl'ff.

In an action sounding in damages, the jury may allow interest or not, in its discretion. It is error for court to charge that interest must be allowed. *Home Insurance Co. v. P. R. Co.*, 11 Hun. 182.

Horse killed on track for lack of guards. Interest on damages properly allowed by referee. *Lackin v. D. & H. C. Co.*, 22 Hun. 309, citing on subject of interest.

Parrott v. Knickerbocker &c. Co., 46 N. Y. 361; Whitehall &c. Co. v. New York &c. Co., 51 id. 369; but, see, White v. Miller, 9 Week. Dig. 153.

Warner v. New York Central R. Co., 52 N. Y. 437.

In an action by a husband for wife's injury, recovery of the wife for her damages from same injury cannot be shown. *Neeson v. City of Troy*, 29 Hun. 173, rev'g judg't for pl'ff.

In an action for negligence in causing, as alleged, permanent injury to a horse, the jury may give interest upon the sum found by them to represent the depreciation in its value, from the date of such injury.

The charter of the city of Troy (Laws of 1872, chap. 129) provided that no action could be maintained upon a claim against the city unless it was presented to the city comptroller, and the latter did not audit it within sixty days.

Held, that no interest could be recovered upon such claim until sixty days after the date at which it had been duly presented as required by the act. *Wilson v. The City of Troy*, 60 Hun. 183, modifying judg't for pl'ff; s. c. aff'd, 135 N. Y. 96.

Subject of allowing interest considered and cases cited.

See, also, Gray v. Central R. Co. &c., 89 Hun. 477.

Where interest in an action for death under a foreign statute is discretionary with the jury, the clerk cannot add it pursuant to local statute. *Frounfelker v. Delaware &c. R. Co.*, 16 N. Y. Supp. 745.

Interest allowed on cost of repair of railroad track, washed out through break in reservoir on adjoining land, from date of injury, but, on cost of transferring passengers around the washout during repair, only from time the amount was stated in the bill of particulars. *New York &c. R. Co. v. Ansonia Land &c. Co.*, 72 Conn. 703.

Interest allowed on value of property from date of loss by carrier. *Baltimore &c. R. Co. v. Dougherty*, 7 App. D. C. 378.

See, also, Mobile &c. R. Co. v. Jurey, 111 U. S. 584; Mote v. Chicago &c. R. Co., 27 Iowa, 22.

In actions *ex delicto* for value of property destroyed, it is within the discretion of the jury to add a sum equal to interest from the time of destruction, which, however, must be called damages, not interest. *Western &c. R. Co. v. Brown*, 102 Ga. 13.

Interest from date of shipment is a matter of right in an action on contract for injuries to goods in transit over a railroad. *Goodman v. Missouri &c. R. Co.*, 71 Mo. App. 460.

See, also, Dun v. Railway, 68 Mo. 278; Gray v. Packet Co., 64 id. 50.

Interest on value of property lost by carrier runs from date when delivery should have been made. *Lachner Bros. v. Adams Ex. Co.*, 72 Mo. App. 13.

Not allowed in common law action for negligently killing stock. *Meyer v. Atlantic &c. R. Co.*, 64 Mo. 542. Nor for setting fires by locomotive. *De Steiger v. Hannibal &c. R. Co.*, 73 id. 33.

In an action based on negligence, where no pecuniary benefit has or could have accrued to the defendant, interest is not allowed. Not allowed for negligent failure to properly present a draft. *Gray's Harbor &c. Co. v. Continental Nat. Bank*, 74 Mo. App. 633.

Interest allowed on property negligently destroyed by fire from the time of destruction. *Union P. R. Co. v. Ray*, 46 Neb. 750.

See, also, *Fremont v. Railway Co.*, 25 Neb. 138.

Allowed on damage to adjacent property from negligent construction and maintenance of sewer from time of injury as part of the damages, not as interest. *Toledo v. Grasser*, 12 Oh. C. C. 520.

See, also, *Zipperlein v. Pittsburg &c. R. Co.*, 8 Oh. S. & C. P. 587 (personal injuries).

Not allowed on damage from time of personal injury. *Texas &c. R. Co. v. Carr*, 91 Tex. 332.

Not allowed on value of cattle killed before judgment in statutory action. *St. Louis &c. R. Co. v. Chambliss*, 93 Tex. 62.

See, also, *International &c. R. Co. v. Barton*, 93 Tex. 63; *Texas &c. R. Co. v. Payne*, (Tex. Civ. App.) 35 S. W. Rep. 297.

But allowed from date of killing in common law action. *San Antonio &c. R. Co. v. Wray*, (Tex. Civ. App.) 37 S. W. Rep. 461; *Houston &c. R. Co. v. Jones*, 16 Tex. Civ. App. 179.

Allowed on value of goods destroyed while in hands of carriers. *Texas &c. R. Co. v. Payne*, 15 Tex. Civ. App. 58.

And on damages for delay from time when delivery should have been made. *Texas &c. R. Co. v. Truesdale*, 21 Tex. Civ. App. 125.

Interest from commencement of action allowed as part of damages for failure to deliver telegram. *Western &c. Teleg. Co. v. Carver*, 15 Tex. Civ. App. 547.

## DEATH FROM NEGLIGENCE.

### I. RULES.

### II. CAUSE OF ACTION IS CREATED BY STATUTE.

### III. STATUTES IN NEW YORK AND OTHER STATES.

(a) By whom and in whose behalf action may be brought.

(b) For what recovery may be had.

### IV. FORMER ADJUDICATION.

### V. JURISDICTION. \*

(a) Jurisdiction—injuries on high seas, ports, bays, etc.

### I. Rules.

At common law no action for personal injuries causing death survived in behalf of the decedent's estate.

Lord Campbell's Act, passed in England in 1846, first created such a cause of action, and most of the American states have passed similar acts. Frequently special provisions in behalf of particular persons, such as minors, or for the death of persons of a particular description as against master for death of a servant, persons killed by or on railways, etc., have been enacted. In all the states, save Connecticut, Iowa, Louisiana, New Hampshire, and Tennessee, where the statute provides that the cause of action shall survive (Tiffany's Death by Wrongful Act, § 26), the cause of action is created by the statute, but in no case can the action be maintained for injuries causing death, unless the injured person might have maintained the action, if death has not ensued. Hence, any act or omission of the injured person that would have precluded his maintenance of the action, operates to defeat it after his death. This is not the rule in Kentucky, where death results from willful neglect. The rule is that, if the negligence of a beneficiary contributed to the injury, he cannot recover, and the usual rules as to the contributory negligence of parents prevail. See "Contributory Negligence, Infants."

It is immaterial whether the death was instantaneous or otherwise, if it resulted from the injury the action will lie. In Maine the remedy cannot be enforced if the death be not instantaneous. *State v. Grand Trunk R. Co.*, 6 Me. 114.

In Massachusetts, Maine, Kentucky, it has been held that *under the statutes involved* no cause of action survived, if the death was instantaneous.

Tiffany's Death by Wrongful Act, sec. 74.

In New York and in many states the action may be maintained for death arising from any tort, although the act amount to a felony. Tiffany's Death by Wrongful Act, sec. 79.

The cause of action abates by the death of the wrong-doer. This is not the case in Alabama, Arizona, Georgia, Iowa, Mississippi, North Carolina, Texas and Virginia.

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\*NOTE—As to death from mob violence, see "Municipality," post.

The proper person to sue is oftener the personal representative, but in several states the beneficiaries may bring the action for their own benefit or for themselves and others entitled to share in the distribution. The damages are very much within the discretion of the jury; but are usually, confined to compensation for the pecuniary loss; but in some states exemplary damages are allowed, and frequently the damages cannot be less or greater than a sum allowed in the statute.

An action under a statute for negligent killing has no extra territorial jurisdiction, and therefore an action cannot be maintained in one state for damages for death caused by injury happening in another state or a foreign country, unless it be proved that the laws of such latter state or country are of similar character to those of the state where the remedy is sought.

For statutes of limitation, see "Limitation of Action."

## II. Cause of Action is Created by Statute.

In the absence of a statute, damages cannot be recovered for death caused by the wrongful act of another. *Sullivan v. Union Pac. R. Co.*, 1 McCrary, (U. S.) 301.

*Insurance Co. v. Brame*, 95 U. S. 754; *Baker v. Bolton*, 1 Camp. 493; *Connecticut &c. Ins. Co. v. N. Y. &c. R. Co.*, 25 Conn. 265; *Kramer v. Market St. R. Co.*, 25 Cal. 434; *Indianapolis &c. R. Co. v. Keely*, 23 Ind. 133; *Cincinnati &c. R. Co. v. Chester*, 57 Ind. 297; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Yonge*, 15 Ga. 349; *Peoria &c. Ins. Co. v. Frost*, 37 Ill. 333; *Eden v. Lexington &c.*, 14 B. Mon. (Ky.) 204; *Hubgh v. New Orleans &c. R. Co.*, 6 La. Ann. 495; *Hermann v. Carrollton R. Co.*, 11 id. 5; *Carey v. Berkshire R. Co.*, 1 Cush. 475; *McNamara v. Slaven*, 76 Mo. 330. See *Cutting v. Seabury*, 1 Sprague (U. S.) 522; *Ford v. Momoe*, 20 Wend. 210; *James v. Christy*, 18 Mo. 162; if recovery is had, it is for loss of service; see *Edgar v. Castello*, 14 S. C. 20; see, also, *Osborn v. Gillet*, L. R., 8 Exch. 88.

Such statutes are constitutional, *Carroll v. Mo. Roe. R. Co.*, 80 Mo. 239.

The right being unconditional it is unaffected by the common law presumption that if a person live for a year and a day the injury was not the proximate cause of the death. *Western &c. R. Co. v. Bass*, 104 Ga. 390.

At common law a widow had no right of action for death of her husband. Nor is such a right created by an employer's liability act making an employer liable to servant for negligence of fellow servant. *Major v. Burlington &c. R. Co.*, 115 Iowa, 309.

Father cannot recover for loss of services of minor son whose death was the instantaneous result of the negligent act. *Bligh v. Biddeford &c. R. Co.*, 94 Me. 499.

The common law does not give parents an action for the loss of services upon the death of their minor child. *Gulf &c. R. Co. v. Beall*, 91 Tex. 310; s. c., 41 L. R. A. 807.

In Hawaii, recovery can be had at common law for death by wrongful act. *The Schooner Robert Lewers Co. v. Kekauoha*, 114 Fed. Rep. 849.

### III. Statutes in New York and other States.\*

The New York Code of Civil Procedure provides as follows:

Section 1902. ACTION FOR DEATH BY NEGLIGENCE.—“The executor or administrator of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after decedent's death.” L. 1847, ch. 450; L. 1849, ch. 256; L. 1870, ch. 78.

Statute to be liberally construed. *Lang v. Houston & Co. R. Co.*, 75 Hun, 151; *Beach v. Bay State Co.*, 10 Abb. 71; 30 Barb. 433, rev'g 6 Abb. 415; 27 Barb. 248.

Should be strictly construed. *Stewart v. Terre Haute R. Co.*, 103 Ind. 44; *Ind. & E. R. Co. v. Keeley*, 23 id. 133. See authorities arrayed against each other in *Tiffany's Death by Wrongful Act*, sec. 32.

It is immaterial whether the injury resulting in death was instantaneous or otherwise. *Brown v. Buffalo & E. R. Co.*, 22 N. Y. 191. *Tiffany's Death by Wrongful Act*, sec. 73, where the rule is said to be general except under the Maine statute, where the remedy by indictment cannot be enforced if the death was not instantaneous. It is also pointed out (see sec. 74) that in some states, in cases where the statute provides for the survival of the common law cause of action and does not provide for injury resulting from the death, an action cannot be maintained for injuries resulting in death where the death was instantaneous.

Unless deceased, if surviving, could have maintained action representative cannot. *Quin v. Moore*, 15 N. Y. 432. *Perkins v. N. Y. C. & E. R. Co.*, 24 N. Y. 196.

So under Missouri Rev. Stat., sec. 2122. *Gray v. McDonald*, 28 Mo. App. 477. *Price v. Richmond R. Co.*, 33 S. C. 556.

Hence the contributory negligence of the party injured is a defense, whether the statute provide that the action is maintainable whenever the party injured might have maintained it, or otherwise, and so where the statute provides for the survival of the cause of action. *Tiffany's Death by Wrongful Act*, sec. 66 and cases cited.

So it has been held that a contract releasing the alleged wrong-doer from prospective damages is a bar to an action for death, but there is authority to the contrary, and a release by the injured person is also a bar to an action for his death. See cases collected under RELEASE.

Damages not recoverable under New York Code Civ. Proc., sec. 1902, for death of child by negligence of city in permitting sewage to flow on

\* A plan to present at least an abridged statement of the statutes of each state, and a discussion of them, was abandoned upon consulting *Tiffany's Death by Wrongful Act*. Nothing could add to the completeness and convenience of that work.

premises of parent. *Hughes v. City of Auburn*, 161 N. Y. 96; rev'g s. c., 21 App. Div. 311.

Statutory action maintainable where deceased was killed on a highway by flying piece of wood from blast on adjoining property. *Sullivan v. Durham*, 161 N. Y. 290, aff'g s. c., 35 App. Div. 342.

The statute gives no right of action for death of child resulting from malpractice by a physician. *Sorenson v. Balaban*, 11 App. Div. 164.

An executrix of the administratrix and statutory beneficiary of deceased held not entitled to continue the statutory action. A successor of the administratrix of deceased should have been appointed. *Hodges v. Weber*, 65 App. Div. 180.

In *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, an administratrix of a sole administrator and beneficiary was allowed to recover on reviving the original action. See, also, *Mundt v. Glokner*, 24 App. Div. 110, 223.

SECTION 1903. FOR WHOSE BENEFIT RECOVERY HAD.—The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands after payment of all debts and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action and his commissions upon the residue; which must be allowed by the surrogate, upon notice given in such a manner and to such persons, as the surrogate deems proper. L. 1841, chap. 450; L. 1849, chap. 256; L. 1870, chap. 78. *Stuber v. McEntee*, 142 N. Y. 200.

The right of action is a property right survives the beneficiary and becomes an asset of his estate. *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145; s. c., 51 L. R. A. 235.

The act creates a new cause of action for the benefit of the husband or wife and next of kin as a class. Widow was compelled to divide with father of deceased. *Matter of Suedeker v. Suedeker*, 164 N. Y. 58.

Recovery for death of an unmarried son belongs to a father, when there is no mother or next of kin. *Doyle v. New York &c. R. Co.*, 66 App. Div. 398.

A husband is not the next of kin of his wife so as to share with the next of kin on account of her death. *West, Union Tel. Co. v. McGill*, 57 Fed. Rep. 699.

*Drake v. Gilmore*, 52 N. Y. 389; *Dickins v. N. Y. C. R. Co.*, 23 id. 158; *Warren v. Engelhart*, 13 Neb. 283; but contrary rules exist in Ohio. *Steele v. Kurtz*, 28 Oh. St. 191; and in Tennessee, *Trafford v. Adams Ex. Co.*, 8 Lea, 96.

The word "heir" under Kentucky statute, means "children," and does not include other relatives. *Jordan v. Cincinnati R. Co.*, 11 Ky. L. R. 204.

Complaint must allege existence of widow or next of kin. *Safford v. Drew*, 3 Duer, 627.

*Lucas v. R. Co.*, 21 Barb. 245; 2 Abb. Ct. App. 480.

*Tiffany's Death by Wrongful Act*, sec. 80, citing numerous cases. Under statutes of Virginia, West Virginia, North Carolina the rule is otherwise.

*Tiffany's Death by Wrongful Act*, sec. 81.

If there are no children, wife, or next of kin, the action does not survive *Indianapolis &c. R. Co. v. Keeley*, 23 Ind. 133.

*Stewart v. Terre Haute &c. R. Co.*, 103 Ind. 44. See, *Jeffersonville &c. R. Co. v. Swayne*, 26 Ind. 477; *Jeffersonville &c. R. Co. v. Hendricks*, 41 id. 48.

Missouri statute gives right of action to husband, wife, or minor children, or father and mother, or either of them; if all these beneficiaries perish in the same disaster the right of action does not survive. *Gibbs v. Hannibal*, 82 Mo. 143.

The usual rule is that the action abates by the death of the beneficiary. If there be more than one it survives for the benefit of the others. In Indiana, Arizona, Georgia and Texas, by a provision of the statute a different rule prevails.

*Tiffany's Death by Wrongful Act*, sec. 87.

In the several states the recovery is usually for the benefit of the surviving family or persons dependent on the deceased for support, and is distributed to the widow or husband alone, or to the widow or husband and next of kin, or heirs, or to parents in the case of a minor child. But the recovery is not for the benefit of creditors of the deceased and hence no action can be maintained unless there be beneficiaries in existence entitled to receive. This is not the rule, however, in the states of Iowa, Virginia, Oregon and Washington, where, if there be no beneficiary, the creditors may participate, and North Carolina, where, in such case, it goes to the university.

The beneficiary's interest is assignable, but such assignment does not interrupt the prosecution of the action. *Quin v. Moore*, 15 N. Y. 432.

A right of action for negligently causing the death of another does not survive in behalf of his creditors or for the benefit of the estate, under Tennessee act, 1851, chap. 17, amended act of 1871, chap. 78. *East Tenn. &c. R. Co. v. Lilly*, 90 Tenn. 563.

Section 1904. AMOUNT OF RECOVERY.—“The damages awarded to the plaintiff may be such a sum, *not exceeding five thousand dollars* (see next paragraph), as the jury, upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report, or decision, may specify the day from which interest is to be computed: if it omits so to do, the day may be determined by the clerk upon affidavits.”

N. Y. Const., art. 1, sec. 18, provides: “The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.” (Amendment of 1894.)



The provision of N. Y. Const. 1894, art. 1, sec. 18, prohibiting the abrogation of the right of action for injuries resulting in death or the limitation of the amount of recovery is not retractive. *Isola v. Weber*, 147 N. Y. 329.

Held error to charge that if a verdict is found for plaintiff it must be for more than nominal damages. Recovery is for pecuniary loss. *Sciurba v. Metropolitan Street R. Co.*, 73 App. Div. 170.

The constitutional removal of limitation of amount of recovery held to apply where injury occurred before death after it went into effect. *Smith v. Metropolitan Street R. Co.*, 15 Misc. 158.

The jury is not limited to any arbitrary amount except to \$5,000 in Colorado (where death is caused by common carrier: minimum sum \$3,000), Connecticut, Illinois (under miner's act direct damages unlimited), Maine (not less than \$500 nor more than \$5,000 except in action against municipality for defect in highway), Massachusetts (fine for not less than \$500 nor more than \$5,000; in action by administrator or executor not exceeding \$5,000 or less than \$500, except in an action against municipality for injury on highway, then \$1,000; and for the death of the employé not instantly killed \$5,000, or where employé is instantly killed in action by widow, etc., not less than \$500 nor more than \$5,000), Minnesota, Missouri (except in case of loss of life by willful violation of miner's act), Nebraska, New Mexico (when done by common carrier or its agents), Oregon, Wisconsin, Wyoming; \$7,000 in New Hampshire; \$10,000 in Ohio, Oklahoma, Utah (except where action is brought by a parent for minor child, a guardian for a ward, or heirs and personal representative for a person not a minor) Indiana, Kansas, Virginia, Dist. of Columbia, W. Virginia; \$20,000 in Montana (in an action for the exclusive benefit of widow and next of kin).

Exemplary damages are allowed for willful act or gross negligence in Arizona, Kentucky and Texas. Damages may also be given in Missouri for aggravating circumstances, and also in New Mexico.

Under L. 1870, ch. 78, rate of interest is governed by law in force when verdict is rendered. *Salter v. U. & Bl. R. R. Co.*, 86 N. Y. 401.

Section 1905. NEXT OF KIN DEFINED.—"The term 'next of kin,' as used in the foregoing sections, has the meaning specified in section 1870 of the act." L. 1871, ch. 219.

Section 1870. NEXT OF KIN DEFINED.—"The term 'next of kin,' as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts, and expenses, other than a surviving husband or wife." *Murdock v. Ward*, 67 N. Y. 387; rev'g 8 Hun, 9.

*Ketaltas v. Ketaltas*, 72 N. Y. 312.

#### (a). BY WHOM AND IN WHOSE BEHALF ACTION MAY BE BROUGHT.

The proper party to sue as party plaintiff is the PERSONAL REPRESENTATIVE; so in New York, Arkansas (if no representative, heirs), *Davis v. St. Louis & E. R. Co.*, 57 Ark. 117; Connecticut, Dist. of Columbia, Delaware (but widow in proper person, if there be one), Indiana.

Personal representative may maintain where the relation of parent and child does not exist, for the benefit of next of kin. *Mayhew v. Burns*, 103 Ind. 328.

Where a minor was instantly killed, leaving his mother surviving, the guardian had paid no expenditures incurred from the injury, and could not recover under Indiana Rev. Stat. 1881, sec. 266. *Louisville &c. Co. v. Goodykuntz*, 119 Ind. 111.

Parent may sue as administrator for death of son, under Indiana Rev. Stat. 1881, sec. 284, instead of suing as parent under sec. 266. *Barry v. Louisville &c. R. Co.*, 128 Ind. 484.

So in Iowa: The test being whether deceased lived after the injury—not, how long he lived,—a right of action accrues to his representative if he survives the injury but for a moment. *Kellor v. Central Iowa R. Co.*, 68 Iowa, 470.

So in Michigan, Minnesota, Montana (or heirs in some cases), Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, South Carolina. *Edgar v. Costello*, 14 S. Co. 20.

*Contra*, *Morgan v. Thompson*, 82 Ky. 383; *Spring v. Glenn*, 12 Bush. (Ky.) 172.

So in Vermont, Virginia, West Virginia, Wisconsin (*Gores v. Graff*, 77 Wis. 174), Wyoming, Idaho (or by heirs, and if decedent be a minor, then proper party is father, or in case of his desertion, mother for minor child and guardian for ward). So in Kansas (unless deceased was non-resident or no representatives had been appointed, and then widow, if none, next of kin). *Hulbert v. Topeka R. Co.*, 44 Fed. Rep. 310. So in Kentucky, but for willful negligence also widow, heir (widow and children have prior right to sue and possess whatever may be recovered in an action for death, under Kentucky Gen. Stat. ch. 57, sec. 3. *Henderson v. Kentucky R. Co.*, 86 Ky. 289), and for malicious and unjustified use of firearms, and in duels, widow and minor children, or either. So in Maine, from defect in highway, but by indictment for death by common carrier; so in Tennessee, but if representative declines, widow and children may use his name (or widow in her name; if none, children). So in Utah (and also heirs and also father, or in cases of death or desertion mother for minor child, guardian for ward). So in Alabama (a father, or, in case of his death, desertion, imprisonment or insanity, mother or personal representative may maintain the action for the death of a minor child), but in other cases the action is by the representatives. *Lovell v. De Bardleben &c. Co.*, 90 Ala., 13; *Stewart v. Louisville &c. R. Co.*, 83 id. 493.

The rule in certain other states is as follows:

California: Heirs or personal representatives, father, or if none, or in case of desertion, mother for minor child, guardian for ward; in Arizona all the parties, or one or more for the benefit of all, may sue, and in case of failure to do so in six months after death the personal representative; in Colorado a husband or wife, or, in the case of his or her failure to sue within a year after death, or in the case there be none, then the heirs, but in the case of a minor or unmarried person, the father or mother, or the survivor of them. In Florida the widow or husband, if surviving, otherwise minor children; if there be none, person dependent on decedent for support; if there be none, the executor or administrator. Georgia: Widow for death of husband, or, if none, children for death of father. Husband for death of wife, and children jointly, if there be any; mother, or if there be none, father for death of child upon whom he or she is dependent for support, or in case he contributed thereto, in case the child leave no wife, husband or child. Illinois: Personal representatives, or in case of death from will-

ful violation of minor's act, widow, lineal heirs, adopted children, or any person dependent on deceased for support. *Holton v. Daly*, 106 Ill. 131.

See *C. & E. &c. R. Co. v. O'Connor*, 119 Ill. 586; *Corliss v. Worcester &c. R. Co.*, 63 N. H. 404; *Clark v. Manchester*, 62 id. 577; *Needham v. R. Co.*, 38 Vt. 294, *Indianapolis &c. R. Co. v. Keely*, 23 Ind. 133.

Louisiana: Minor children or widow, or either, or, if there be none, surviving father and mother, or either. Maryland: State for use of beneficiaries.

Massachusetts: By indictment, if by negligence of corporation operating a railway, or by the unfitness or gross negligence of its servants, passenger or person not a passenger or in the employ of the corporation be killed, or if a person be killed by a collision with the cars of a corporation at a crossing through neglect to give statutory signals. Under the same circumstances representative may bring action, and also for death of employé of a railroad company, if employé might have maintained the action had he not been an employé, or if passenger be killed by the negligence of common carrier or the unfitness or gross negligence of its servants, or in an action against a municipality for defect in highway causing death; and where an employé is killed and death is not instantaneous, by the negligence of employer under employer's liability act. But where the employé is killed instantly action should be brought by widow, under such act, and if no widow, by next of kin dependent on decedent. Where death is caused by the negligence of a fellow servant, no action can be maintained by the administrator. *Mass. Stat.* 1887, ch. 270, applies only to action by widow or next of kin. *Dacy v. Old Colony R. Co.*, 153 Mass. 112.

Mississippi: Widow (*Natchez Cotton Mill Co. v. Mullins*, 67 Miss. 672), or husband, if none, by child; by parent for death of child. (Where a statute gives one right of action to a representative for the wrong to the deceased, and another to the next of kin for injury sustained by them, one person uniting both capacities can recover on both grounds in one suit. *Illinois Central R. Co. v. Crudup*, 63 Miss. 291.)

Missouri and New Mexico: Husband or wife, or, if none, or if there be failure to sue within six months after death, minor child; or, if decedent was a minor and unmarried, father and mother, or survivor. In case of death or willful violation of minor's act, widow, lineal heirs or adopted children, or any person dependent on decedent for support.

Rhode Island: Personal representative, appointed within or without the state, for the benefit of widow and next of kin, but where there is a widow only, she may, at her option, sue any person having a direct pecuniary interest in the life. Under Rhode Island Pub. Stat. ch. 204, sec. 20, an action must be brought, not by the father of the son killed, but by the latter's administrator. *Goodwin v. Nickerson*, 17 R. I. 478.

Texas: All beneficiaries are entitled, or one or more for all; or, if there be failure to sue within three months, personal representative, unless requested otherwise by beneficiaries. Tennessee: Personal representative, but if he decline, widow and children who may use his name; also widow, or, if none, children. Although a widow has a preference under *Mel. & V. Tenn. act*, secs. 3130, 3132, she may waive it and administrator sue. *Webb v. East Tenn. R. Co.*, 88 Tenn. 119.

A non-resident mother has cause of action. *Augusta &c. R. Co. v. Glover*, (Ga.) 18 S. E. Rep. 406; *Chesapeake &c. R. Co. v. Higgins*, 85 Tenn. 620; *Luke v. Calhoun Co.*, 52 Ala. 115.

The usual rule is that an illegitimate child is not a child within the meaning of the statutes giving action for death. *Tiffany's Death by Wrongful Act*, sec. 85.

The following decisions will more fully illustrate the construction and effect of the various statutes on the subject :

Under Alabama Code, sec. 2588, mother of a person killed may recover, if father be not living. *Grinsley v. Hankins*, 46 Fed. Rep. 400.

Action for negligence resulting in death does not abate though deceased never became conscious after the accident. *St. Louis &c. R. Co. v. Dawson*, 68 Ark. 1.

Mother may recover for the death of her child, under Colorado Stat., although not dependent upon him. *Brennan v. Mollic Gibson &c. Co.*, 44 Fed. Rep. 795.

The words "heir or heirs" used in describing the second class entitled to sue, construed to mean lineal descendants. *Hindry v. Holt*, 24 Colo. 464; s. c., 39 L. R. A. 351.

Provision for survival of action for injuries resulting in death instantaneous or otherwise construed to include instantaneous death by negligence. *Broughel v. Southern &c. Tel. Co.*, 72 Conn. 617.

A wife living apart from her husband and using the wages of her minor son for the support of a family, may maintain action for son's death in her own name and name of her husband. *East Tenn. &c. R. Co. v. Maloy*, 77 Ga. 237.

Under Georgia act of 1887, the mother or father may sue for the killing of child, where the child contributed to their support. *Clay v. Central R. Co.*, 84 Ga. 345.

Under Ga. Acts, 1887, p. 43, a father cannot recover for death of minor son who was survived by his mother, though she has since died. *Frazier v. Georgia R. &c. Co.*, 96 Ga. 785.

And if she fails to sue during her lifetime the right of action does not pass to her representatives. *Frazier v. Georgia R. &c. Co.*, 101 Ga. 77.

Contributory negligence held a defence to the statutory action. *Georgia R. &c. Co. v. Sawyer*, 112 Ga. 346.

The statute giving recovery for the death of a "husband or parent" on whom a child is dependent does not extend to stepfather. *Marshall v. Macon Sash &c. Co.*, 103 Ga. 725; s. c., 41 L. R. A. 211.

The Idaho statute permitting suit by "heirs, or personal representatives" construed to allow a mother who is the sole heir to bring it in her own name. *Peterman v. Northern P. R. Co.*, 105 Fed. Rep. 335.

Judgment reversed for lack of allegation that deceased left a widow or next of kin. It may, however, be supplied by amendment, but not after the statute of limitations has intervened. *West Chicago Street R. Co. v. Mabie*, 77 Ill. App. 176.

See, also, *Assumption v. Campbell*, 95 Ill. App. 52; *Foley v. Suburban R. Co.*, 98 id. 108; *Chicago &c. R. Co. v. Hebreg*, 99 id. 563.

Mother of illegitimate child may sue as "next of kin." *Security &c. R. Co. v. West Chicago Street R. Co.*, 91 Ill. App. 332.

But the father of an illegitimate child cannot recover as for the death of a "child." *McDonald v. Pittsburg &c. R. Co.*, 144 Ind. 459; s. c., 32 L. R. A. 309.

Administrator cannot sue under statute vesting right of action in widow and children. *Maule Coal Co. v. Partenheimer*, 155 Ind. 100; *Boyd v. Brazil &c. Coal Co.*, 25 Ind. App. 157.

That a mother gave the child shortly before her death to her grandmother,

who, thereafter maintained it with the husband's consent, was not such an emancipation as to prevent the latter recovering for its death by negligence. *Elwood &c. R. Co. v. Ross*, 26 Ind. App. 258.

Under the Arkansas statute in force in Indian Territory, recovery by widow and next of kin may be had though death be instantaneous. *Missouri &c. R. Co. v. Elliot*, 102 Fed. Rep. 96.

Where right of action is vested in personal representative, widow cannot sue. *Major v. Burlington &c. R. Co.*, 115 Iowa, 309.

To permit a parent to recover as next of kin under Kan. Civ. Code, secs. 442, 442a, he must show that no personal representative has been appointed. *Atchison &c. R. Co. v. Judd*, 10 Kan. App. 577; s. c., 62 Pac. Rep. 711; *Atchison Water Co. v. Price*, 9 Kan. App. 884; s. c., 59 Pac. Rep. 677.

Before statutes were enacted pursuant to Ky. Const. sec. 241, that section authorized recovery by the personal representatives for the benefit of the estate. *Thomas v. Royster*, 98 Ky. 206.

So that they might recover though deceased left neither a widow or a child. *Lexington &c. R. Co. v. Huffman*, (Ky.) 32 S. W. Rep. 611.

An infant was killed by careless use of a firearm by a co-employé. The father was not allowed to recover under a statute, giving recovery for such injury to widow or minor child, nor under a statute giving right of action for death, which requires that personal representatives bring the suit, nor for loss of services of son during minority, since right to such services ceased with death of son. *Harris v. Kentucky &c. Co.*, (Ky.) 45 S. W. Rep. 94; s. c., 43 id. 462.

Recovery cannot be had from master for negligence of fellow-servant, either under Ky. Const. sec. 241 or Ky. St. sec. 6. *Link v. Louisville &c. R. Co.*, (Ky.) 54 S. W. Rep. 184.

An adult child is an "heir" within the meaning of a statute, giving recovery to a widow, heir, or personal representative. *Pennsylvania R. Co. v. Malia*, (Ky.) 49 S. W. Rep. 809.

Action for death given to "minor heirs," held not to survive their majority or death. *Huberwald v. Orleans R. Co.*, 50 La. Ann. 477.

Action for death by wrongful act (Me. Acts 1891, ch. 124), is confined to immediate death and does not extend to death resulting from injury. *Sawyer v. Perry*, 88 Me. 42.

Where action is given to personal representatives, father cannot sue. *Bligh v. Biddeford &c. R. Co.*, 94 Me. 499.

The statutes giving a right of action to a person's representative for injury causing his death, did not contemplate the case of an infant prematurely born by reason of an accident to the mother, and surviving but a few moments thereafter. *Dietrich v. Northampton*, 138 Mass. 14.

The dependence, in fact and not in law, is required to entitle one to maintain an action under Massachusetts employer's liability act, by instantaneous death of employé by employer's negligence. *Daly v. N. J., &c. Co.*, 155 Mass. 1.

No recovery under Mass. L. 1887 c. 270 for death not instantaneous, but accompanied by conscious suffering. *Martin v. Boston &c. R. Co.*, 175 Mass. 502.

"Widow or next of kin," construed to include a mother who is a non-resident alien. *Mulhall v. Fallon*, 176 Mass. 266.

Plaintiff cannot recover in statutory action for death, where deceased lived several hours after receiving his injuries, but an action for the injuries survives to personal representatives. *Jones v. McMillan*, (Mich.) 88 N. W. Rep. 206.

"Next of kin," construed not to include husband. *Watson v. St. Paul &c. R. Co.*, 70 Minn. 514.

Personal representative vested with cause of action held to have right to settle without the consent of the next of kin. *Foot v. Great Northern R. Co.*, 81 Minn. 493; s. c., 52 L. R. A. 354.

Mother may recover at common law if she be the only surviving parent, for the loss of his services from the time of the injury until his death, and for expenses incidental to his sickness. *Natchez &c. R. Co. v. Cook*, 63 Miss. 38.

The word "parent" construed as meaning father; hence, a mother cannot bring an action for the death of her child. *Amos v. Mobile &c. R. Co.*, 63 Miss. 509.

Where action for death by wrongful act is given to next of kin and death was instantaneous, personal representative cannot sue. *McVey v. Illinois C. R. Co.*, 73 Miss. 487.

Right of action given to "brother" or "sister," held not to apply to an illegitimate child. *Illinois C. R. Co. v. Johnson*, 77 Miss. 727; s. c. 51 L. R. A. 837.

Nor can mother sue for death of an illegitimate son. *Alabama &c. R. Co. v. Williams*, 78 Miss. 209; s. c., 51 L. R. A. 836.

A provision of an employer's liability act giving right of recovery to personal representatives for death by negligence of fellow servant held not to emit the statutory right of next of kin, where death is caused by negligence of master. *Bussey v. Gulf &c. R. Co.*, 79 Miss. 597.

Mother may recover for death of child by a former husband, but stepfather cannot. *Hennessey v. Bararian Brew. Co.*, 145 Mo. 104; s. c., 41 L. R. A. 385.

Statutory action allowed where death was instantaneous. *Metz v. Chicago &c. R. Co.*, 85 Fed. Rep. 180.

Right of action for death by negligence given by the statute of Montana to heirs is joint and does not permit mother to sue alone. *Whelan v. Rio Grande &c. R. Co.*, 111 Fed. Rep. 326.

The right of action for death by negligence given to personal representatives on behalf of widow and next of kin, is not an asset of deceased's estate and need not be inventoried. It belongs to the beneficiaries. *Friend v. Burleigh*, 53 Neb. 674.

Where death was the result of injuries sustained, representatives may recover in statutory action only where deceased might have recovered had he lived. *Chicago &c. R. Co. v. Zerneck*, 59 Neb. 689.

Contributory negligence of beneficiary, no defense to the statutory action for death. *Consolidated &c. R. Co. v. Hone*, 59 N. J. L. 275.

Right to damages due statutory beneficiary survives him and is an asset to be disposed of by will or statute of distributions. Where the statutory action is granted to personal representatives of deceased, death of beneficiary does not abate it and his administrator should not be made a party to the record. *Cooper v. Shore Electric Co.*, 63 N. J. L. 558.

Under a statute vesting the right of action in the personal representative a complaint by widow in her own right is demurrable. *Howell v. Commissioners*, 121 N. C. 362.

The action is defeated by contributory negligence of deceased. *Cameron v. Great Northern R. Co.*, 8 N. D. 618.

Or of beneficiary. *Wolf v. Lake Erie &c. R. Co.*, 55 Oh. St. 517; s. c., 36 L. R. A. 812.

Administrator's letters need not show that he was appointed to bring suit. *Solar Refining Co. v. Elliott*, 15 Oh. C. C. 581.

A statute giving right of action to "personal representatives" construed to include executors. *Wittman v. Cincinnati &c. R. Co.*, 10 Oh. S. & C. P. Dec. 563.

Where deceased was an illegitimate child, no recovery was allowed the mother. *Harkins v. Philadelphia &c. R. Co.*, 15 Phila. 286; *Dickenson v. Northeastern R. Co.*, 2 Hurl. & Colt. (Exch.) 734.

A woman, married to deceased after the injury, causing death, held entitled to the statutory damages as widow. *Gross v. Electric Traction Co.*, 180 Pa. St. 99; aff'g s. c., 5 Pa. Dist. 294.

Under a statute giving the action first of widow and, if none, then to children, a complaint by children showing a widow living, held demurrable. *Snyder v. Philadelphia &c. R. Co.*, 9 Pa. Dist. 3.

Deceased's mother, allowed to discontinue a suit for his death begun by the father. *Doran v. Aroca Coal Co.*, 9 Kulp. 479.

It is not necessary that the wife, husband, parent or children should have any legal claim for support upon the person killed, under South Carolina Gen. Stat., sec. 2184. *Petrie v. Columbia R. Co.*, 29 S. C. 303.

Statute, giving action for death by negligence to "widow, heir, or personal representative," construed to give no personal remedy where deceased left neither widow or child. *Lintz v. Holy Terror Min. Co.*, 13 S. D. 489.

A non-resident widow has a cause of action for injuries, causing the death of her husband, in the state of Tennessee, even though he was a non-resident. *Chesapeake &c. R. Co. v. Higgins*, 85 Tenn. 620.

Under a statute providing that the personal representative might sue for benefit of widow and next of kin, and, if he refused, widow and children might bring it in his name, father and mother can not sue and action for their benefit must be brought by the personal representative. *Holston v. Coal and Iron Co.*, 95 Tenn. 525; *Railroad v. Johnson*, 97 id. 667, s. c., 34 L. R. A. 442 (so of husband).

So long as marital relation exists a wife may recover for the negligent killing of her husband, although she had been living apart from him. *Dallas &c. R. Co. v. Spicker*, 61 Tex. 427.

A married daughter and son in nowise supported by parent cannot recover for his death. *St. Louis &c. R. Co. v. Johnston*, 78 Tex. 536.

A posthumous child has a cause of action for death of father, under Texas Rev. Stat. sec. 2903. *Nelson v. Galveston R. Co.*, 78 Tex. 621. He is a surviving child. *Texas R. Co. v. Robertson*, 82 id. 657; *Tiffany Death by Wrongful Act*, sec. 85.

Statutory action allowed where death is instantaneous. *Sterenberg v. Mailhos*, 99 Fed. Rep. 43.

Where statute allows an action to be brought by all the parties interested, or by one for the benefit of all, one has authority to sue for benefit of all without their knowledge or consent. *San Antonio Street R. Co. v. Reuken*, 15 Tex. Civ. App. 229.

Contributory negligence held a defense to a statutory action for death. *Robinson v. Detroit &c. R. Co.*, 73 Fed. Rep. 883.

An amendment of a statute, giving damages for death to family, which allows suit to be brought by the "widow, or if there be no widow, by the children," construed to regulate and not change beneficiaries. *Felton v. Spiro*, 78 Fed. Rep. 576.

When the intention of a statute permitting suit where actionable wrong causes death, is the survivorship of an action, it may be brought though death was not instantaneous. *Boyden v. Fitchburg R. Co.*, 70 Vt. 125; *Legg v. Britton*, 64 id. 652.

"Heirs," held to include widow and children and exclude parents. *Noble v. Seattle*, 19 Wash. 133; *Nesbitt v. Northern P. R. Co.*, 22 id. 698.

Under Washington statutes granting right of action for wrongful death to heirs and personal representatives and providing for the survival of actions for personal injury where a wife or child survive, an administrator can sue only for benefit of a widow or child. *Deuber v. Northern P. R. Co.*, 100 Fed. Rep. 424.

The fact that the children of one killed by negligence of another are of age, does not prevent them from recovering for such pecuniary benefits as they had reasonable expectation of securing from his additional accumulations had he lived. *Tutuer v. Chicago &c. R. Co.*, 75 Wis. 505.

"Personal representative," held to include a special administrator. *Swan v. Norvell*, 107 Wis. 625.

Under a statute providing that the suit shall be brought in the name of the personal representatives of deceased and the proceeds paid over to his lineal descendants, a final settlement of decedent's estate held no bar to action in name of personal representative on behalf of children. *Hubbard v. Chicago &c. R. Co.*, 104 Wis. 160.

#### (b). FOR WHAT RECOVERY MAY BE HAD.

Although the defendant be criminally liable, yet under New York Code of Civil Proc. 1889, he is liable in a civil action. *Kain v. Larkin*, 56 Hun, 79.

Master held liable for death of minor serving in dangerous employment without father's consent, although child was guilty of contributory negligence. *Williams v. Southern &c. R. Co.*, 91 Ala. 635.

A statute giving action for death of any person through carelessness or criminal action of an agent, officer, or other employé of a railroad company, does not apply where the person was killed by the negligence of the co-employé. *Lutz v. Atlantic &c. Co.*, 16 L. R. A. 819; Am. & Eng. R. C. 478 (1894).

A provision of an act prohibiting employment of minors in a mine, granting a right of action to parties injured by willful violation of the act construed to give no action to next of kin for death of minor while so employed. *Kansas &c. Co. v. Gabsky*, (Ark.) 66 S. W. Rep. 915.

No action can be maintained for death resulting from willful or intentional acts. *Winnegar v. Central Passenger R. Co.*, 85 Ky. 547.

One inviting person to drink liquor so as to cause his death in a few hours is not liable under the statute giving action for death caused by willful negligence. *Rogers v. Hughes*, 87 Ky. 185; *King v. Henkee*, 80 Ala. 505; *Hackett v. Smelsley*, 77 Ill. 109.

An engineer and fireman may be joined with a railroad in an action for death by negligence under Ky. Stat. sec. 6. *Winston v. Illinois C. R. Co.*, (Ky.) 65 S. W. Rep. 13; s. c., 55 L. R. A. 603; *Cincinnati &c. R. Co. v. Cook*, 67 id. 383.

Out of statutory damages for death, funeral expenses and costs of administering that particular fund only are to be paid before distribution. *O'Malley v. McLean*, (Ky.) 67 S. W. Rep. 11.



Recovery for death may be had under Ky. Stat. sec. 6, though the result of negligence of superior fellow servant. *Cincinnati &c. R. Co. v. Cook*, (Ky.) 67 S. W. Rep. 383.

In the Kentucky constitution, giving action for death by negligence the word negligence is construed to mean actionable negligence in its ordinary legal acceptance. *Singleton v. Felton*, 101 Fed. Rep. 506.

The fraudulent sale of a horse by one who knows that it has glanders to a person ignorant thereof will render the former liable for the death of the latter, where such disease was contracted as a natural and probable consequence of the condition of the horse. *State, Hartlore v. Fox* (Md.) 26 L. R. A. 267.\*

Death of husband due to neglect and maltreatment in hospital of a voluntary unincorporated association of which he was a member held to give no right of action against the association. *Martin v. Northern &c. Asso.*, 68 Minn. 521.

One who induces or encourages another to commit a wrongful act resulting in the death of a third person is liable under Missouri Rev. Stat. 1879, sec. 2122. *Gray v. McDonald*, 104 Mo. 303.

Where a steamboat company, after having landed a person at an unsafe place, turned off the steamer lights so that he fell into the river and was drowned, under Missouri Rev. Stat. 1879, sec. 2121, a cause of action is given for death by injury from negligence of master, employé, etc., while running or managing a steamboat. *Biddenberg v. Charles &c. Co.*, 108 Mo. 394.

One who induced another already helplessly intoxicated to drink liquor to such a degree as to cause his death will be liable to next of kin. *McCue v. Klein*, 60 Tex. 168; *Fink v. Garman*, 40 Pa. St. 95.

A statute, giving recovery against carrier for the death of "any person whether a passenger or not," held not to apply to death of an employé caused by negligence of a fellow servant. *Miller v. Coffin*, 19 R. I. 164.

No recovery for death can be had where deceased was shot in a fit of temporary insanity induced by his own use of unnecessary violence. *Jenkins v. Hankins*, 98 Tenn. 545.

A master is liable for the death of a minor son serving as fireman without father's consent. *Gulf &c. R. Co. v. Rediker*, 75 Tex. 310.

A corporation is "a person" liable to a statutory action for death by negligence. *Rigdon v. Temple Waterworks*, 11 Tex. Civ. App. 542; *Lynch v. South-western Teleg. &c. Co.*, (Tex. Civ. App.) 32 S. W. Rep. 776; *Fleming v. Loan Agency*, 87 Tex. 238.

Otherwise as to a municipal corporation. *Scaright v. Austin*, (Tex. Civ. App.) 42 S. W. Rep. 857.

Statutory liability for death by negligence construed not to extend to negligence of a servant. *Lipscomb v. Houston &c. R. Co.*, (Tex.) 64 S. W. Rep. 923; s. c., 55 L. R. A. 869; modifying s. c., 62 S. W. Rep. 954; *Cole v. Parker*, 66 id. 135.

Liability for death by negligence does not extend to the receiver of a private corporation. *Parker v. Dupree*, (Tex. Civ. App.) 67 S. W. Rep. 185.

The master of a vessel not guilty of a willful or malicious act was not liable for the death of an employé, as his acts were those of his principal. *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

A statute making municipality liable for destruction of property by mobs, does

\* NOTE.—*Marsh v. Webber*, 13 Minn. 109, 114; *Jeffrey v. Bigelow*, 13 Wend. 518; *French v. Vining*, 102 Mass. 132. See "Manufacturers and Vendors."

not include the killing of a person by mob. *Ginfortune v. New Orleans*, 61 Fed. Rep. 64.

As to the probability of survivorship, see, *Re Ehles Will*, 73 Wis. 345; *Ferry v. Samson*, 112 N. Y. 415.

#### IV. Former Adjudication.

If an injured person recover damages in his life time, and then die from the injury, his personal representatives have no action under the act of 1847. (chap. 450, Laws of 1847) : this act did not impose double liability. *Littlewood v. Mayor &c.*, 89 N. Y. 24, aff'g 15 J. & S. 547 and judg't for debt. Overruling *Schlichting v. Wintgen*, 25 Hun, 626, and citing *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555.

**From opinion.**—"It is claimed that the authority of this case is shaken by subsequent adjudication, but those referred to do not seem to me to have any such effect. *Pym. Adm'x v. Great Northern Railway Co.* (2 Best & Smith 761) and s. c. (4 Best & Smith, 397) was decided before the *Read* case and does not touch or approach the same point. *Bradshaw v. Lancashire &c. Railway Co.* (L. R. 10 C. P. 189), decided in 1875, held that, where the death of a person was caused by negligence on the part of a railway company which had contracted to carry him, his executrix had a right of action, independently of the statute, for the damages which his estate had sustained by such breach of contract, and that Lord Campbell's act did not take away such right of action. *Leggott Adm'x v. The Great Northern Railway Co.* (L. R. 1 Q. B. Div. 599), decided in 1876, was the converse of the *Bradshaw* case just cited, and held that a recovery by the administratrix under Lord Campbell's act was no bar to a subsequent action by the same administratrix for the damages to the estate of the deceased, caused by his injuries. The soundness of the decision in the *Bradshaw* case was doubted, but it was yielded to as an authority. The *Read* case, however, was not questioned.

*Barnett v. Lucas* (5 L. Rep., C<sup>r</sup> L., 140), and s. c., on appeal (6 id. 247), decides the same point as the *Leggott* case. In none of the cases cited had the deceased recovered damages for the personal injury from which death ensued, and the question was not involved in any of them whether Lord Campbell's act applied to a case where such recovery had been had. In each of the cases cited the action was brought by the representative, as such, for a cause of action claimed to have survived, and such an action was held to have no connection with, and not to be affected by, an action under Lord Campbell's act, which was founded upon a personal injury for which no cause of action survived."

Under statute of some states a cause of action is given to recover damages in favor of estate of person injured, and another action in favor of members of his family for pecuniary injury. As to actions under such statutes see *Tiffany's Death by Wrongful Act*, secs. 126, 127, 128.

Judgment, obtained in an action for injuries, begun before, and continued pursuant to stipulation after, death of party injured, held a bar to the statutory action for the death. *McGahey v. Nassau Electric R. Co.*, 51 App. Div. 281.

Under California Code Civ. Proc., sec. 317, only one action can be maintained, and that only by the heirs or personal representatives. *Munro v. Pacific Coast &c. R. Co.*, 81 Cal. 515; *Hartigan v. R. Co.*, 86 id. 142.

Recovery by widow for death is a bar to an action by a posthumous child as an "heir." *Dawbert v. Western Meat Co.*, (Cal.) 69 Pac. Rep. 297.

Action for death is barred by a settlement by deceased in his lifetime for the injuries. *Southern Bell Tel. &c. Co. v. Cassin*, 111 Ga. 575.

The right of action for death by negligence held to be a property right of the beneficiaries and deceased in his life time powerless to abridge it. *Illinois C. R. Co. v. Cozby*, 69 Ill. App. 256.

But the fact that the deceased person has instituted suit for damages does not bar a suit by his wife and children after his death. *International &c. R. Co. v. Kuehn*, 70 Tex. 582; *Indianapolis R. Co. v. Stout*, 53 Ind. 143.

There can be but one action and but one recovery for injury from neglect. *North Vernon v. Voelger*, 103 Ind. 314.

Defendant was liable for the death of plaintiff's child, due to careless treatment, where it agreed, in consideration of monthly rebate on his wages, to give medical treatment to himself and family. *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588.

Recovery for death held a bar to action for loss of services. *Louisville &c. R. Co. v. McElwain*, 98 Ky. 700; s. c., 34 L. R. A. 788.

Under Massachusetts Employer's Liability Act, Laws of 1887, chap. 270, an administrator may not recover on account of death of intestate in addition to his right as legal representative to recover damages accruing to intestate in his lifetime. *Ramsdell v. N. Y. R. Co.*, 151 Mass. 245.

Judgment in statutory action for deceased's injuries bars a common law suit therefor. *Clare v. New York &c. R. Co.*, 172 Mass. 211.

Where minor children are allowed suit, by statute, in case the parent fails to sue, denial of the claim in action by the widow barred action by the children. *McNamara v. Slarens*, 76 Mo. 329.

See, *Stephens v. R. Co.*, 10 Lea, (Tenn.) 448; *Greenlee v. R. Co.*, 5 id. 418.

Payment by defendant of sum, due by virtue of membership of deceased in a relief fund conducted by it, to beneficiary, held not a bar to the statutory action for death. *McKeering v. Pennsylvania R. Co.*, 65 N. J. L. 57; *Baltimore &c. R. Co. v. McCamey*, 12 Oh. C. C. 543.

Settlement by deceased in his lifetime for injuries subsequently causing death held a bar to statutory action for death. *Solar Refining Co. v. Elliott*, 15 Oh. C. C. 581.

An action for injuries commenced by deceased and continued by his

administratrix held a bar to an action for the death. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339.

And no recovery for death can be had in such action. *Edwards v. Gimbel*, 202 Pa. St. 30.

The *bona fide* action of widow with the statutory right to bring the suit, in settling, binds all parties. *Smalling v. Kreech*, (Tenn.) 46 S. W. Rep. 1019; *Prater v. Marble Co.*, 105 id. 496.

The recovery of medical attendance, expenses and loss of service does not prevent recovery for damages for death. *Barley v. Chicago &c. R. Co.*, 4 Biss. 430.

## V. Jurisdiction.

The statute giving action for death from negligence does not apply when the injury is committed in a foreign country although by the negligence of a corporation chartered by the laws of this state. The cause of action under the statute is a new one and not the revival of one possessed by the deceased. *Whitford v. The Panama R. Co.*, 23 N. Y. 465, aff'g judg't for def't on demurrer.

An action for the death of a citizen of this state on the high seas, on board a vessel hailing from, and registered in a port, within the state and employed by the owners in their own business, through whose negligence the death results, *may be maintained in this state*. *McDonald v. Mallory*, 11 N. Y. 541, overruling demurrer to complaint.

An action is allowed in this state for the negligence of the defendant in another state, causing death, when it appears that such cause of action is given by law in the latter state. *Leonard v. California S. N. Co.*, 84 N. Y. 48, aff'g judg't for pl'ff, distinguishing *Richardson v. N. Y. C. R. Co.*, 98 Mass. 85; *Woodward v. M. S. & N. I. R. Co.*, 10 Ohio St. 101; *Needham v. G. T. R. Co.*, 38 Vt. 295; *Allen v. P. & C. R. Co.*, 45 Md. 11; *S. R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Marcy v. Marcy*, 32 Conn. 308.

**From opinion.**—"It is held that under these provisions of the statute of Connecticut an action lies in that state in favor of the representatives of a deceased party to recover damages. *Murphy v. N. Y. & N. H. R. Co.*, 30 Conn. 184; s. c., 29 id. 496; *Soule v. N. Y. & N. H. R. Co.*, 24 id. 575. The construction thus placed by the courts of another state upon the statutes of that state should be followed, and is controlling in the tribunals of such state. *Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 id. 218.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory (*Bouv. L. Dic. Personal Actions, Transitory Actions*); and these actions may be brought anywhere, and are governed by the *lex fori*. (*Bouvier; Story on Conflict of Laws*, see, 307, *a. c.*) The cause of action which the statutes of Connecticut created is transitory in its nature, and, unless excepted from the

general rule as to the place where such actions may be brought, can be enforced in the courts of this state or any other forum, provided the laws of that forum do not forbid its maintenance. In this state it is held that actions will lie for injuries to the person, committed outside of the territorial limits of the state. In *Smith v. Bull*, 17 Wend. 323, it was decided that an action for an assault and battery, committed in the state of Pennsylvania, could be maintained in any court of common pleas of this state. The rule, no doubt, is that all common law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state but in a foreign country, unless it is proved that the laws of that country are of a similar character. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. The Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547.

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The doctrine that an action will lie when the common law, or the statutes of different states or countries correspond, is sustained by numerous authorities. *Madrazo v. Willes*, 3 B. & Ald. 353; *Melan v. Duke de Fitz-James*, 1 Bos. & Pul. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 *Smith's Lead. Cas.* 963; *Shipp v. McCraw*, 3 *Murphy* (N. C.) 463; *Wall v. Hoskins*, 5 *Ired. Law* (N. C.) 177; *Stout v. Wood*, 1 *Blackf. (Ind.)* 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death happening in the state of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other state courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. N. Y. C. R. R. Co.*, 98 *Mass.* 85, the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different states were not of a similar nature, and the common law rule prevailed in Massachusetts. The case, therefore, is not analogous. In *Woodward v. Mich. So. & N. R. R. Co.*, 10 *Ohio St.* 121, it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representative of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under statute of Illinois or whether an administrator appointed under the laws of Illinois, might not maintain such action.

The question now presented is not fully considered, and, therefore, the decision has no force as a case in point. In *Needham v. G. T. Railway Co.*, 38 *Vt.* 295,

the death occurred in the state of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In *Allen v. Pitts, &c. R. R. Co.*, 45 Md. 41, there was no allegation that there was any statute in the state where the death was caused creating a cause of action, and it was held that, in the absence of any proof, there was no presumption in favor of a positive statute law of the state, but it must be presumed that the common law prevailed. The case, therefore, is not in point. In *Selma R. & D. R. R. Co. v. Lacy*, 43 Ga. 461, the same general state of facts existed, and the same rule was recognized."

An action under the statute for negligent killing, has no extra-territorial jurisdiction, so there may be no recovery for an injury in another state, without proving a similar statute of that state. *Debevoise v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 311, aff'g judg't of nonsuit.

Citing *Whitford v. Panama R. Co.*, 23 N. Y. 464; *McDonald v. Mallory*, 77 id. 546; *Leonard v. Columbus Steam Navigation Co.*, 84 id. 48.

Must show that cause of action arose within jurisdiction of the court. *Hegerich v. Keddie*, 99 N. Y. 258.

Although a non-resident may be appointed an administrator in this state, he does not, by the appointment, become in any sense a resident.

Such an administrator, therefore, cannot maintain an action under the Code of Civil Procedure, (sec. 1180) against a foreign corporation upon a cause of action for a tort which did not arise within this state.

In an action to recover damages for a death caused by defendant's negligence, the cause of action is for a tort.

As the question of jurisdiction in such an action relates to the subject-matter of the action, jurisdiction cannot be conferred upon the court by any consent or stipulation of the parties, and the objection may be taken at any stage of the action, and *it seems* the court may *ex mero moto*, when attention is called to the facts, refuse to proceed further and dismiss the action.

The distinction made between residents and non-residents by said provision of the Code is not repugnant to the provision of the Federal Constitution, (sec. 2, art. 4), declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *Robinson v. Oceanic S. N. Co.*, 112 N. Y. 315.

The complaint showed, that the plaintiff was a resident of New York, and the defendant a corporation thereof operating a line of railway, extending into the state of Pennsylvania, upon which extension the husband of the plaintiff was killed through the negligence of the defendant. The statute of the latter state gives the widow, for her own benefit and that of the children of the decedent, a cause of action similar in import to that given by the law in this state. Held, that the widow could recover as such in this state, but not beyond the amount limited by the

state of New York. *Wooden v. W. N., N. Y. & P. R. Co.*, 126 N. Y. 10, aff'g judg't overruling demurrer to complaint.

Administratrix, through appointment in New York, of person killed in New Jersey by a foreign corporation may recover judgment therefor here, as the New Jersey statute and that of this state both authorize recovery therefor. *Stallnecht v. P. R. R. Co.*, 13 Hun, 451, aff'g order overruling demurrer to complaint.

Section 1902 of the Code of Civil Procedure is not covered by the express terms of section 2702 thereof, but by the broad powers conferred by the latter section upon ancillary representatives: it is evident that the legislature intended to give them every right of action conferred upon executors or administrators except those specially excepted. *Lang v. Houston &c. R. Co.*, 75 Hun, 151; s. c. aff'd, 144 N. Y. 717.

Although the statutes of the various states, giving causes of action in case of death of a person caused by the wrongful act of negligence of another, have no extra-territorial force, the courts of the state of New York, as a matter of comity, where the statutes of the state in which the cause of action arises and that of the state of New York are similar, and where they have jurisdiction of the defendant, will furnish the machinery to prosecute the claim, but it is the statute of the state wherein the cause of action arose and not that of the state of New York which the courts of the latter state will enforce in such cases, and an action under such statute is maintainable only by the person who, by the terms of the statute of the state wherein the cause of action arose, is authorized to maintain the same. *Selma R. & D. R. Co. v. Lacey*, 49 Ga. 106; *Beldin v. Black Hills & St. Pierre R. Co.*, 52 Am. & Eng. R. R. Cases 624; *Illinois Central R. Co. v. Hunter*, 70 Miss. 471.

The question of the capacity of a plaintiff to sue can be raised only by answer or demurrer, and if not so raised it is deemed to have been waived, but the question whether a complaint states facts sufficient to constitute a cause of action can be raised at any time during the trial of the action and need not be presented either by answer or demurrer. *Stone v. The Groton Bridge &c. Co.*, 77 Hun, 99.

In an action in New York for death in Canada, the statutes of Canada determine the substantive rights of the parties and the statutes of New York, the details of procedure. The interest granted by New York Code Civ. Proc. sec. 1904 was not allowed when the statutes of Canada did not provide for it. *Kiefer v. Grand Trunk &c. R. Co.*, 12 App. Div. 28; *Boyle v. Southern R. Co.*, 36 Misc. 289.

Release executed by the administrator prior to his appointment is inoperative. *Snedeker v. Snedeker*, 47 App. Div. 471; s. c. aff'd, 164 N. Y. 58.

A non-resident alien permitted to bring the statutory action. *Szymani v. Blumenthal*, (Del.) 52 Atl. Rep. 347.

See, also, *Kelleyville Coal Co. v. Petraytis*, 95 Ill. App. 635; s. c. aff'd, 195 Ill. 215.

Action cannot be maintained in Georgia without allegation that laws of Alabama and Georgia are the same respecting negligent killing. *Selma R. Co. v. Lacy*, 43 Ga. 461.

No evidence was given that law of Indiana authorized action, where injury was received, hence common law was presumptively in force. *Chicago &c. R. Co. v. Schroeder*, 18 Ill. App. 328.

Right of action exists only by law of place where injury happened. Hence, where killing occurred in Missouri, proof that action could be maintained in that state was necessary on a trial in state of Iowa. *Hyde v. Wabash &c. R. Co.*, 61 Iowa, 441.

Citing *State v. Pittsburg &c. R. Co.*, 45 Md. 41; *Hover v. Penn. R. Co.*, 25 Oh. St. 667.

Where a right of action accrues by virtue of a statute of any state, the action may be maintained in the courts of any other state where the statutes relating to the same subjects are of similar import, though they be not precisely the same. It would seem to be sufficient, if the action be not contrary to the public policy or law of the state of the tribunal. Hence, where an administrator had a right of action, under the statute of Illinois for death of his intestate by negligence of defendant, the action would be maintained in Iowa. *Morris v. Chicago &c. R. Co.*, 65 Iowa, 727.

See *Boyce v. Wabash R. Co.*, 63 Iowa, 70.

**From opinion.**—"We think that it has been generally held that where a right of action accrues by virtue of a statute of any state, the action may be maintained in any other state, if not contrary to the public policy or law of the place where the suit is brought. See *King v. Sarria*, 69 N. Y. 24; *Phillips v. Eyre*, L. R. 62 B. 1; *Wall v. Hoskins*, 5 Fred. Law 177; *Herrick v. Minneapolis &c. R. Co.*, 31 Minn. 11; *Boyce v. Wabash R. Co.*, 63 Iowa, 70. \* \* \* It is not to be denied that there are cases not in accord with the rule of those above cited. See *Woodward v. Michigan S. & N. I. R. Co.*, 10 Oh. St. 121; *Richardson v. New York Cent. R. Co.*, 98 Mass. 80, and *McCarthy v. Chicago P. I. & P. R. Co.*, 18 Kan. 46."

Courts of Kansas refused to enforce a statute of New Mexico, penal in its nature and giving recovery for death by negligence, as to persons who could not recover, if the injury had been received in Kansas. *Dale v. Atchison &c. R. Co.*, 57 Kan. 601.

Likewise of the Missouri statute. *Matheson v. Kansas City &c. R. Co.*, 61 Kan. 667.

The fact that a corporation was organized in both states of Massa-



achusetts and Connecticut cannot affect the liability for an accident occurring in the latter state, as there is no statute in Connecticut whereby the action survives or is created. *Davis v. N. Y. R. Co.*, 143 Mass. 301.

Action for death occurring in South Dakota permitted in Minnesota. *Nicholas v. Burlington &c. R. Co.*, 78 Minn. 43.

An administrator may enforce, in Mississippi, a cause of action arising and held in the state of Tennessee, for the wrongful killing in the latter state, although it could not have been maintained in Tennessee had it occurred in Mississippi. *Illinois R. Co. v. Crudup*, 63 Miss. 291.

The Kansas statute, enforced in Missouri, under a statute permitting parties to sue on causes of action accruing to and enforceable by them in any state or territory. *Riley v. Grand Island Receivers*, 72 Mo. App. 280.

Action held unenforceable where brought, if unenforceable where accident occurred. *Ott v. Lake Shore &c. R. Co.*, 18 Oh. C. C. 395.

The courts of Ohio enforce the laws of another state only when that state would enforce its law in similar cases. *Wabash &c. R. Co. v. Fox*, 20 Oh. C. C. 440.

A non-resident alien cannot bring the statutory action in Pennsylvania. *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525; aff'g s. c., 6 Pa. Dist. 15.

An action may be maintained in Pennsylvania, upon process served in that state, to recover damages in an action *ex delicto*, for negligence causing death, occurring in New Jersey, when statutes of the two states are similar. While a foreign statute has no extra territorial force, rights under it, not contrary to the policy of Pennsylvania, will, by comity, be enforced. *Knight v. West Jersey R. Co.*, 108 Pa. St. 250.

An administratrix appointed in New York can maintain an action in that state for injury received in New Jersey causing death, the right to which arises under the New Jersey statute. *Dennick v. R. Co.*, 103 U. S. 11.

**From opinion.**—"The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States for the northern district were competent to try such a case when the parties were properly before it. *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Bl. 983, 1055; *McKenna v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said that it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute

was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See *ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Great Western Railway Co. v. Miller*, 19 Mich. 305. \* \* \*

We are aware that *Woodward v. Michigan Southern & Northern Indiana Railroad Co.*, (10 Oh. St. 121), asserts a different doctrine, and that it has been followed by *Richardson v. New York Central Railroad Co.*, 98 Mass. 85, and *McCarthy v. Chicago, Rock Island & Pacific Railroad Co.*, 18 Kans. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the court of appeals of New York, in the case of *Leonard, Administrator v. The Columbia Steam Navigation Co.* not yet reported, but of which we have been furnished with a certified copy."

A right given by the statutes of one state such as a right to sue and recover for the death of a person caused by negligence, will be recognized and enforced in the courts of another state, whose laws give a like right under the same facts. *Texas & Pacific Railway Co. v. Cox*, 145 U. S. Sup Ct. 593.

In *Willis v. Missouri R. Co.*, 61 Tex. 432, it was held by the Supreme Court of Texas that suit could not be brought in that state for injuries resulting in death inflicted in the Indian territory, where no law existed creating such a right of action. The opinion goes somewhat further than this in expression, but in that regard has not been subsequently adopted.

In *Texas & P. R. Co. v. Richards*, 68 Tex. 375, it was said that while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one state would be recognized and enforced in the courts of another state, whose laws gave a like right under the same facts. In *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, the Supreme Court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas, for the reason that the statutes of Arkansas were so different from those of Texas in that regard that jurisdiction ought not to be taken, but the court indicated that it would be a duty to do so in transitory actions where the laws of both jurisdictions were similar. The question, however, is one of general law; and we regard it as settled in *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11.

Where a statutory cause of action for death by negligence arises in one state it may be enforced in any other, where the statute or policy of the law is substantially the same, though the beneficiaries may differ. *Stewart v. Baltimore &c. R. Co.*, 168 U. S. 145.

Right of action founded on death arises where the injury occurred, and not where the administrator was appointed. *Lung Chung &c. v. Northern Pac. R. Co.*, 19 Fed. Rep. 254.

The right to recovery is governed by statutes of the state where the negligence and death occurred, though the deceased and those entitled to recover are citizens of another state, and, when not inconsistent with

its laws, may be enforced in another state. *Davidow v. Pennsylvania R. Co.*, 85 Fed. Rep. 943.

Non-resident aliens held not entitled under an act allowing next of kin to sue. *Brannigan v. Union Gold Min. Co.*, 93 Fed. Rep. 164.

An Indiana administrator allowed to sue in Ohio for damage from death by negligence. *Cincinnati &c. R. Co. v. Thieband*, 114 Fed. Rep. 918.

Civil action given to next of kin by laws of Mexico, though there classed as a negligent crime, enforced in Texas. *Mexican &c. R. Co. v. Slater*, 115 Fed. Rep. 593.

Where the statutes of one state vested the right of action in heirs and that of another, in personal representative, a complaint in the former, for death in the latter, by an heir, held demurrable. *Thorpe v. Union P. R. Co.*, 24 Utah. 475.

If the action is not maintainable where accident occurred, it cannot be enforced where suit is brought. *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109.

Action accrued in province of Quebec for failure of defendant to comply with law of that province, as to the construction of lawful crossings on a highway. The action, although transitory, is entirely dependent on the foreign law, and that such law must be fully set out to enable the court to know whether the cause of action exists, and the legal effect cannot be plead. *McLeod v. Conn. &c. R. Co.*, 58 Vt. 727.

Citing *Kennedy v. Morgan*, 57 Vt. 48; *Fay v. Kent*, 55 id. 557.

See, also, *S. P. Bruce's Adm'r v. Cincinnati R. Co.*, 83 Ky. 174; *Ill. Cent. R. Co. v. Crndup*, 63 Miss. 291.

A statute giving cause of action for a "death caused in this state," construed to include death outside of state from accident in the state. *Rudiger v. Chicago &c. R. Co.*, 94 Wis. 191.

#### ADMINISTRATOR—APPOINTMENT.

Suit may be brought by a temporary administrator. *Louisville &c. R. Co. v. Chaffin*, 84 Ga. 519; *Houston &c. R. Co. v. Cook*, 60 Tex. 403.

Also by a foreign executor or administrator in a jurisdiction where statutory power is given him to do so. *Union Pac. R. Co. v. Shacklet*, 119 Ill. 232; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; 41 id. 48.

But not otherwise. *Tiffany's Death by Wrongful Act*, see, 110.

A claim for damages for death are not such assets as will authorize a probate court to appoint an administrator, where such appointment depends upon the existence of assets of the deceased. So, held under Kansas statute in the case of the death of a non-resident (*Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477; *Perry v. St. Joseph R. Co.*, 29

Kas. 420; *Union Pac. R. Co. v. Dunden*, 37 id. 1; *Ill. R. Co. v. Cragin*, 71 Ill. 111, where the administrator was appointed in Iowa upon the estates of a resident of Illinois, who has no property in the former state, and the action was brought in Illinois). In Iowa, Minnesota and Nebraska it is held that, as the cause of action is given to the personal representative, the power to appoint is implied. *Tiffany's Death by Wrongful Act*, sec. 111.

The question of the power to appoint an administrator may be inquired into (*Union Pac. R. Co. v. Dunden*, 37 Kas. 1), but such appointment is presumptively authorized, if made. *Jacob's Adm'r v. Louisville &c. R. Co.*, 10 Bush. 263. Such appointment may be directly attacked by the alleged wrong doer, when based upon a claim against him. *Tiffany's Death by Wrongful Act*, sec. 112.

When administrator would have right of action in state of Iowa for collection of a claim, the circuit court had jurisdiction to appoint him an administrator for collection of claim, no matter where decedent resided at his death. *Morris v. Chicago &c. R. Co.*, 65 Iowa, 127. See, *Boyce v. Wabash R. Co.*, 63 id. 70.

A surrogate, in issuing letters of administration, has authority, and it is within his discretion, to limit the powers conferred upon the administrator.

Where, therefore, such letters contain this clause, "these letters are issued with limited authority to prosecute only, and not with power to collect or compromise," held, that the surrogate had power to issue the limitation.

It seems, that if a limitation was in excess of the powers of the surrogate, it did not invalidate the letters but was at most only an irregularity.

It seems also (Miller, J., Danforth and Finch, JJ., concurring), that the objection is one that may not be raised collaterally, in a suit brought by the administrator. *Martin v. Dry Dock &c. R. Co.*, 92 N. Y. 70.

Foreign administrator allowed to sue in Federal Court, though beneficiaries resided where accident happened. *Popp v. Cincinnati &c. R. Co.*, 96 Fed. Rep. 465.

#### (a). JURISDICTION—INJURIES ON HIGH SEAS, PORTS, BAYS, &c.

Long Island Sound is the subject of territorial dominion: being an inland arm of the sea, with no outlet to the ocean, except by a channel within cannon range on either side.

If the sound was not embraced in the royal grant to the Duke of York, the king retained it as the property of the crown, until it was

divested by the revolution; and his dominion over its waters then devolved on the states of New York and Connecticut.

So far as these waters are wholly within this state, the territorial authority of New York, subject to the public right of navigation, extends from shore to shore; and so far as the two states are co-terminous, it extends to the middle of the sound, if not to a line running directly from Fisher's Island to Lyon's Point.

The cession to the federal authorities of admiralty and maritime jurisdiction, over our inland seas and bays, was not an alienation of their waters, or of general jurisdiction over them; and in respect to these, the states retain unimpaired the residuary powers of legislation and their rights of territorial dominion.

The counties and towns which are bounded generally on the sound, comprehend within their limits, for the purposes of ordinary civil and criminal jurisdiction, the waters between their respective shores and the exterior water line of the state. *Mahler v. The Norwich & N. Y. Transportation Co.*, 35 N. Y. 452.

The supreme court of this state had jurisdiction of an action against the owners of a steamboat, navigating the waters of Lake Champlain, for causing the death of plaintiff's intestate by negligence, while a passenger on said boat within this state.

This jurisdiction is not taken away by the act of Congress of 1851, limiting the liability of shipowners, &c. 9 U. S. Stat. at Large, 635. Where the injury is confined to one party, the limited liability prescribed by said act (sec. 3) can be equally as well enforced in a common law action as though no such limit had been imposed. *Dongan v. Champlain Transportation Co.*, 56 N. Y. 1.

The jurisdiction of actions to enforce common law remedies for breaches of maritime contracts or for maritime torts saved to the state courts by the judiciary act of 1789 (1 U. S. Stat. at Large, 76, sec. 9), is not limited, restricted or qualified by the act of Congress of 1851, "to limit the liability of shipowners," etc. (9 U. S. Stat. at Large, sec. 635), unless appropriate proceedings are taken under said statute by a party interested, to avail himself of the benefit thereof.

In such an action the provisions of said act of 1851 can only be interposed to limit the plaintiff's recovery to the modified liability prescribed therein. Sees. 3, 4.

Plaintiff employed one "C." who was the owner of a scow, to transport thereon cattle and horses across the St. Lawrence river. "C." employed defendant's tug to tow the scow, with the knowledge and assent of plaintiff, he agreeing to pay a portion of the contract price; by the unskillful management of the tug the scow was drawn under water and

some of the cattle lost. Held, that plaintiff could maintain an action to recover his damages, and that the Supreme Court of this state had jurisdiction of such action. *Baird v. Daly*, 57 N. Y. 236.

Where death occurs on high seas, the action may be maintained in the courts of the state in a port of which the vessel is owned and registered. *McDonald v. Mallory*, 77 N. Y. 546, rev'g 44 N. Y. Supreme Court, 80; *Crapo v. King*, 16 Wall. 610, rev'g 45 N. Y. 86.

Where death occurs on navigable waters within state of Rhode Island, the courts of Rhode Island had jurisdiction. *Am. S. Co. v. Chase*, 16 Wall. 522; 9 R. I. 419.

See *Sherlock v. Alling*, 93 U. S. 99; *Mahler v. Norwiche Trans. Co.*, 35 N. Y. 352; *Dougan v. Champlain Trans. Co.*, 56 id. 1; *Opsahl v. Judd*, 30 Minn. 126.

As to jurisdiction of Federal Courts, suits in admiralty, &c. see *Tiffany's Death by Wrongful Act*, sec. 203.

In an action for the death of one by the act of another, committed abroad, it is incumbent on the plaintiff to prove that such death was an actionable wrong by the law of the place where the act was committed. Ports, bays and harbors to the distance, at least, of a marine league from the shore are within the territorial jurisdiction and subject to the municipal law of the sovereign of the adjacent land. Accordingly, held, that, in an action for the death of one by the act on board of a vessel lying in the port of a foreign country, at a point not more than two miles from the shore, a failure by the plaintiff to show that, by the law of that country, such death was an actionable wrong, is fatal to a recovery.

Where a servant went overboard a ship and was drowned, freedom from contributory negligence must be proved. *Geoghegan v. The Atlas Steamship Co.*, 3 Misc. 224, rev'g judg't for pl'ff. (Common Pleas of N. Y.)

**From opinion.**—"The action is by an administratrix for damages from the death of her intestate, who by the alleged negligence of the defendant, fell overboard from its steamer, a British vessel, in the bay of Savanilla, United States of Columbia.

That the actionable quality of an alleged wrong depends upon and is determined by the municipal law of the place of the transaction; that in a suit here proceeding upon an alleged wrong committed abroad, the court, in the absence of evidence to the contrary, will presume the common law to be the law of the locality; that if by the principles of the common law, such alleged wrong would not be the subject of action for private redress, the plaintiff, in order to recover, must prove it to be so by the law of the place of the transaction; that by the common law the death of a human being is not the subject of a civil action, and that, by consequence, whoever seeks reparation in our courts for the death of another abroad, must establish by affirmative evidence that such death is an actionable wrong by the law of the place of the occurrence, are now elementary

principles in the jurisprudence of the state of New York. (Whitford v. Panama R. Co., 23 N. Y. 465; McDonald v. Mallory, 77 id. 546; Leonard v. Columbia S. N. Co., 84 id. 48; Wooden v. Western New York & P. R. R. Co., 126 id. 10.)

Incontestably the decision of the appeal, in one of its aspects, is suspended upon the application of these principles to the case in controversy. Counsel for the respondent so conceded on the trial, and accordingly, maintaining that the *locus* of the transaction was a British vessel on the high seas, and invoking the recognized rule that the law of the flag is the law of a vessel so situate (McDonald v. Mallory, 77 N. Y. 546), he introduced in evidence Lord Campbell's act, by which the death of a human being by the wrongful act of another is made the subject of a civil action. The appellant challenged the contention, and assuming the position that as it appeared by uncontroverted proof that the act in litigation was committed within the territorial jurisdiction of the United States of Colombia, and as no evidence was adduced that by the law of that country the alleged wrong is actionable, he moved to dismiss the complaint.

We are of the opinion that the ground upon which the appellant stood is impregnable; and that the learned trial judge erred in denying the motion.

When the plaintiff rested it was in evidence by the log book, that at the time of the accident, the vessel was in the harbor of Savanilla, where the port authorities were received, where passengers and mails were discharged, and where the cargoes were delivered and taken in. A witness for the plaintiff testified: "I couldn't tell how far the shore was from the ship, when this accident happened: I couldn't calculate the distance. We could see the shore from the ship, but I couldn't tell the distance. I should think it wouldn't be three miles." On part of the defendant the evidence as to the locality of the vessel was, that "she was in the bay of Savanilla, a mile and three-quarters or two miles from the shore."

Upon this uncontested state of fact, the question was one of law for decision by the court, whether at the time of the accident the vessel was on the high sea, as claimed by the plaintiff, or within the territory of the United States of Colombia, as asserted by the appellant.

That the vessel was not on the high sea, but was within the dominion and subject to the law of the United States of Colombia, is, upon the authority of the publicists, an obvious and undeniable proposition. "The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this extent territorial jurisdiction, a distance of a marine league, or as far as a cannon shot will reach from the shore, all along the coast of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Lawrence's Wheaton, part II, chap. iv, sec. 6, p. 320. "The exclusive dominion of a state unquestionably extends to those portions of the sea adjoining its territory embraced by harbors, gulfs, bays and estuaries, and into the open sea to the distance of a marine league." 1 Kent's Comm. 29, 30, marginal pages.

"The ports and roadsteads are unquestionably a part of the territory and subject to the exclusive dominion of the state to which they belong, to the same extent as the land itself. They are governed in all respects by the municipal law." Pom. Inter. Law, sec. 145.

And the same doctrine is promulgated by the tribunal in this country of highest authority on the subject. "Between nations the minimum limit of the

territorial jurisdiction of a nation over tidewaters is a marine league from its coast." *Manchester v. Massachusetts*, 139 U. S. 240, 258. "It is part of the law of civilized nations that when the merchant vessel of one country enters the port of another for the purpose of trade it subjects itself to the law of the place to which it goes unless by treaty or otherwise the two countries have come to some different understanding or agreement." *Wildenhaus' Case*, 120 U. S. 1, 11.

"Upon a critical examination of the cases cited by the respondent, we find nothing to the contrary of the proposition that the rights of the parties to this litigation are to be determined by the law of the United States of Colombia.

The act upon which the suit proceeds having been committed abroad, the burden was on the plaintiff to prove it an actionable wrong; and as she produced no evidence in support of the proposition, the complaint should have been dismissed.

Assuming, however, that at the time of the accident, the vessel was on the high sea, and so subject to the law of England, which authorizes an action for the death of a human being; still, upon a familiar principle, the law of the forum regulates the burden of proof and the quantum of evidence requisite to a recovery."

Statute in New Jersey as to actions for death by negligence extends to death within three miles of the shore. *Lennan v. Hamburg &c. Ss. Co.*, 73 App. Div. 357.



## DOMESTIC ANIMALS.

### I. INJURIES FROM.

- (a) What is sufficient notice or knowledge.
- (b) Not lawful to knowingly keep a vicious animal.
- (c) Injury by vicious dog to persons coming on owner's premises.
- (d) Contributory negligence.

### II. INJURING TROUBLESOME AND VICIOUS ANIMALS.

### III. WHO IS LIABLE FOR KNOWINGLY KEEPING OR HARBORING A VICIOUS ANIMAL.

### IV. JOINT TRESPASSERS.

### V. INJURY BY ANIMALS WHILE TRESPASSING.

- (a) Extent of liability.
- (b) Dogs straying—common law rule did not extend to.
- (c) Act of stranger causing the trespass.
- (d) Duty of land-owner to fence.
- (e) Division fences.
- (f) Injuries committed on highway.
- (g) Wild animals.

### VI. INJURY ON RAILWAYS.

### VII. CATTLE UNLAWFULLY AT LARGE PRECLUDES RECOVERY.

### VIII. CATTLE UNLAWFULLY AT LARGE DOES NOT PRECLUDE RECOVERY.

### IX. COMPANY LIABLE FOR WANTON OR WILLFUL ACTS OR GROSS NEGLIGENCE.

### X. COMPANY SHOULD USE REASONABLE CARE TO PREVENT INJURY TO CATTLE KNOWN TO BE ON RAILWAY.

### XI. COMPANY SHOULD USE REASONABLE CARE TO DISCOVER CATTLE AND PREVENT INJURY TO THEM.

- (a) Suitable care requires outlook.
- (b) Special watchman need not be kept.
- (c) Train agent need not keep outlook.
- (d) Bell should be rung or whistle sounded when cattle are seen.
- (e) Train should be at once stopped.
- (f) Company not liable for failure to stop.
- (g) On account of darkness or fog.
- (h) Safety of passengers is paramount.

- (i) Speed of trains—Failure to diminish constitutes negligence.
- (j) Company should keep track free from obstruction.
- (k) Best appliances not required.
- (l) Brakes must be applied.
- (m) Sufficient equipment of men is necessary.
- (n) Insufficiency of locomotive does not establish negligence.
- (o) Substances on right of way attracting cattle does.

## XII. CATTLE NEAR TRACK.

## XIII. INJURY FROM FRIGHT, EXCAVATIONS, OR STRUCTURE AND NOT FROM ACTUAL COLLISION WITH CARS.

## XIV. BARBED WIRE FENCES.

## XV. DUTY OF RAILWAY COMPANY TO FENCE.

- (a) Failure to fence makes company liable for injury caused thereby.
- (b) Company's liability for negligence in maintaining fence.

## XVI. CONTRIBUTORY NEGLIGENCE.

- (a) When company fails to erect fence, action is not usually defeated by negligent act of landowner.
- (b) If sufficient fence had been once erected, action is defeated by negligence of owner of cattle.

## XVII. RIGHTS OF OTHERS THAN ADJOINING OWNERS.

## XVIII. ADJOINING LANDOWNER CANNOT RECOVER FOR INJURY TO CATTLE FROM HIS FAILURE TO MAINTAIN FENCE.

## XIX. GATES, &c.—WHO MUST KEEP SHUT.

## XX. IN WHAT PLACES COMPANY MUST FENCE.

## XXI. SUFFICIENCY OF FENCE.

The owner or keeper of domesticated animals can only be made liable for the negligent exercise of his right to keep the same, for usually liability arises only from negligence in the exercise of a right, while absolute liability follows injury from unlawful acts.

Hence, if a domesticated animal, not trespassing on land, do injury to another or another's property, the owner of the animal is only liable for negligence in the exercise of his right to keep such animal. If, however, the animal have a propensity to attack men or other animals, and the owner know, should know, or is presumed to know of such propensity, such animal is regarded by the law as no longer domesticated, and the owner is not thenceforth protected by the law in his former right to keep it, and hence it is negligence per se, or unlawful, for him, save at his own risk, to keep it at all, and, if an injury follow to another, the owner would be liable, as in the case of injury resulting from any other nuisance doing special damage, in the absence of evidence that the person harmed brought

the injury upon himself. If the injury happen while the animal is unlawfully on the land of another, the owner of the animal is absolutely and irrespective of any negligence on his part, liable for the natural consequences of the trespass. But if the animal is on the land of another by his failure to perform some duty to keep it therefrom, whether such duty arise from direct provision of law, or contract expressed, or grant presumed, the owner of the animal is not liable.

## I. Injuries From.

When a domesticated animal does injury to the property of another, the owner or keeper of the animal is not ordinarily liable therefor unless he failed to use ordinary care in keeping or handling such animal, or in case of injury from an attack by such animal *on man or beast*, unless he knew, was presumed to know, or in the exercise of ordinary prudence should have known of the propensity or probability of the animal making such attack, in which case, the animal ceases to be regarded as a domesticated animal, and the owner, having no right to keep it at all, does so at his peril.

(This rule does not include the case, where the injury was done while the animal was *unlawfully* on the land of another without fault of the owner of the land, in which case, as will be seen, the owner of the animal is liable for trespass, and the question of negligence is not involved.)

Dickinson v. McCoy, 39 N. Y. 403; Cox v. Murphy, 82 Ga. 623; Stumps v. Kelley, 22 Ill 140; Brent v. Kimball, 60 id. 211; Keightlinger v. Eagan, 65 id. 235; Wormley v. Gregg, 65 id. 251; Marian v. Vanaltdt, 88 id. 132; Graham v. Payne, 122 Ind. 406; Maine v. Weiland, 81½ Pa. St. 243; Coggswell v. Baldwin, 15 Vt. 404; Cooley on Torts, 342; Beck v. Dyson, 4 Camp. 198; Jones v. Perry, 2 Eng. 482; Pickering v. Orange, 1 Sean. 338; Graham v. Payne, 122 Ind. 406; Joseph Schlitz Brew Co. v. Blacklay, 18 Oh. C. C. 359; Trinity &c. R. Co. v. O'Brien, 18 Tex. Civ. App. 690; Crowley v. Groonell, 73 Vt. 45; s. c., 55 L. R. A. 876; Chickering v. Lord, 67 N. H. 555; O'Connell v. Jarvis, 13 App. Div. 3; Clowdis v. Fresno Flume &c. Co., 118 Cal. 315; Barelay v. Hartman, 2 Marv. (Del.) 351; Hallyburton v. Burke County Fair Asso., 119 N. C. 526; s. c., 38 L. R. A. 156.

Defendant was liable for wrongfully turning horses into a vacant field where there were other horses, regardless of whether he knew that they were vicious. *Martin v. Farrell*, 66 App. Div. 177.

Owner must have sufficient notice to put a prudent man on his guard. *Fake v. Addicks*, 45 Minn. 37; 22 Amer. R. 716.

To establish liability for viciousness of a domestic animal, owner must have had notice of its viciousness, or have been wanting in exercise of reasonable care. *Startler v. McArthur*, 33 Mo. App. 218; *Bell v. Leslie*, 24 id. 661.

Owner of a mule killing a colt is only liable if he knew of mule's propensity to injure young colts. *Meehan v. McKay*, 1 Okla. 59.

Mere fact that young, unbroken horse injured person assured that he was gentle, who was aiding in fastening him to a wagon, does not show that he was vicious, although owner represented him to be gentle, and owner is not liable unless he knew or had reason to know it was false. *Funny v. Curtis*, 78 Cal. 498.

(a). WHAT IS SUFFICIENT NOTICE OR KNOWLEDGE.

NATURAL PROPENSITIES.

Evidence that a horse kicked when teased, tickled or struck with sticks, was not sufficient to establish its vicious disposition. *Lawlor v. French*, 2 App. Div. 140.

Especially where it shows no such disposition, except when so annoyed or struck. *McHugh v. New York*, 31 App. Div. 299.

Notice to foreman in charge of a dog during its owner's absence, held notice to owner. *Niland v. Geer*, 46 App. Div. 194.

Evidence that a dog attacks a person when set upon him by its custodian is not sufficient to establish its viciousness; nor is evidence of a fight between it and another dog. *Strubing v. Mahar*, 46 App. Div. 409.

Such propensities as are natural to the animal the owner is presumed to know. Hence, if the animal be given an opportunity to exercise the propensity, through the negligence of the owner, he would be liable. *Wharton on Negligence*, sec. 907.

*Hammond v. Melton* 42 Ill. App. 188.

Defendant was not charged with notice of viciousness, where his horse had never before or since kicked anyone. *O'Connell v. Mooney*, 32 Misc. 641.

Balking and kicking on the road, while drawing a load, is no notice of horses' liability to kick in the stall. *Bennell v. Mallard*, 33 Misc. 112.

Owner of horse known to be vicious and likely to injure one going in his stall, was liable to a groom not warned of the danger, although he never injured anyone before. *McGarry v. N. Y. & H. R. Co.*, 28 J. & S. (60 Super. C.) 367.

Owner's knowledge held immaterial, where servant knew it and in view thereof, was negligent in his management of the animal. *Clowdis v. Fresno Flume &c. Co.*, 118 Cal. 315.

Knowledge of ferocious temper is enough. *Warner v. Chamberlain*, 7 Honst. 18.

Allegation of dog's habit to bite is unnecessary, where there is an allegation of owner's knowledge of its fierce disposition. *Guenther v. Foley*, 26 Ind. App. 93.

In an action under a statute, providing that "the owner of a dog shall

be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act," it was held that while the statute was evidently intended to do away with the necessity of proving *scienter*, still a plaintiff might prove the things necessary to a right of action, at common law, and proof of *scienter* was permitted. *Sanders v. O'Callaghan*, 111 Iowa, 544.

In absence of knowledge of the vicious nature of a dog, owner was not liable, where, upon being inadvertently stepped on, it ran from under the wagon and bit one of a number of boys who were throwing dirt at the wagon. *Cuney v. Campbell*, 76 Minn. 59.

A bull that had always been docile was not shown to be vicious, by evidence that he had once attacked a man who provoked him by abuse. *Erickson v. Bronson*, 81 Minn. 258.

A boy, the servant of a tenant on a farm, and entitled to use the *locus in quo*, brought his gray horse from the pasture through the barnyard where a bull was confined, and from which he drove the cows into the lane, leaving the gate into the barnyard open so that the bull followed into the lane and injured the boy and the horse. The bull was known to the boy and to its owner to have a peculiar aversion to gray horses.

The boy having the right to the common use of the lane, could recover, although he was careless in leaving the gate open. *Earhart v. Youngblood*, 27 Pa. St. 331.

Actual biting on a previous occasion is not essential: where the dog has shown a disposition to do so, it is sufficient to carry the case to the jury. *McConnell v. Lloyd*, 9 Pa. Super. Ct. 25.

Jury was not justified in inferring a habit of running away from evidence that a horse had walked off when unhitched and unattended. *Buckley v. Earle & Co.*, 22 R. I. 358.

Where owner knew a ram would butt, he was bound to prevent injury from this vice. *Oakes v. Spaulding*, 40 Vt. 347.

*Jackson v. Smithson*, 15 M. & W. 563.

Proof of *scienter* as to rams between August 1st and December 1st, dispensed with. This absolutely required ram to be restrained. *Town of Lamphier*, 37 Vt. 52.

Knowledge that dog had a disposition likely to cause it to commit injury similar to that in question is sufficient. *Robinson v. Marino*, 3 Wash. 434.

Where a bull driven along the street, ran at a man with a red handkerchief, and the defendant thereafter ascribed the attack to the handkerchief, there was some evidence to go to the jury on the question of the defendant's knowledge of the dangerous character of the bull. *Hudson v. Roberts*, 6 Exch. 699; 20 L. J. id. 299.

## PREVIOUS COMMISSION OF THE OFFENSE.

The fact that a pair of horses, ordinarily gentle, previously ran away through fright, reasonably justified, does not charge owner with notice that they were vicious or dangerous, so as to make him liable where they subsequently ran away from the same cause. *Benoit v. Troy &c. R. Co.*, 154 N. Y. 223; rev'g s. c., 9 App. Div. 622.

Evidence that dog had bitten another about two weeks before, and that the owner had been advised of it, was sufficient to justify submission to the jury of the question of the owner's knowledge of its vicious disposition. *Bauer v. Lyons*, 23 App. Div. 204.

Citing *Buckley v. Leonard*, 4 Den. 500; *Caldwell v. Snook*, 35 Hun, 73; *Brice v. Bauer*, 108 N. Y. 428.

Defendant was chargeable with knowledge of the viciousness of a dog, which had bitten two others while with her child, during the previous year. *Duval v. Barnaby*, 75 App. Div. 154.

Owner of dog known to have the habit of jumping at heads of horses is liable for injuries from such act, while taking him along a public street. *Putnam v. Wigg*, 3 N. Y. S. R. 304; 14 N. Y. Supp. 90.

Notice to or knowledge by owner that the animal had previously committed a like injury, is sufficient. *Arnold v. Norton*, 25 Conn. 92.

*Kittridge v. Elliott*, 16 N. H. 77; *Buckley v. Leonard*, 4 Denio, 500; *Fake v. Addicks*, 45 Minn. 37.

Enough to show that it is within the owner's knowledge that dog might bite, not necessary to show that he had bitten. *Flangsbury v. Basin*, 3 Ill. App. 531.

*Rider v. White*, 65 N. Y. 54; *Wood v. Vaughan*, 28 N. B. 472.

It is not necessary to show that a vicious dog had previously bitten somebody, if owner should have known of its disposition to bite or attack. *Kalb v. Klages*, 27 Ill. App. 531.

Defendant cannot set up a lack of knowledge of the viciousness of a dog, where it had made various attacks on another. *Chicago &c. R. Co. v. Kuckkuck*, 98 Ill. App. 252.

Fact that a bull taken along the street had never attacked anyone before was not conclusive, but to be considered. *Barnum v. Terpenning*, 75 Mich. 557.

Where owner had knowledge of dog's disposition to attack horses on the road, evidence that such actions were contrary to his disposition were inadmissible. *Willett v. Goetz*, 125 Mich. 581.

That owner has seen dog run to the fence and bark is not sufficient notice of its vicious habit of jumping against the fence so as to frighten horses and cause them to run away. *Bradley v. Myers*, Pa. C. P., 10 Lanc. L. Rev. 137.

Although the owner knows that dog is in the habit of chasing persons or animals on the road, he is not liable for frightening horses, when he has no knowledge that injury ever resulted from such habits, and when he used ordinary care to prevent injuries. *Shaw v. Craft*, 37 Fed. Rep. 317.

Knowledge that a dog on previous occasion ran at a person growling and showing its teeth is sufficient notice of its viciousness. *Wood v. Vaughan*, 28 N. B. 472 (1892).

#### FEROCIOUS DOGS.

Keeping ferocious dogs without confinement is gross negligence rendering the owner liable for attacking and biting. *Jacoby v. Ocherhausen*, 59 Hun. 619.

A dog without slightest warning sprang upon and bit a woman. This sufficiently showed it to be vicious and dangerous and imposed on the master the duty of keeping him in subjection. *Webber v. Hoag*, 28 N. Y. S. R. 630.

Notice of dog's ferocity to owner's wife is sufficient. *Barclay v. Hartman*, 2 Marv. (Del.) 351.

That the dog was on exhibition in a stall in charge of an exhibitor, did not relieve the owner, under a statute imposing liability for injury by dogs except where the party injured is on owner's premises after dark or engaged in a wrongful act. *Bush v. Wathen*, 104 Ky. 548.

If a dog be of a ferocious nature it is equivalent to notice to the owner.

Master turning loose a dangerous and ferocious dog is liable for the harm done by it. *McGuire v. Ringrose*, 41 La. Ann. 1029.

One who puts an animal known to be vicious, in charge of an employé to be conducted along the public street, cannot avoid responsibility by investing the employé with the character of an independent contractor. *O'Neill v. Blase*, (Mo. App.) 68 S. W. Rep. 764.

#### PRESUMPTION AS TO DOGS.

Except when a rule is changed by statute the presumption is that a dog has not a propensity to worry or bite. Wharton on Neg. sec. 913.

Citing *Read v. Edwards*, 17 C. B. N. S. 245; *Thomas v. Morgan*, 2 C. M. & R. 496; *Marsh v. Jones*, 21 Vt. 378; *Brown v. Carpenter*, 26 id. 638; *Woolf v. Chalker*, 31 Conn. 121; *Vrooman v. Lawyer*, 13 Johns. 339; *Wheeler v. Brant*, 23 Barb. 324; *Fairchild v. Bentley*, 30 id. 147; *Buckley v. Leonard*, 4 Denio 500; *Sherfey v. Bartley*, 4 Sneed 58; *Durden v. Barnett*, 7 Ala. 169; *McCaskill v. Elliott*, 5 Strob. 196; *Jackson v. Smithson*, 15 M. & N. 563; *Hudson v. Roberts*, 6 Exch. 697.

Notice that dog will worry sheep is not notice that he will attack a man; nor, that a horse is unruly, that he may kick or bite. (*Spray v. Ammerman*, 66 Ill.

309; Keightlinger v. Egan, 65 id. 235; Cockersham v. Nixon, 11 Ind. 269; Hartley v. Halliwell, 2 Stark. 212.) But notice that bull gores other domestic animals is warning that he will attack man. (Earhart v. Youngblood, 27 Penn. St. 331; Cockersham v. Nixon, 11 Ind. 269.)

See, Twigg v. Ryland, 62 Md. 386; Smith v. Donohue, 49 N. J. L. 548; Buck v. Moore, 12 Bush. 337.

There is no presumption of ferocity with domestic animals as there is with wild animals. *West Chicago Street R. Co. v. Walsh*, 78 Ill. App. 595.

Where a dog has always been kind and gentle and never given reason for a suspicion that he would bite, the owner is not liable. *Martinez v. Bernhard*, 106 La. 368; s. c., 55 L. R. A. 671.

#### WATCH DOGS—DOGS KEPT CONFINED.

The fact that a dog is kept for the purpose of guarding property imputes knowledge to the owner of a propensity to attack and bite mankind, and hence it is negligence on the part of the owner to allow him at large.

The plaintiff, a child of about seven years old, lived with her parents in a house rented of the defendant, in the rear of his house. The latter procured the dog about a month before the injury to guard his property in the barn; he was usually kept chained and muzzled, but escaped, and as plaintiff was passing around defendant's house to the rear, along the side of the house, the dog sprang upon her and bit her. The evidence showed that the dog was vicious. Owner knew dog had bitten person before. A recovery was sustained. *Hahnke v. Friederich*, 140 N. Y. 224, aff'g judgt for plff.

*Lynch v. McNally*, 73 N. Y. 347; *Rider v. White*, 65 id. 54; *Jacoby v. Ocherhausen*, 59 Hun. 619; s. c. aff'd, 129 N. Y. 649.

#### SCIENTER.

Need not be proved under statutes of Connecticut, as to dog's evil disposition. Michigan, New Hampshire, New York, Pennsylvania, Ohio or Wisconsin, in case of injury to sheep. *Cooley on Torts*, 341, note.

The statute making the owner of a dog which shall *kill* or *wound* sheep liable, without notice that he was mischievous, has no application where the sheep were only *chased and worried*. In that case there must be proof of the *scienter* to render the defendant liable. *Auchmuty v. Ham*, 1 Denio, 195.

Fact that the owner kept a dog confined was strong evidence that he was unsafe when at large. *Buckley v. Leonard*, 4 Denio, 500.

The defendant's vicious and ferocious dog, once having bitten the defendant's servant, escaped at night and went to the plaintiff's premises



and bit him. Defendant was chargeable with knowledge of the vicious character of the dog, and, it seems this would be so, if it had not appeared that the dog had bitten another person before it bit the plaintiff, as the very purpose for which he was kept required a dog of a fierce nature; and that, therefore, defendant was chargeable with negligently keeping him. *Brice v. Bauer*, 108 N. Y. 428.

But see *Jennings v. D. G. Burton Co.*, 73 Hun, 545.

Defendant W. rented premises of defendant C. for use as a stable and kept a dog thereon which he chained in the day time. It was for W.'s own purposes and C. had no knowledge that the dog was even harbored on the premises. W. was chargeable with knowledge of its viciousness but C. was not. *Lagutta v. Chisolm*, 65 App. Div. 326.

See, also, *Marsh v. Hand*, 120 N. Y. 315.

Knowledge of vicious propensities may be inferred from the owner usually keeping him confined. *Warner v. Chamberlain*, 71 Houst. 18.

Knowledge that a dog, used as a watch dog, is tied during the day time is notice that he is dangerous. *Speckman v. Krieg*, 79 Mo. App. 376.

See, also, *Chicago & C. R. Co. v. Kueckuck*, 98 Ill. App. 252.

Dogs kept in a barn are presumed not to be vicious; and knowledge of vicious or dangerous habits must be shown. *Shaw v. Craft*, 37 Fed. Rep. 317.

It appeared that dog had *always been kept chained*; that he would bark and jump at persons near him and try to get loose, and once, when loose, ran and seized a woman's dress as she escaped through a gate; that he sprang upon plaintiff as she went to defendant's house and bit and bruised her savagely, and defendant had expressed fears that the dog would get loose and bite a neighbor's child.

There was enough for jury on the ferocious disposition of the dog, and the owner's knowledge. *Robinson v. Marino*, 3 Wash. 434.

**From opinion.**—"The keeper of such a dog must see to it that he is kept securely, or be responsible for all injury done. Cooley on Torts (2d ed.) 404; Starr, pp. 343-4; 2 Shearm. and Redf. on Neg. (4th ed.) sec. 630; Flansburg v. Raisin, 3 Ill. App. 531; Godean v. Blood, 52 Vt. 251 \* \* \* Wilkinson v. Parrott, 52 Col. 102."

#### REPUTATION.

The general reputation of a dog and the conduct of the public towards it, is inadmissible on an issue of its viciousness. *Norris v. Warner*, 59 Ill. App. 300.

Dog's reputation for viciousness is admissible on the question of *scienter*. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

See, also, *Cuney v. Campbell*, 76 Minn. 59.

Reputation of animal as being vicious may be shown. *Fake v. Addicks*, 45 Minn. 37.

See *Buckley v. Leonard*, 4 Denio 500; *Mann v. Weiland*, 4 Weekly Notes 6.

Reputation among the drivers in a stable is admissible upon the question of the proprietor's knowledge of disposition of a horse, but not as to its disposition. *Short v. Bohle*, 64 Mo. App. 242.

#### (b). NOT LAWFUL TO KNOWINGLY KEEP A VICIOUS ANIMAL.

Where complaint alleged that defendant kept a ram, well knowing that it was accustomed to attack and butt mankind, and that it did attack and butt and injure, mangle, etc., it is insufficient without alleging that animal was vicious and dangerous. *Van Leuven v. Lyke*, 1 Com. 515.

*Decker v. Gammon*, 44 Me. 322; *Evans v. McDermott*, 49 N. J. L. 163.

A person who keeps a dog upon his premises, known to him to be so vicious and ferocious as to endanger the safety of strangers, is liable for injuries inflicted by the dog upon one, who is innocently upon the premises, without notice of the character of the dog; the fact that the injury is the first actually inflicted by the dog does not excuse such person from liability. *Rider v. White*, 65 N. Y. 54.

*Wood v. Vaughan*, 28 N. B. 472.

In an action for the keeping of a vicious dog, *with knowledge of its propensities*, negligence is not an element of the action, nor is contributory negligence a defense. It must be shown that the person injured brought the act on himself, and it is not enough that the plaintiff was ordinarily familiar with the dog running at large. *Lynch v. McNally*, 73 N. Y. 341, aff'g judg't for pl'ff.

In an action against the owner of a ferocious dog, or other animal, the *gravamen of the action is keeping the animal with knowledge of his propensities*. If the animal be of a *ferocious* nature, it is equivalent to notice to the owner; hence, if the animal get loose by the negligence of a co-servant, it is no defense to an action by another servant injured thereby, and slight negligence on the part of the person injured will not constitute contributory negligence; it must be shown that he voluntarily brought injury on himself. *Muller v. McKesson*, 73 N. Y. 195; affirming 10 Hun. 14, and judg't for pl'ff.

**From opinion.**—"The negligence consists in keeping such an animal. In *May v. Burdett* (9 Ad. & El. N. S., 101), Denman, Ch. J., said: 'But the conclusions to be drawn from an examination of all the authorities appear to us to be this, that a person keeping a *mischievous* animal, *with knowledge of its propensities*, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed.'

When accustomed to bite persons, a dog is a public nuisance and may be killed

by any one when found running at large. *Putnam v. Payne*, 13 J. R. 312; *Brown v. Carpenter*, 26 Vt. 638. And when known to the owner, corresponding obligations are imposed upon him. Lord Hale says: 'He (the owner) must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable in damages.' In *Kelly v. Tilton* (2 Abb. Ct. App. Cas. 195) Wright, J., said: 'If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril.' In *Wheeler v. Brant* (23 Barb. 324) Judge Balcom said: 'Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them or confine them as soon as they know their dangerous habits, or answer in damages for their injuries.' In *Card v. Case* (57 Eng. C. L. R. 622), Coltman, J., said: 'That the circumstances of the defendant's keeping the animal negligently is not essential; but the *gravamen* is the keeping of the ferocious animal, knowing its propensities.' The cases are uniform in this doctrine, although expressed in a variety of language by different judges. *Smith v. Pelah*, 2 Strange 1264; *Jones v. Perry*, 2 Esp. 482; *Greason v. Keteltas*, 17 N. Y. 496; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 Car. & P. 138; *Rider v. White*, 65 N. Y. 54."

A vicious dog being a nuisance *per se*, an allegation that the owner knew it throws upon him the burden of showing that he kept it securely; and failure to allege that he did not do so does not make the complaint demurrable. *Woodbridge v. Marks*, 5 App. Div. 604; aff'g s. c., 14 Misc. 388.

Failure to keep a horse tied up, knowing it to be vicious, rendered its owner liable for frightening a mare on the highway. *Kitchens v. Elliot*, 114 Ala. 290.

Defendant knew his dog was vicious. It had bitten others. He was liable for its biting plaintiff after breaking its chain. *Kippen v. Olluson*, (Cal.) 69 Pac. Rep. 293.

The keeping of a vicious dog is wrongful and at peril of owner, and *prima facie* owner is liable to any person injured without averment or proof of negligence in securing or taking care of it. *Woolf v. Chalker*, 31 Conn. 121.

Georgia Code, sec. 2964, declares "a person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury." *Conway v. Grant*, 88 Ga. 40.

During an attempt of a woman driving a mare to drive off a stallion attacking her, she was struck by stallion and hurt. The court reversed the judgment for defendant and stated the law as in opinion. *Hammond v. Metton*, 42 Ill. App. 187.

**From opinion.**—"The horse being a domestic animal necessary for the use and pleasure of man, the keeping of a stallion is not a wrong in itself, but is proper, and no wrong can come from it unless there is in addition some wrongful

conduct. The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and if such propensities are of a nature to cause injury, he must anticipate and guard against them. He necessarily knows that the act will be committed if opportunity offers, so the keeper of a stallion is bound to take notice of the well-known propensities of stallions in general, and to use such degree of care as the nature of the animal may reasonably require to avoid injury from such propensities. But he is under no obligation to guard against injuries which he has no reason to expect from the animal, either on account of the propensities of stallions in general or some disposition of the individual animal which he has notice of. If, however, the animal is disposed to attack mankind, and the keeper has notice of the dangerous propensity, the public safety demands that if he keep the animal at all, he shall keep him secure. *There is no such necessity for keeping exceptionally vicious individuals of a species of animals naturally peaceable, as justifies their being kept upon any other terms.* After notice, 'he keeper of such animal is responsible for all injuries occasioned by such attacks, and the fact that he endeavors to so keep the animal as to prevent the mischief will not protect him if he fails. *The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with the knowledge of the vicious propensity.*' (Citing *Stumps v. Kelley*, 22 Ill. 140; *Flansburg v. Basin*, 3 Ill. App. 531; *Wood on Nuisances*, sec. 759.) \* \* \* *In one sense the basis of the action would be negligence, but it is that sort of negligence which consists in knowingly keeping a dangerous animal and not keeping him secure.* In such case it is not necessary to prove want of care in methods of stabling. *Cooley on Torts*, p. 343; 1 *Addison on Torts*, secs. 261, 285; 1 *Hilliard on Torts*, 569."

The mere keeping of a dog knowing it to be vicious is *prima facie* actionable negligence, if injury occur, regardless of any question of negligence in securing it. *Ahlstrand v. Bishop*, 88 Ill. App. 424.

The complaint alleged that defendant wrongfully kept the dog, and suffered him to go at large: that he attacked and bit the plaintiff: knowledge on the part of the defendant, that the dog was accustomed to commit such injury. This was sufficient. *Partlow v. Haggarty*, 35 Ind. 178.

*S. P., Williams v. Moray*, 74 Ind. 25.

When plaintiff alleges the mischievous or vicious propensity of the animal, the injury resulting therefrom and the *scienter*, he makes a good case upon paper, and one which the defendant must meet by a denial, or an answer which confesses and avoids the alleged cause of action. The gist of the action is keeping with knowledge of the mischievous propensities. *Graham v. Payne*, 122 Ind. 406.

*Oakes v. Spaulding*, 40 Vt. 347; *Brown v. Carpenter*, 26 id. 638; *Card v. Case*, 57 Eng. Com. Law, 622; *Popplewell v. Pierce*, 10 Cush. 509; *Mann v. Weiland*, 81½ Pa. St. 243; *Coggsell v. Baldwin*, 15 Vt. 404.

Permitting a dog of known vice to run at large, gives recovery to one bitten by it. *Hahn v. Kordula*, 5 Kan. App. 142.

Placing a cow in a public stock pen knowing or negligently ignorant

of her viciousness, rendered owner liable for injury to a prospective purchaser while examining her. *Brooks v. Brooks*, (Ky.) 53 S. W. Rep. 645.

The owner of a dog, having knowledge of his ferocious proclivities, is liable in damages to any one injured by the animal. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. *Goode v. Martin*, 57 Md. 606.

*Buckley v. Leonard*, 4 Denio, (N. Y.) 500; *Auchmuty v. Ham*, 1 id. 491; *Loomis v. Terry*, 17 Wend. 49; *Smith v. Pelah*, 2 Strange, 126; see *Spring Co. v. Edgar*, 99 U. S. 654; *Gladmon v. Johnson*, 36 J. L. (C. P.) 153; *Stiles v. Cardiff &c. Nav. Co.*, 33 L. J. (Q. B.) 319; *Baldwin v. Casella*, L. R. 7 Exch. 325; *Appleby v. Percy*, L. R. 9 Com. 1. 647; *Kinnmoreth v. McDougall*, 46 N. Y. S. R. 241, (1892); *Durden v. Bareutt*, 7 Ala. 169; *Karr v. Parks*, 44 Cal. 46; *Keightlinger v. Avary*, 65 Ill. 235; 75 id. 141; *Dockerty v. Hutson*, 125 Ind. 122; *Sylvester v. Moag*, 155 Pa. 225; *Marsh v. Jones*, 21 Vt. 378; *Strouse v. Leipf*, (Ala.) 23 L. R. A. 622; *Fakes v. Addicks*, 45 Minn. 37.

In such case the whole keeping is misfeasance. *Nickerson v. Wheeler*, 118 Mass. 295.

Owner of horses, knowing them to be vicious, was liable, where they ran away and injured plaintiff. *Hall v. Huber*, 61 Mo. App. 384.

A vicious dog, being a nuisance, an owner keeping it after knowledge thereof, does so at his peril. *Speckman v. Krieg*, 79 Mo. App. 376; *Zimet v. Hollenback*, 9 Kulp, (Pa.) 564.

Gist of an action where a dog is kept, knowing of its vice, is not the mere keeping of it, but the keeping of it "in a negligent manner." *Haynes v. Smith*, 62 Oh. St. 161.

Keeping a dog knowing its vice, is sufficient to give recovery, regardless of any question of negligence in securing it. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

That the owner of a vicious dog endeavored to restrain him, and that it broke loose or was untied by another person, will not relieve such owner from liability for injuries committed by the dog at large. *Robinson v. Marino*, 3 Wash. 434.

#### (c). INJURY BY VICIOUS DOG TO PERSONS COMING ON OWNER'S PREMISES.

A person who keeps a dog upon his premises, known to him to be so vicious and ferocious as to endanger the safety of strangers, is liable for injuries inflicted by the dog upon one, who is innocently upon the premises, without notice of the character of the dog. *Rider v. White*, 65 N. Y. 54.

*The Tonawanda Railroad Co. v. Munger*, 5 Denio, 255.

**From opinion.**—"Sarek v. Blackburn, (4 C. & P. 297.) was an action brought

to recover damages for an injury by the bite of a vicious dog kept by the defendant. The dog was chained in a yard in the rear of the defendant's house, near one of the passages leading to it, and through which the plaintiff was walking when the dog fell upon him. Chief Justice Tindal in his charge to the jury said, 'The question will turn upon whether there was a justifiable right to be on the spot.' 'If a man puts a dog in a garden walled all around, and a wrongdoer goes into the garden, and is bitten, he cannot complain in a court of justices of that which was brought upon him by his own act.' And in an action for an injury done by a vicious bull, Chief Justice Best was not less explicit. 'If the plaintiff,' said he, '*had gone where he had no right to go*, that might have been an answer to the action; but the fact was not so. The plaintiff had a right to be where he was—he was in the pursuit of his ordinary business.' (*Blackman v. Simmons*, 4 C. & P. 138.) See, also, *Brock v. Copeland*, (1 Esp. 203), *Howland v. Vincent*, (10 Metcalf, 371), and *Jordin v. Crump*, (8 M. & W. 782).

Where that which is done by a party on his own land is illegal and punishable as such; or, although not illegal, if it be an act which probably may endanger human life, as the setting of spring guns, he may be responsible even to a voluntary trespasser for injuries thus sustained. (*Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, *supra*.) But even in such a case, where the plaintiff had notice that deadly engines were placed in a wood, into which he, notwithstanding, entered and was severely wounded, it was held he could not maintain any action, having voluntarily brought the injury upon himself. (*Hott v. Wilkes*, 3 B. & Ald. 304.)

One who complains of another's negligence should, himself, be without fault. (*Brownell v. Flagler*, 5 Hill. 282; *Cook v. The Champ. Trans. Co.*, 1 Denio, 99.) Where the plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence.

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrong-doer. A horse straying in a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. *Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act.* (Story on Bl. sees. 19, 22; *Gardner v. Heartt*, 3 Denio, 236.) *Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former.*"

In Wharton on Negligence, sec. 914, it is said:

"Keeping a ferocious dog for defense does not impute liability unless the dog be kept negligently. In this respect the rule is to be distinguished from that laid down as to spring guns. A spring gun is an unnecessary and cruel engine: a watch dog, who will assail invaders, is sanctioned by usage and law, and may be maintained, chained or inclosed, for household protection. (*Woolf v. Chalker*, 31

Conn. 121; *McIntyre v. Plaisted*, 57 N. H. 606.) Hence, when the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and let loose into the yard after dark, and the defendant's foreman negligently went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to recover damages." *Brock v. Copeland*, 1 Esp. 302.

A man, however, has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there may be injured by it. Citing *Munn v. Reed*, 4 Allen, 431; *Laverone v. Mangianti*, 41 Cal. 438.

It is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises that he should be attacked by a savage dog. *Bigelow on Torts*, pp. 249, 250.

Owner of a ferocious watch dog, chained so as to permit a range of fifty feet to guard outbuilding, held not liable to one approaching such building by an unusual route and at an unusual time in search of a man supposed by him to be in such building. *Woodbridge v. Marks*, 17 App. Div. 139.

A man may keep a dog for the necessary defense of his house, his garden or his fields, and may cautiously use him for that purpose in the *night time*: but if he permits a mischievous dog to be at large on his premises, and a person is bitten by him in the *day time*, the owner is liable in damages, though the person injured be at the time *trespassing* on the ground of the owner, by hunting in his *woods* without license.

*It seems* that a person is not permitted, for the protection in his absence, of property against a *mere trespasser*, to use means endangering the life or safety of a human being, whatever he may do where the entry upon his premises is to commit a felony or breach of the peace: and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding: full notice of the mischief to be encountered must be given: and the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues. *Loomis v. Terry*, 17 Wend. 491.

One who knowingly keeps upon his premises a vicious dog, so that he can injure an innocent trespasser, is liable for damages. *Melshimer v. Sullivan*, 1 Col. App. 22.

Owner of a vicious dog, knowing it is accustomed to bite, is liable to person entering a back yard in a city on lawful business. *Conway v. Grant*, 88 Ga. 40.

**From opinion.**—"Though the gate was open and the plaintiff was on lawful business, it may be that he had *no strict legal right* to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such a dangerous

means of defense against mere trespassers the law will not countenance." And to the general authorities on this subject, see, *Broek v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 296; *Curtis v. Mills*, 5 id. 489; *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Pierret v. Moller*, 3 E. D. Smith, 574; *Kelley v. Tilton*, 3 Keyes, (42 N. Y.) 263; *Sherfey v. Bartley*, 4 Sneed. 58; 67 Am. Dec. 597; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175; *Lavarone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; Notes to *Knowles v. Mulder*, (Mich.) 16 Am. St. Rep. 627; *Cooley on Torts*, sec. 345; *Bishop on Noncontr. Law*, sec. 1235, *et seq.*; 1 *Thomp. on Neg.* p. 220, sec. 34; *Muller v. McKesson*, 71 N. Y. 195; 29 Am. Rep. 123; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600.

Keeping a ferocious dog does not create liability. *Keightlinger v. Eagan*, 65 Ill. 235.

When a mischievous or vicious animal is given the freedom of a pasture field, and afforded thereby an opportunity to injure a person having occasion to pass in the field, the confinement is not such as the law requires. *Graham v. Payne*, 122 Ind. 403.

That plaintiff was bitten by another's dog while upon defendant's premises, did not render the latter liable, where he did permit him to be there with a knowledge of its viciousness. *Trumble v. Happy*, 114 Iowa, 624.

In a statutory action, under a statute imposing on the owner of a dog, liability for all injury done by it unless the injured party was doing an unlawful act, mere negligence not amounting to an unlawful act, is no defense. Going to a barn at 8 P. M. to get some things from a buggy left in charge of a liveryman is not such an unlawful act. One who harbors a dog is an owner under such an act. *Schultz v. Griffith*, 103 Iowa, 150.

In action under the statute, the burden is on the defendant to set up that the injury occurred after dark or that plaintiff was on the premises unlawfully, as a defense. *Wolff v. Lamann*, (Ky.) 56 S. W. Rep. 408.

Under such a statute, a visitor to servants going in the back way, was held not a trespasser. *Riley v. Harris*, 177 Mass. 163.

Knowledge that the dog was vicious made it a nuisance, and gave recovery to one lawfully on the place, regardless of any question of negligence in its keeping. *Speckman v. Kreig*, 79 Mo. App. 376.

Owner of dog, knowing of its viciousness, is liable when he permits it to be at large upon highway, although he may keep a dog for necessary defense of his home, garden or fields. *Rochers v. Remhoff*, 55 N. J. L. 175.

One who keeps a ferocious dog in a city must so secure it, that persons going lawfully on premises or along highway will not be injured. Defendant knew dog's character. The action was for trespass, and although the defendant's conduct showed negligence the case did not go off on that. *Sylrester v. Moag*, 155 Pa. St. 225.



## (d). CONTRIBUTORY NEGLIGENCE.

If a person with full knowledge of the evil propensities of an animal wantonly excite him, or voluntarily and unnecessarily put himself in the way of such an animal, he should be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury. *Muller v. McKesson*, 13 N. Y. 195, affirming 10 Hun. 44, and judg't for pl'ff.

*Cogswell v. Baldwin*, 15 Vt. 404; *Koney v. Ward*, 36 How. Pr. 255; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628; *Fake v. Addicks*, 45 Maine 37.

**From opinion.**—"There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Smith v. Pelah* (2 Strange 1264) the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the Chief Justice saying: 'For it was owing to his not hanging the dog on the first notice.' It is not stated that the person injured knew of the dog's propensities, or that it was done intentionally. In *Woolf v. Chalker* (31 Conn. 130), it is said that the owner is liable 'irrespective of any questions of negligence of the plaintiff,' and citing *May v. Burdett* and *Card v. Case* (*supra*).

In *May v. Burdett*, the Chief Justice, after approving of the ruling in *Smith v. Pelah* (2 Strange, *supra*), and a passage from Hale's Pleas of the Crown (p. 430), said: 'It may be that if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense, but it is unnecessary to give any opinion as to this.'

When an employé of a person, keeping a dangerous dog continues to work for his employer, with knowledge of the character of the dog and the place where he is kept, he takes the risk of being bitten, and his employer is not liable for the damages he may sustain by reason of his being bitten by such dog. *Farley v. Picard*, 18 Hun. 560.

A person who irritates an animal and is bitten or kicked in return, is deemed in law to have consented to the injury. *Conway v. Grant*, 88 Ga. 40.

Under a statute imposing liability for injury by dog upon owner unless party injured was engaged in a wrongful act, negligence is no defense, unless it amounts to an unlawful act. - *Schultz v. Griffith*, 103 Iowa, 150; s. c., 40 L. R. A. 117.

Which is not shown by proof that plaintiff on several previous occasions, had thrown stones at the dog. *Van Bergen v. Eulberg*, 111 Iowa, 139.

Where one is upon premises by permission, it is not contributory negligence to fail to inquire whether there is a vicious dog there. *Sanders v. O'Callaghan*, 111 Iowa, 574.

A prospective purchaser is not negligent in going into a stock pen to examine a cow. *Brooks v. Brooks*, (Ky.) 53 S. W. Rep. 645.

The exception under a statute imposing on owner of dog liability for all damage done by it as to persons injured while on the premises after dark or while engaged in some unlawful act, does not exclude the defense of contributory negligence. *Bush v. Wathen*, 104 Ky. 548; *Wooldridge v. White*, 105 id. 247.

In action under the statute, on an issue as to whether a child of 11 was engaged in a "wrongful act" in teasing a dog while eating, the child's age is an element of consideration. *Wolff v. Lamann*, (Ky.) 56 S. W. Rep. 408.

If the person bitten by a ferocious dog encouraged the same about his premises, such conduct may be submitted to the jury on the question of contributory negligence. *Twigg v. Ryland*, 62 Md. 380.

In an action under a statute imposing on owner of a dog, liability for damage done by it while outside of owner's inclosure, defendant was held liable for his dog's assault on a child in the house of latter's parents, though dog was taken from his inclosure contrary to instructions by servants. Negligence of child's parents in admitting dog to house was not imputed to child. *Fye v. Chapin*, 121 Mich. 675.

For other cases construing same statute, see *Swift v. Applebone*, 23 Mich. 252; *Elliot v. Herz*, 29 id. 202; *Monroe v. Rose*, 38 id. 347; *Trompen v. Verhage*, 54 id. 304; *Burnham v. Strother*, 66 id. 519.

Boy who sticks his hand in a crack in an enclosure, in which a dog is properly secured cannot recover. *Badali v. Smith*, (Tex. Civ. App.) 37 S. W. Rep. 642.

## II. Injuring Troublesome and Vicious Animals.

Where one person's cattle come upon another's premises, the latter has the right to drive them therefrom into the highway, and in an action for alleged injuries to such cattle, it is for the owner to show that such person abused or ill-treated them.

It is not a wrongful act for a person driving cattle of another from his premises to chase them twice around his farm, unless unnecessarily done, nor to use a pitchfork to separate the cattle, unless he uses it in a wrongful way.

A farmer may use a dog, if not ugly, to aid him in driving trespassing cattle from his premises. *Carney v. Brome*, 77 Hun. 583.

Vicious dog duly licensed, collared and confined for protection, may not be killed. *Brill v. Flagler*, 23 Wend. 354.

Dog found worrying sheep, or followed immediately up after worry-

ing, under Cal. Civ. Code, sec. 341, sub-sec. 2, may be killed. *Johnson v. McConnell*, 80 Cal. 545.

May not shoot trespassing hens. *Johnson v. Patterson*, 14 Conn. 1; *Clark v. Keliber*, 107 Mass. 406; *Matthews v. Fiertel*, 2 E. D. Smith, 90.

Right to kill a dog under Conn. Gen. St. sec. 3751 is not limited to injury to person, but to destruction of young and tender plants, where he was asleep, and the value of the dog is immaterial. *Simmonds v. Holmes*, 61 Conn. 1.

Although the owner may maintain an action of trespass *vi et armis* for malicious killing, he cannot maintain ease for unintentional and negligent killing by railway train. Negligence of defendant was not shown. *Jemison v. So. Western R. Co.*, 75 Ga. 444.

See, also, *Wilson v. The Wil. & Man. R. Co.*, 10 Rich. L. R. (S. C.) 52.

Hunters liable for killing by mistake. *Ransom v. Kitner*, 31 Ill. App. 241.

Shooting dogs worrying a hen which was carried outside the fence by another dog, was justifiable. *Anderson v. Smith*, 7 Ill. App. 354.

Owner of crops may not kill domestic animals while found trespassing thereon. *Reis v. Stratton*, 23 Ill. App. 314.

*Snap v. The People*, 19 Ill. 80; *Tynor v. Cary*, 5 Ind. 216; *Dodson v. Moek*, 4 Dev. & Bat. 146; *Ford v. Taggart*, 4 Tex. 492.

Person may shoot a trespassing dog injuring his property, viz. bacon, late at night. *Dunning v. Bird*, 24 Ill. App. 270.

Person in defending wheat field against a trespassing dog shot the same. Question of justification was for jury and they found for defendant. *Life v. Blackwelder*, 25 Ill. App. 119.

See, also, *Aldrich v. Wright*, 53 N. H. 398.

Dogs may not be killed with impunity nor for a trivial offense. *Brent v. Kimball*, 60 Ill. 211.

*Spray v. Ammerman*, 66 Ill. 309; *King v. Klein*, 6 Pa. St. 318.

One willfully and maliciously killing a dog, not vicious or dangerous, and not doing damage, is liable to owner, although dog was accustomed to bark at passers-by. *Jacquay v. Hartzill*, 1 Ind. App. 500.

Fact that person had been annoyed by a trespassing dog, and that the dog in question had been trespassing, does not justify killing him. *Sosut v. State*, 2 Ind. App. 586.

See, also, *Tift v. Tift*, 4 Den. 175; *Davis v. Campfield*, 23 Vt. 236.

Owner of domestic animals may kill a dog harassing, maiming or worrying sheep, even if at the time the dog is not committing the act, provided his conduct is such as to excite a reasonable apprehension that he is about to do so. *Marshall v. Blackshire*, 44 Iowa, 475.

To justify a killing of a dog, as permitted by statute, when "found

worrying, wounding or killing any domestic animal outside the inclosure or immediate care of his owner," the worrying and killing must substantially concur; that the dog was known to have done so or is believed to be about to do so merely, is not sufficient. *Chapman v. Decrow*, 93 Me. 378.

It is within the police power of a state, to provide for the summary destruction of dogs found running at large. *Hagerstown v. Witmer*, 86 Md. 293; s. c., 39 L. R. A. 649.

Vicious dog duly licensed, collared and confined for protection may not be killed. *Uhlain v. Cromack*, 107 Mass. 273.

A statute, as to the killing of dogs worrying cattle or sheep, does not apply to or interfere with one's right to kill a dog which is about to kill his poultry. *Nesbitt v. Wilbur*, 177 Mass. 200.

Shooting into a congregation of dogs, that for eight nights had assembled on a person's premises and fought so as to keep family awake and seriously annoy them, and after they had become an intolerable nuisance, and after ineffective complaint to the police and twice driving them away in the night, raised a question for the jury whether shooting was justified. Trial court only submitted question of damages; error. *Hubbard v. Preslon*, 90 Mich. 221.

If a valuable dog on several different occasions bark around one's house at night, chase cats treeward, track up a freshly painted porch, visit the hen house and break a single egg, it may not be killed without previous protestation to the owner, when known. One morning defendant saw dog in front of his house and shot him; he found he had left tracks on his freshly painted stoop. *Bowers v. Horen*, 93 Mich. 400.

So a dog that has never trespassed before, but that runs from the highway to a lily pond, may not be killed without warning to those in charge. *Tenhopen v. Walker*, 96 Mich. 236.

Owner of sheep may shoot upon sight, while on his premises unattended, a sheep-killing dog, which shortly previous was chasing his lambs. *Throne v. Mead*, 122 Mich. 273.

If a person, to kill dogs engaged in killing his sheep, place poisoned meat on his farm, having reason to suppose his neighbors' dog might come thereon, and they do so and are killed, he will be liable therefor, unless such dogs in fact did kill his sheep. *Gillum v. Sisson*, 53 Mo. App. 516.

The act of killing another's dog, is not a criminal offense either statutory or at common law. *State v. Meuse*, 69 Mo. App. 581.

Defendant was justified in killing a dog which he found stealing milk at night. *Fisher v. Badger*, (Mo. App.) 69 S. W. Rep. 26.

In a county in which the Missouri stock law has not been adopted, owner of land may drive off trespassing animals; but if he attempts to detain them he is liable for resulting injury. *Harris v. Brummel*, 74 Mo. App. 433.

While dogs may be killed to protect one's own property, they are to be respected as property, and cannot be killed simply because they are found trespassing. *Fenton v. Bisset*, 80 Mo. App. 135; *Woolsey v. Haas*, 65 Mo. App. 198.

Notice to keep the dog off the premises was not enough; it was for the jury to say whether it was necessary under the circumstances to kill the dog to protect the property. *Hodges v. Causey*, 77 Miss. 353.

Dog has a money value, and if it be unlawfully killed compensation may be recovered. *Nehr v. State*, 35 Neb. 638.

See, also, *Smith v. St. Paul & C. R. Co.*, 79 Minn. 254.

But dog that persistently and threateningly assails people passing on the street is a nuisance and may be killed by the person assailed. *Nehr v. State*, 35 Neb. 638.

*Brown v. Carpenter*, 26 Vt. 638; *Putnam v. Payne*, 13 Johns. 312; *Hinekey v. Emerson*, 4 Cow. 351; *Loomis v. Terry*, 17 Wend. 496; *Maxwell v. Palmersten*, 21 id. 406; *Brill v. Flagler*, 23 id. 354; *Dunlap v. Snyder*, 17 Barb. 561; *Parker v. Wise*, 27 Ala. 480; *King v. Kline*, 6 Pa. St. 318; *Woolf v. Chalker*, 31 Conn. 121.

Where an ox escaped into defendant's field by reason of his own failure to fix a fence, he was liable for driving it out upon the highway, where it got upon the railroad track and was killed. *Morse v. Glover*, 68 N. H. 119.

Reasonable and ordinary methods only are warranted in driving off trespassing cattle. Wanton injury to them is not justified. *Addington v. Canfield*, (Okla.) 66 Pac. Rep. 355.

Pa. Act, April 14, 1851, sec. 7, as to the permission to kill dogs found worrying sheep, was not repealed by Pa. Act, May 15, 1889, and May 25, 1893. *Commonwealth v. Gabby*, 5 Pa. Dist. 159.

Though a dog is of bad habits and has just bitten his child, one is not justified in going upon its owner's premises thereafter and shooting it. *Decker v. Holgate*, 5 Lack. L. News, 56.

Dogs assaulting a person may be killed by him, even after interval necessary to get his gun. *Spaight v. McGovern*, 16 R. I. 658. (Under R. I. Pub. St., chap. 93, sec. 8.)

That plaintiff's dog had frequently trespassed on defendant's premises, was suspected of killing defendant's rabbits and plaintiff was notified that unless it was stopped the dog would be shot, was not sufficient

justification for killing the dog unintentionally while shooting to scare it. *Harris v. Eaton*, 20 R. I. 81.

Dog is personal property and recovery may be had for negligent injury. *Richardson v. Railroad Co.*, 55 S. C. 334; *Sally v. Id.*, 54 id. 481.

Maliciously shooting a dog was the proximate cause of injury to one whom the dog ran against. *Isham v. Dow's Estate*, 70 Vt. 588; s. c., 45 L. R. A. 87.

### III. Who Is Liable for Knowingly Keeping or Harboring a Vicious Animal.

Where executors agreed with "C." that the latter should occupy and work a farm on shares for a year, keep fences in repair, take care of stock, leave thereon as much and as good stock as he found, keep nothing thereon in which the first party did not have an interest, and "C." while so occupying the farm, procured a vicious ram in exchange for one already on the farm and kept it without the knowledge of the first party, and the same escaped and injured the plaintiff, "C." and not the executors was liable. *Marsh v. Hand*, 120 N. Y. 315, aff'g 40 Hun, 339, distinguishing *Champion v. Bostwick*, 48 Wend. 415; *Stroher v. Elting*, 91 N. Y. 102.

One who resides as head of the family on his wife's premises was liable for ugly dog kept thereon. *Kessler v. Lockwood*, 62 Hun, 619.

Married woman liable for bite of her husband's dog, harbored on her premises, with knowledge of its vicious propensities. *Quilty v. Battie*, 48 N. Y. S. R. 413.

The statutory provision rendering a person in possession of a dog, or who shall suffer a dog to remain about his house for twenty days, &c., liable as owner for his mischievous acts, does not make an employer liable for mischief done by the dog of his hired laborer, where the dog was in the habit of following his master daily to his work on the farm of the employer and of returning each night to and staying with his master at his own house, which was distant from that of the employer. *Auchmuty v. Ham*, 1 Denio 195.

See *Jennings v. D. G. Burton Co.*, 73 Hun, 546.

An employer does not harbor a dog, because he knows that his hired man has one in his family, which occupies a separate residence on the farm.

"G." in occupation of a farm, employed in working it "W." who was allowed to occupy a farm-house on the premises as a part of the compensation for his labor, the products of which were received by "G." "W." brought a dog upon

the premises, which in the course of his employment, "W." occasionally used to churn butter which was made for "G." The dog was vicious and bit one Simpson, who brought an action against "G." to recover damages for the injury thus inflicted.

Held, in the absence of knowledge upon the part of "G." of the bad disposition of the dog, that he was not liable. *Simpson v. Griggs*, 58 Hun, 393.

Defendants were husband and wife, living together upon premises owned by the wife, both contributing to the household expenses. The husband bought a dog and brought it upon the premises. The jury found, upon sufficient evidence, that the dog was vicious, and known by the wife to be so; and that she harbored it upon the premises with knowledge of its vicious propensities. The dog, not being confined, went upon neighboring premises and there bit the plaintiff.

Harboring this dog was the personal act of the wife; allowing it to escape, knowing that its vicious propensities might cause injury to others, was her personal tort, and she was liable for the resulting injury.

Being the personal tort of the wife her husband was properly joined as defendant. *Quilly v. Battie*, 61 Hun, 164; aff'd, 135 N. Y. 201.

Citing *Fitzgerald v. Quann*, 109 N. Y. 441; *Genenz v. De Forest*, 49 Hun, 364; *Keenan v. Gutta Percha Mfg. Co.*, 46 id. 544.

Lessor of a farm on shares was under contract to provide therefor certain cattle including a bull, and was liable for a vicious one, when he had notice that it was so and refused to consent to measures to prevent injury from it. *Lettis v. Horning*, 67 Hun, 627.

Where a man occupies certain premises and supports his family, and with them several dogs, which are kept on the place, the dogs, so far as the public are concerned, are presumed to belong to him.

The defendant kept certain dogs, which were of a vicious character, as he well knew; they were suffered to go at large without being properly guarded, and the plaintiff was injured by them; the defendant was a householder, occupying with his family premises owned by his wife; he supported his family, supplied his table and was the head of his own household; the dogs were fed from the table and had the freedom of the premises. The defendant testified that he did not own the dogs and did not own the premises where he lived.

The question of the title was of little importance, and the defendant, as he kept and harbored the dogs, was liable under a proper state of facts for the injuries which they inflicted. *Bundschuh v. Mayer*, 81 Hun, 111.

One who lived with his mother on premises rented by her, over which he had no control, was not liable as owner or harbinger of a dog kept by her coachman. *Lynt v. Moore*, 5 App. Div. 487.

President and manager of theatre company is the harbinger or keeper of a vicious horse, where he has the ordering and the disposing of it.

*Lawlor v. French*, 14 Misc. 497; s. c. rev'd on other grounds, 2 App. Div. 140.

When husband keeps dog on wife's premises, it is chargeable to him and not her. *Strouse v. Leipf.* (Ala.) 23 L. R. A. 622.

Harboring a vicious dog, knowing its propensity, creates liability. *Hornbein v. Blanchard*, (Col. App.) 35 Pac. Rep. 187.

They to whom the use and care and control of cattle are confided, although not the absolute owners, are deemed the owners under Connecticut Statutes (tit. 33, sec. 21). All damages done by cattle, horses, sheep or swine, when the fence is sufficient, shall be paid by the owners of them." So that father and a son having use and possession of cattle generally, as joint occupants of a farm, in an action of trespass, *quare clausum fregit* were jointly liable. *Smith v. Jaques*, 6 Conn. 530.

He who has care and custody of sheep, for the purpose of depasturing them, is liable for damage done by them, to same extent as owner. *Barnum v. Vandusen*, 16 Conn. 200.

One who harbors a dog as owner, is chargeable as owner in a statutory action. *Shultz v. Griffith*, 103 Iowa, 150; s. c., 40 L. R. A. 117.

Owner of animal is liable for injuries committed by his animal. *McGuire v. Ringrose*, 41 La. Ann. 1029.

A vendor who allows his dog, which has returned, to remain, without the vendee's consent, is chargeable as his keeper. *Mitchell v. Chase*, 87 Me. 172.

Whether owner of land was keeper of dog was passed on by jury in *Barrett v. Malden & c. R. Co.*, 3 Allen, 101; *Cummings v. Riley*, 52 N. H. 368.

The word "owner," as used in Massachusetts' General Statutes, chap. 25, sec. 25, is intended to include the person in whom is the general property in the animal, and also those in possession of them under special title or by virtue of any lien, and such general owner must be held responsible even if, at the time of the injury, they were in possession of a bailee for the purpose of being driven. *Hartford v. Brady*, 114 Mass. 466.

Citing *Sheridan v. Bean*, 8 Mete. 284.

Dog was owned and licensed in the name of superintendent of poor farm of city, and kept and fed at farm and allowed to run thereon. This with knowledge and without objection of overseers of poor; did not show, as a matter of law, that the city was keeper of dog within General Statutes, chap. 88, sec. 59. *Collinghill v. City of Haverhill*, 128 Mass. 218.

Distinguishing *Barrett v. Malden & c. R. Co.*, 3 Allen, 101.

Wife was not a keeper of dogs so as to render her liable to persons bitten, when they were owned and kept on her premises by her husband.



although she carried on a separate business on such premises. Charge of the court was that wife was not liable if jury found dog was husband's, and he kept it against her consent. *McLoughlin v. Kemp*, 152 Mass. 7.

So, where a hired man kept a dog on master's premises, and by his acquiescence, latter was not liable *per se* for its bite. *Whittemore v. Thomas*, 153 Mass. 347.

See, *contra*, *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

Merely suffering a dog to remain on the premises temporarily, does not establish the status of a keeper. *O'Donnell v. Pollock*, 170 Mass. 441.

Owner of premises, who allows a boarder to keep a dog thereon, is not as matter of law, chargeable as keeper in a statutory action. *Boylan v. Everett*, 172 Mass. 453.

Nor is one who allows a dog, which had wandered with a servant of its master to his premises, to remain there temporarily. *Fye v. Chapin*, 121 Mich. 675.

But such liability has been imposed upon the owner of land, worked on shares, by her son, who owned the dog, and whose only home was with his mother. *Jenkinson v. Coggins*, 123 Mich. 7.

When animal is hired out *for some time*, hirer and not owner is liable for injuries from its vicious habits. *Bell v. Leslie*, 24 Mo. App. 661.

Owner, having general possession, care and control of beasts, is answerable for trespass. *Noyes v. Colby*, 30 N. H. 143.

Where defendant negligently kept a vicious dog, it was not essential to his liability that he own or control either the premises or the dog. *Hayes v. Smith*, 62 Oh. St. 161.

Little son of steward brought, and on moving away steward left, a dog at the county almshouse; directors failed to banish it and acting steward adopted it for the county; county was not liable. *Sproat v. Greene County Poor Directors*, 145 Pa. St. 598.

Where a boy of fourteen owned a dog and lived with his mother, who was defendant's housekeeper, defendant's liability was for jury on question of viciousness of dog of which he had knowledge, and whether he had kept or harbored it. *Snyder v. Patterson*, 161 Pa. St. 98.

Owner's servant, without his knowledge or consent, placed a vicious horse in charge of third person, where he injured a colt, and owner was liable. *Campbell v. Trimble*, 75 Tex. 270.

#### AGISTORS.

One having a qualified ownership, as an agistor of cattle, is liable for their trespass; and absolute owner is not liable, *unless in case*. (*Wales v. Ford*, 3 Holst. 267.) *Rossell v. Cotton*, 31 Pa. St. 525.

Owner or agistor of agisted cattle is liable for trespass, *although but one satisfaction can be obtained*. Common law not changed by R. S. C. 113, sec. 4. The statute is, "When any person is injured on his land by sheep, &c., he may recover his damages in an action of trespass against the owner of the beasts or by distraining, &c." *Sheridan v. Bean*, 8 Mete. 284.

When "A." and "B." own adjoining closes, the partition fence between which is not divided, each is bound to keep his cattle on his own land at his peril. But if "C." with "A.'s" assent, keep his oxen in "A.'s" pasture, and has the custody of them there, and they stray into "B.'s" close, "C." and not "A." is to be considered, as to the oxen, as the occupant of "A.'s" close, and is liable for damage. But it is *otherwise* if "A." has custody of "C.'s" oxen while they are in his close. *Twoksbury v. Bucklin*, 7 N. H. 518.

Citing 4 D. & E. 318; *Chatham v. Hampson*, 2 L. Raymond, 804; *The Queen v. Bucknall*, 3 D. & E. 766.

Action of trespass will not lie against owner while cattle are in hands of agistor or bailee; if action would lie at all it would *be in case*, as if he had selected reckless and irresponsible agistor or bailee, or had reason to know that cattle would commit trespass. *Ward v. Brown*, 64 Ill. 307.

*Ozburn v. Adams*, 70 Ill. 291; *Baird v. Shipman*, 132 id. 20.

#### IV. Joint Trespassers.

When dogs belonging to several owners are found in company killing sheep, each owner is liable for the injury done by his own dog, and for no more. *Auchmuty v. Ham*, 1 Denio, 495.

When cows belonging to several owners, are found trespassing, each owner is liable only for the damage done by his own cow, and in absence of all proof as to the amount done by each cow, it will be inferred that the cattle did equal damage. *Partenheimer v. Vanorder*, 20 Barb. 479.

Two persons, owning dogs severally, are not jointly liable for acts of mischief done by such dogs jointly. Owner must be sued in separate actions.

Connecticut statute makes owner of dog liable in trespass for all damages by wounding or destroying sheep, although owner did not know that dogs were accustomed to do such mischief. *Russell v. Tomlinson et al.*, 2 Conn. 206.

From opinion.—"It would be repugnant to the plainest principles of justice, to say that the dogs of different persons, by joining in doing mischief, could

make their owners jointly liable. This would be giving them a power of agency, which no animal was ever supposed to possess."

Where the cattle of two several parties go upon the field of another, and injure his crops, a joint action of trespass cannot be maintained against them. Each owner is separably liable for the injuries done by his own stock. *Westgate v. Carr*, 43 Ill. 450.

*Yeakell v. Alexander*, 48 Ill. 263.

Plaintiff may elect to sue all or only a part of the several owners of trespassing animals. *Brady v. Ball*, 14 Ind. 317.

Citing Chit. Pl. 86 Perk. Pr. 144.

Where growing crops were destroyed by the repeated trespassing of cattle of different owners, and it was impossible to distinguish between the trespass of one lot of cattle and that of the other, the court apportioned the damage according to the number of cattle and allowed a recovery against one owner in accordance with such apportionment; no error. *Powers v. Kindt*, 13 Kan. 61.

Where injury was done by two dogs, together, belonging to several owners, each owner was liable only for the damage done by his own dog, not for the whole damage done by the two dogs. Separate action necessary. *Buddington v. Shearer*, 20 Pick. 477.

Citing *Van Steinburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495.

**From opinion.**—"In such cases there is no concurrence of intent or action among the several owners of the animals in producing the same injury. A person's responsibility for the act of his dog arises from the fact of ownership. \* \* \*"

Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them severally. *Jack v. Hudson*, 25 Oh. St. 255.

All who join in harboring a vicious dog, are liable as joint tort feorsors for its acts. *Hayes v. Smith*, 15 Oh. C. C. 300.

Pennsylvania act, 1851, permits suit to be brought against all the owners of several dogs, which at one and the same time kill and wound sheep. No *scienter* need be proved. Each owner is liable for whole damage; proof of joint ownership need not be proved when they do the act together. *Ker v. O'Connor*, 63 Pa. St. 341.

The statute allows the several owners of dogs concerned in a joint mischief to be joined, but does not require it. Without this statute, the different owners and keepers of dogs could not be properly joined, but each must answer for the wrongs of his own dog. *Rowe v. Bird*, 48 Vt. 578.

*Adams v. Hall*, 2 Vt. 9.

A charge that each of the several owners of dogs engaged in an attack on sheep, was liable for the whole damage, was proper in a statutory action. *Nelson v. Nugent*, 106 Wis. 477.

## V. Injury by Animals While Trespassing.

By the common law, every owner or possessor of cattle was bound absolutely to keep them from the land of another.\*

This rule has been adopted in several states. But it is often modified by certain duties of the injured person respecting fences. Thus, either by agreement, statute or prescription it may be the duty of a person to erect a fence along the boundaries of his land or a portion thereof. If he fail in this duty and cattle thereby enter, he can have no redress. But, although he be obliged to fence, it may be that he is only bound to fence against the beasts of his adjoining owner, in which case, if he fail to build or properly maintain such fence, it would be no excuse for the trespass of a person not an adjoining owner, whose cattle might thereby enter.

In many states the common law never prevailed. This was often the case, because in a new country the large extent of uncultivated lands able to be employed only for pasturage rendered the fencing or other restraint of cattle impracticable. Hence, it was the right of every owner of cattle to let them roam, and the duty of every land owner to keep the cattle of others from his land, if he so wished. As the cultivation of the land increased there was greater occasion for protection against straying cattle, and fence and estray laws, or the common law rule in some form was adopted, or contracts made to fence, or prescriptive rights arose respecting the same. Hence, when a fence was built as prescribed, the land that it was intended to protect was as privileged from the trespass of cattle, as if as to such land the common law prevailed, and if cattle entered without fault of the land owner, so far as such fence was concerned, the owner of the cattle was absolutely liable. But in such case, also, when the duty of the land owner was to maintain some portion or the whole of a *division* fence, his failure to do so

\* NOTE.—Such law entirely eliminates all question of negligence (save in the instances hereinafter stated), where the injury is done by trespassing animals, and places the owner in a position where he has a right to keep animals, but if he does not keep them securely, so far as injuries on his neighbors' land are concerned, he will be absolutely liable, as if for the maintenance of a nuisance. This is an anomaly in the law and contrary to the essential principles governing the lawful ownership and enjoyment of property. A right conferred in the innocent exercise thereof becomes a wrong. If, without the slightest negligence of the owner, gun-powder and a cow on "A." land simultaneously go off and do damage on the land of "B." a neighbor, "A." is absolutely liable for the injury done by the cow, but not that done by the powder without evidence of negligence. It is, therefore, in legal theory, safer to keep a tro glycerine, operate steam engines, burn lands, confine water, and use all fearful and destructive agencies on land, than to harbor thereon a domesticated cow.

was a defense available only to the adjoining owner. And so, if it were the duty of the cattle owner to fence, so far as such duty extended, the obligation of the common law was applied; and if a statute existed against straying cattle, so far as it extended, it put the responsibility for trespassing on the owner of the beasts.

The question is this, whose duty is it to keep beasts from unlawful entry on land? The common law is itself a fence *for the land owner*, but when, for any reason, it becomes the land owner's duty to fence, the common law rule is modified, because his fence, so far as required, and not the law, becomes the barrier to the cattle.

So, where the common law does not prevail, either the cattle may roam at will, or statute, contract or prescription determines that the land owner, or cattle owner, or both, shall do some act to keep cattle from trespassing, and so far as either party fails, so far he becomes liable, or is precluded from recovering, if injury arise by his fault.

So there may be various conditions of the law, thus.

(1) When there is no duty to fence and no law against cattle straying; then it would be a simple question whether the common law prevails, or otherwise;

(2) Law forbidding cattle to be at large. This would be an adoption of the common law;

(3) By law, contract or prescription, duty of owner of cattle to fence them in; the failure to do this makes him liable absolutely, as if to that extent the common law prevailed;

(4) Law, contract, or duty by prescription, that land owner should fence against cattle. The fence properly built and maintained makes his land as inviolable as did the common law, and failure to fence, so far as such failure contributed to his injury, would take away his right to recover.

Thus, statutes as to fencing and estrays are but *pro tanto* adoptions or restrictions of the common law, as they result in measurably adopting or supplanting that law for the purpose of keeping beasts from trespassing. If a breach of duty by the injured person assists the injury, the damage resulting therefrom is not recoverable; if the breach of duty be by the owner of the cattle, it establishes his liability.

However, any generalization must be imperfect by reason of the peculiar language of statutes and the diverse holdings of courts. Especially is this so where the question of injury to animals by railways is involved.

The following holdings may be useful:

ALABAMA.—Uninclosed lands are common pasturage. *Wilbite v. Speakman*, 79 Ala. 400.

ARKANSAS.—Little Rock &c. R. Co. v. Finley, 37 Ark. 562.

CALIFORNIA.—Common law never was adopted, but by statute 1850, page 130, owner of land could not recover for cattle breaking into his close, unless the land were enclosed by statutory fences. *Comerford v. Dupuy*, 17 Cal. 308.

Statute 1861, p. 523, amended statute 1867, 1868, p. 426, made it unlawful to herd or permit the herding of sheep on the land or possessory claims of another, but this did not apply to cattle straying thereon without the agency, knowledge or consent of their owners. *Logan v. Gedney*, 38 Cal. 579.

Statute 1863, p. 581, amended by statute 1871, 1872, p. 580, treated as estrays all animals running at large in any public street, road or private property, without the consent of the owner thereof, whether accompanied by a herder or not, in the county of Santa Clara, and relieved the owner of the land from fencing in order to recover for trespass thereon. This illustrates local statutes in this and other states. *Hahn v. Garrett*, 69 Cal. 146.

COLORADO.—General law allows cattle to range, and in the absence of local acts, owner of crops can only recover damages for trespass of cattle in case his land be inclosed by a sufficient fence. *Morris v. Fraker*, 5 Col. 425.

CONNECTICUT.—Common law does not prevail. An owner of land cannot recover for trespass thereon unless he has inclosed his land with a lawful fence. But when cattle break through insufficient *division* fence of the owner of cattle, or sufficient fence of land owner, owner of cattle is liable. *Studwell v. Rich*, 14 Conn. 292; *S. P. Wright v. Wright*, 21 id. 344.

And, so, if a fence be defective, damages done by trespassing cattle shall be suffered by the owner of the fence, except when done by cattle unlawfully at large, or by unruly cattle. *Barnum v. Van Dusen*, 16 Conn. 200.

DAKOTA.—Cattle may run at large upon all lands except cultivated or meadow lands, or young timber. *Sprague v. Fremont R. Co.*, 6 Dak. 86.

GEORGIA.—Common law does not prevail. *Georgia &c. R. Co. v. Neely*, 56 Ga. 540.

ILLINOIS.—The common law always did prevail as to partition fences. *Sceley v. Peters*, 5 Gilm. 130; *Stoner v. Shugart*, 45 Ill. 76. But not as to outside fences until the passage of sec. 1, chap. 8 R. S. 1874, which re-enacted the common law. *Birkett v. Williams*, 30 Ill. App. 451; *Lee v. Burk*, 15 id. 651.

Owner of turkeys was liable for damage done by them, while trespassing. *McPherson v. James*, 69 Ill. App. 337.

INDIANA.—Common law prevails except so far as board of county commissioners may permit cattle to run at large, as provided in sec. 2637, R. S. 1881. *Michigan &c. R. Co. v. Fisher*, 27 Ind. 96; *Stone v. Kopka*, 100 id. 458; *Klenberg v. Russell*, 135 id. 553.

1st R. S., page 292, prohibiting recovery unless there were lawful fences, applies to outside fences; and where cattle break into an adjoining close and thence through insufficient fence on to plaintiff's land, statute did not apply, and common law did. *Brady v. Ball*, 14 Ind. 317.

See, *Pittsburg &c. R. Co. v. Stuart*, 71 Ind. 500.

KANSAS.—Law makes owner of land insufficiently fenced negligent, so that he cannot recover for injuries done to his crops by stock running at large and roaming upon his land through such insufficient fence, even though the owner of stock be negligent; but otherwise, if it be his willful, wanton or malicious act. *Larkin v. Taylor*, 5 Kan. 260.

But common law applies, as to hogs, although township may suspend law, in which case the owner would be liable for trespass, although the fences of the owner of land were insufficient. *Wells v. Beal*, 9 Kan. 406.

KENTUCKY.—See *Louisville &c. R. Co. v. Ballard*, 2 Mete. (Ky.) 177.

MAINE.—Common law rule was abolished in Maine by statute, except as to undivided division fences, when each owner must observe the common law rule. *Wilber v. Closson*, 35 Me. 26.

MARYLAND.—Common law rule applies, except so far as the legislature has

changed the same in certain counties, relative to partition fences. *Richardson v. Milburn*, 11 Md. 340.

Baltimore &c. R. Co. v. Lanborn, 12 Md. 257.

MASSACHUSETTS.—Common law prevails. *Rust v. Low*, 6 Mass. 90.

"A's" cattle, through "B's" negligence to keep division fences in repair, escaped into "B's" field, and thence, through "C's" neglect to keep in repair fences between "C." and "B.," escaped into "C's" land and did damage. "A." was liable at suit of "C." *Lyons v. Merriek*, 105 Mass. 71.

MICHIGAN.—Common law prevails, except that no recovery can be had for damage done by beasts, unless land be fenced, except in case where, by the laws of the township, beasts are prohibited from running at large. *Williams v. Michigan &c. R. Co.*, 2 Mich. 260.

Wood v. La Rue, 9 Mich. 158.

MINNESOTA.—In the absence of action by town, under sub. div. 6, sec. 15, c. 10, Gen. Stat., common law prevails. *Locke v. First Dir. &c. R. Co.*, 15 Minn. 283.

Citing, *State v. Pulle*, 12 Minn. 170.

Unless otherwise provided by the town, cattle cannot run at large in summer, although owner of land not legally fenced, cannot recover for injuries done by cattle over two years old, and not breachy. *Fritz v. First Dir. R. Co.*, 22 Minn. 404.

MISSISSIPPI.—See *Vicksburgh &c. R. Co. v. Patton*, 31 Miss. 156; *New Orleans &c. R. Co. v. Field*, 46 Miss. 573.

MISSOURI.—See *McPheters v. Hannibal &c. R. Co.*, 45 Mo. 22.

NEVADA.—See *Chase v. Chase*, 15 Nev. 259.

NEW HAMPSHIRE.—Common law prevails. *Noyce v. Colly*, 30 N. H. 143.

NEW JERSEY.—Common law prevails although statute (Elm. Dig. 192; R. L. 387), declares that fences shall be deemed lawful for the purpose of creating liability in damages in some cases, and of exemption from liability in others; but this extends "only to owners of adjoining closes, between whom, a division of the partition fence has been made, and the part to be maintained by each has been ascertained, either by voluntary agreement between them or an assignment by the township committee." If there be no such division, the common law prevails. This does not apply to cattle running at large and trespassing. *Chambers v. Matthews*, 18 N. J. L. 368; *Vandegrift v. Rediker*, 22 id. 185.

NEW YORK.—The owner of cattle is bound at his peril to confine them on his own land; if they escape and commit a trespass on the land of another, unless through defect in fence which the latter ought to repair, the owner is liable. *Van Leuren v. Lyke*, 1 N. Y. 515; *Spinner v. N. Y. C. R. Co.*, 67 id. 156; *Marsh v. Hand*, 120 id. 319, 320; *Bush v. Brainerd*, 1 Cow. 78, note; *Wells v. Howell*, 19 Johns. 384; *Phillips v. Covell*, 79 Hun, 210.

A neglect to build or repair division or partition fence renders the party liable in damages for injuries arising therefrom. *Bush v. Brainerd*, 1 Cow. 78; *Deyo v. Stewart*, 4 Denio, 101.

For fence laws see Town Law, sec. 100.

OHIO.—Common law never prevailed. 3 Oh. St. 172; 4 id. 474. By statute the owner of cattle is liable for all damages done by them while unlawfully at large, unless done to a railroad; but the act of 1865, forbidding cattle to be at large, does not make the owner of the cattle guilty of a breach of the act, if he uses reasonable care to prevent it. *Marietta R. Co. v. Stephenson*, 24 Oh. St. 48.

OREGON.—See *Campbell v. Bridwell*, 5 Ore. 311.

PENNSYLVANIA.—The common law would prevail, except for statutes whereby the owner of *improved* land must fence both to restrict his own and to shut out his neighbor's cattle; in the absence of which, an action for trespass will not lie; but if the land be properly fenced, the owner of cattle is liable for all damages done by them, trespassing thereon. *Gregg v. Gregg*, 55 Pa. St. 227.

Where adjoining owners agreed not to fence, each was liable for the trespass of his cattle. *Milligan v. Wehinger*, 58 Pa. St. 235.

Where an animal inflicts injury while trespassing, such as hooking the plaintiff while driving it out of his premises it is properly the subject of an aggravation of damages in trespass. *Troth v. Wills*, 8 Pa. Super. Ct. 1.

RHODE ISLAND.—Common law prevails except as to division fences, whereby one in default is negligent. *Tower v. Providence &c. R. Co.*, 2 R. I. 404.

UNITED STATES.—Common law was never adopted as regards the territory of the United States. *Beaufort v. Houtz*, 133 U. S. 320.

VERMONT.—Common law prevails. Statute as to fences does not relieve the owner of cattle as to common law duty. *Sarenberger v. Houghton*, 40 Vt. 150. But when fence is divided and owner fails to maintain his part of the fence, whereby the cattle of the other enter, no recovery is allowed; but where the fence is not divided, common law prevails. *Keenan v. Caranagh*, 44 Vt. 268.

VIRGINIA.—Common law not in force. Owner of trespassing animals not liable unless a "no fence law" has been adopted. *Poindexter v. May*, 98 Va. 143; S. C., 47 L. R. A. 588.

WEST VIRGINIA.—Common law is not in force save as to unruly and dangerous animals. *Baylor v. Baltimore &c. R. Co.*, 9 W. Va. 270.

WISCONSIN.—The common law is technically the law of the statute, although it is declared that by common consent it is disregarded in newly settled parts of the state. *McCall v. Chamberlain*, 13 Wis. 637.

#### (a). EXTENT OF LIABILITY.

The decisions are not harmonious, respecting the injuries that are the proximate result of the trespass, that is, whether a recovery may be had for all injuries done by the trespassing animal, whether they be the natural consequence of such animal trespassing, as vicious attacks on man or beast, or whether in order to recover for such injuries as are not regarded as belonging to domesticated animals, negligence must be shown.

The decisions quoted will fairly illustrate the different holdings. *Klenberg v. Russell*, 125 Ind. 531.

**From opinion.**—"It is the duty of the owner of domestic animals to fence them in where they are such as can be fenced against, and not the duty of his neighbors to fence them out; but it does not necessarily follow that the owner of domestic animals suffered to run at large, or to trespass upon the lands of others, are thereby rendered responsible for all injurious acts committed by such animals while away from the premises of the owner.

In *Fletcher v. Rylands*, an English case found in *Thompson Law of Negligence*, on page 1 (but see page 26), it is said: "The law as to them (speaking of cattle) seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the *natural consequences* of their escape,



that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore.' And all of the general authorities seem to agree that the owner of a domestic animal is not liable because of a negligent failure to keep it confined on his own premises, *except for the consequences which may be anticipated because of its well-known disposition and habits, unless it is possessed of a vicious disposition of which he had notice.* In *Loose v. Buchanan*, 51 N. Y. 476 (but see *Thompson Law of Negligence*, p. 52), it is said: 'As to the former (speaking of domestic animals), the owner is not responsible for such injuries as *they are not accustomed to do*, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually retain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon *the fault which the law attributes to him*, and no further actual negligence need be proved than the fact that they are at large unrestrained.'

We believe the foregoing to be a correct statement of the law in such cases. *Earl v. Van Alstine*, 8 Barb. 630; *Van Leuven v. Lyke*, 1 N. Y. 515; *Vrooman v. Lawyer*, 13 Johns. 339; *Thompson Law of Neg.* sec. 15, p. 201; *Thompson Law of Neg.* sec. 26, p. 209; *Durham v. Musselman*, 2 Blackf. 96; *Thompson Law of Neg.* sec. 10, p. 389; *Sinram v. Pittsburg & E. R. W. Co.*, 28 Ind. 244; *Smith v. Causey*, 22 Ala. 568; *Wormley v. Gregg*, 65 Ill. 251; *Dearth v. Baker*, 22 Wis. 73.

In *S. & R. Law of Neg.*, sec. 629, it is said: 'But the owner of creatures which as a species are harmless and domesticated, and are kept for convenience or use, such as dogs, cattle, horses, and even bees, is not liable for injuries willfully committed by them, unless he is proved to have had notice of the inclination of the particular animals complained of to commit such injuries. If, having had such notice, he neglects to keep them confined where no one can suffer from them while using ordinary care, he is liable for all injuries committed by them. And the owner of even a wild beast is not liable for injuries caused by it in a manner which no acquaintance with its nature could have led him to expect, except upon similar evidence of notice.'

The opposing doctrine is thus stated:

"The gist of trespass is the unlawful entry, and the direct object of an action therefor is the recovery of damages for the injury to the close, but where incidental injuries to the plaintiff's cattle, or the like, are committed by trespassing animals, these may be alleged by way of aggravation, and damages recovered therefor: as where a trespassing animal gores, or kicks or bites the plaintiff's horse or cow. *Angus v. Radin*, 8 Am. Dec. 626; *Dolph v. Ferris*, 42 id. 246; *Saxton v. Bacon*, 31 Vt. 540; *Lyons v. Merrick*, 105 Mass. 71; *Dunckle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10. Nor need it be alleged or proved that the owner of such animal had any previous notice of its vicious disposition, or that it had previously shown such disposition. *Angus v. Radin*, 8 Am. Dec. 626; *Dunckle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722. Although an owner of animals *mansuetæ naturæ* is not liable for such injuries committed by them while not tres-

passing, unless they have been previously vicious to his knowledge. *Angus v. Radin, supra*; *Van Leuven v. Lyke*, 1 N. Y. 515. But when they are trespassing it is at the peril of the owner, and he must answer for all the consequent injuries. The case of dogs attacking sheep or cattle on another's land, already mentioned, stands upon a different footing, for there the original entry was not a trespass. But if a dog accompanies his trespassing owner and does such an injury, he must answer for it without regard to previous notice of the dog's vicious disposition, because it is a proximate result of his own trespass. *Beckwith v. Shordike*, 4 Burr. 2092. In case of vicious injuries to the plaintiff's cattle by a trespassing animal, if *scienter* of the mischievous propensity is not alleged, the fact of the trespass must be averred as the ground of action, or there can be no recovery, even though it appears in proof that the animal was trespassing. *Van Leuven v. Lyke*, 1 N. Y. 515; s. c., *post*.

The communication of disease by the defendant's trespassing animals to the animals of the plaintiff may also be averred and proved in aggravation of the trespass, though the defendant had no notice of the disease. *Anderson v. Buckton*, 1 Stra. 192; *Bamum v. Vanduzen*, 16 Conn. 200. But in an action for negligence in infecting the plaintiff's sheep by contact with the defendant's diseased sheep, where it does not appear how the sheep came on the plaintiff's land, *scienter* is necessary. *Cook v. Waring*, 32 L. J. Ex. 262. Damages are recoverable also in an action for the trespass of the defendant's 'scrub' bull for getting the plaintiff's thoroughbred cow with calf. *Crawford v. Williams*, 48 Iowa, 247. So in case of a trespassing stallion getting a mare with foal. *Hagan v. Casey*, 30 Wis. 553. And damages for such injury may be recovered in a subsequent action, notwithstanding a prior recovery for the trespass, if the facts as to the mare's condition were not known at the time. *Id.* So damages are recoverable for an injury by a trespassing calf to the plaintiff's trees, though the injury is not such as cattle are, by nature, wont to commit. *Keenan v. Cavanaugh*, 44 Vt. 268. The defendant is not liable for injuries committed by other cattle not under his control, entering through the breach made by his cattle."

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Hollenbeck v. Johnson*, 79 Hun, 499.

In a complaint charging a trespass by defendant's horses on plaintiff's land, and alleging by way of aggravations the kicking and breaking the collar bone of the plaintiff's horse, it is not necessary to aver that the defendant's horses *were accustomed to kick, or that the defendant had notice of the vicious propensity*. *Dunkle v. Koecker*, 11 Barb. 387.

This is so even if the injury arise from some unusual vicious propensity of the trespassing animal. The *gravamen* of the action is the trespass, which carries with it all incidental injury.

The owner of an animal is liable for personal injuries done by it to another upon whose land it is trespassing, whether it is a vicious animal, or known to its owner *to be vicious, or otherwise*. *Malone v. Knowlton*, 39 N. Y. S. R. 901.

*Van Leuven v. Lyke*, 1 N. Y. 515; see *Hollenbeck v. Johnson*, 79 Hun, 499; *Vicksburgh & Co. v. Patten*, 31 Miss. 156; *Walker v. Herron*, 22 Tex. 55.

Where defendant's animals are unlawfully as trespassers in the close of another, their owner is liable for all damages or injuries they commit *whether he had any previous notice of their tendency to commit the harm or injury complained of or not*. Nor need it be alleged that owner had previous notice.

*Angus v. Radin*, 8 Am. Dec. 626; *Dolph v. Ferris*, 42 id. 246; *Tonawanda R. Co. v. Munger*, 49 id. 25; *Dunckle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722; *Lyons v. Merrick*, 105 Mass. 71; *Saxton v. Bacon*, 31 Vt. 540.

Statutory liability, for all damages for animals "running at large," does not extend to injury by a jack, where it escaped without defendant's knowledge or negligence. *Briscoe v. Alfrey*, 61 Ark. 196; s. c., 30 L. R. A. 607.

Recovery was allowed, where the consequence of the trespass was communication of disease to cattle. *Barnum v. Vandusen*, 16 Conn. 200.

*Anderson v. Buckton*, 1 Stra. 192.

Though owner of cattle, lawfully at large, may not be liable for their trespassing on uninclosed land, he is nevertheless liable, if he deliberately drives them thereon. *Monroe v. Cannon*, 24 Mont. 316.

Statutory permission to detain animals unlawfully at large, for damage done, held not to exclude common law action for damages. *Bowles v. Abrahams*, 65 Mo. App. 10.

Nebraska Herd Law construed to limit the common law liability for trespassing animals. *Lorance v. Hillyer*, 57 Neb. 266.

The common law rule that allows cattle to be at large only at risk of owner, regardless of negligence, was restored by the repeal of Pa. Act 1889, of the act of 1700, requiring the landowner to assume the burden of keeping cattle out of his premises. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Getting cow with calf, *Crawford v. Williams*, 48 Iowa, 247; or mare with foal, *Hagan v. Casey*, 30 Wis. 553.

So when calf injured trees. *Keenan v. Cavanaugh*, 44 Vt. 268.

"H." and "B." were adjoining owners. In consequence of "B.'s" neglect to maintain his portion of the fence, "A.'s" horse escaped upon "B.'s" land and was gored by "B.'s" bull. It was for the jury and not the court to say whether the injury was the natural consequence of "B.'s" neglect. *Saxton v. Bacon*, 31 Vt. 540.

(Citing *Powell v. Salisbury*, 2 Younge & Jervis, 391.

**From opinion.**—"We do not regard it as indispensable to the maintenance of this action that the vicious habits of the animal should have been known to the defendant."

Where the dividing line of property is along the middle of a road so that no fence can be erected, an owner is bound to prevent his cattle straying. *Carpenter v. Cook*, 71 Vt. 110.

## (b). DOGS STRAYING—COMMON LAW RULE DIDN OT EXTEND TO.

The unlawful entry of dogs, unattended by their master, upon the premises of another, except for the purpose of worrying sheep, does not make the owner liable irrespective of negligence. *Cooley on Torts*, 341.

*Brown v. Giles*, 1 C. & P. 118; *Read v. Edwards*, 17 Com. B. N. S. 245.

The master and dog were unlawfully in a pasture, and hence question of negligence was not involved. *Wolf v. Chalker*, 31 Conn. 128; *Dicker v. Goodman*, 44 Me. 322.

*Goodman v. Gay*, 15 Pa. St. 188; 1 Addison on Torts, sec. 381.

Injury to a colt lawfully in pasture of third person by defendant's dog unlawfully taken with him thereon, makes him liable. *Green v. Doyle*, 21 Ill. App. 205.

Common law rule, not in force in Idaho. *Johnson v. Oregon Short-Line R. Co.*, (Id.) 63 Pac. Rep. 112.

See, also, *Jones v. Oregon Short Line R. Co.*, 56 id. 76.

One, whose dog trespassing upon the land of another kills a domestic animal, is liable though he had no previous knowledge of any vicious propensity of the dog. *Chunot v. Larson*, 43 Wis. 536.

But when the dog attends his master trespassing, the acts of the dog are absolutely at the master's risk; so where the master is instrumental in sending the dog there. *Beckwith v. Shoredike*, 4 Burr. 2092.

*Milten v. Fandrye*, Pop. 161.

And even when the entry is to worry and injure sheep, the owner is not liable unless he had notice of such propensity. *Jenkins v. Turner*, 1 Ld. Raymond 109.

*Read v. Edwards*, 17 Ld. Raymond, N. S. 245.

## (c). ACT OF STRANGER CAUSING THE TRESPASS.

If, without the owner's fault, a stranger drive his cattle on another's land, the stranger but not the owner of the cattle is liable. When a third person, without authority, turned defendant's cattle out of the pasture and drove them in the direction of and near to the plaintiff's land, whereon they strayed, the owner, although in fact not at fault, was held liable. *Noyes v. Colby*, 30 N. H. 143.

## (d). DUTY OF LAND OWNER TO FENCE.

When by law the owner must fence his lands against the highway, but he neglects to make or maintain a suitable fence, he cannot maintain action for trespass by cattle of another. *Cooley on Torts*, 338; *Bush v. Brainard*, 1 Cow. 78, note A. 79.

*Tonawanda R. Co. v. Munger*, 5 Denio, 255; *Westgate v. Carr*, 43 Ill. 450; 49 Am. Dec. 241; *Frazier v. Nortinus*, 34 Ia. 82; *Comerford v. Dupuy*, 17 Cal. 308; *Morris v. Fraker*, 5 Col. 425; *Studwell v. Rich*, 14 Conn. 292; *Wright v. Wright*, 21 Conn. 344; *Larkin v. Taylor*, 5 Kan. 260; *Lyons v. Merriek*, 105 Mass. 71; *Williams v. Michigan &c. R. Co.*, 2 Mich. 260; *Fritz v. First Div. &c. R. Co.*, 22 Minn. 404; *Gregg v. Gregg*, 55 Pa. St. 227.

But, see, *Keenan v. Cavanaugh*, 44 Vt. 268, and *Chambers v. Matthews*, 18 N. J. L. 368, where it was held that the owner of land is not obliged to fence against cattle running at large on highway.

Owner was not relieved from the acts of his turkeys, trespassing upon another's land, because there was an opening in the latter's fence. *Mcpherson v. James*, 69 Ill. App. 337.

Plaintiff cannot recover for damage done by cattle to uncultivated land, unless they be driven thereon. *Meyers v. Menter*, (Neb.) 88 N. W. Rep. 662.

Where fruit trees are planted though in a city lot, it is cultivated land, within the Nebraska Herd Law, as to trespassing animals. *Lorance v. Hillyer*, 57 Neb. 266.

The purpose of the Free Range Law is to protect owners of cattle which stray on the lands of others, but it does not permit one to wilfully drive cattle thereon. *Addington v. Canfield*, (Okla.) 66 Pac. Rep. 355.

Failure to maintain the statutory fence does not prevent recovery under the statute for damages to inclosures or crops by notoriously mischievous cattle. *Smith v. Jones*, 95 Tenn. 339.

The common law not being in force, failure to fence one's property so as to prevent all sizes and kinds of cattle, of ordinary disposition trespassing, prevents recovery therefor. *Clarendon Land &c. Co. v. McClelland*, 89 Tex. 483; s. c., 31 L. R. A. 669.

Owner of animals forbidden to run at large, was conclusively presumed negligent, where they entered plaintiff's land through a fence sufficient to turn animals permitted to be at large. *Frazer v. Bedford*, (Tex. Civ. App.) 66 S. W. Rep. 573.

The acts requiring fencing are not unconstitutional as interfering with the enjoyment of private property, but are mere regulations in such use and enjoyment. *Poindexter v. May*, 98 Va. 113; s. c., 47 L. R. A. 588.

### (c). DIVISION FENCES.

When a division fence is required between adjoining properties, and the cattle escape onto the land of one through defective fence which such person neglected to maintain, the owner of the cattle is not liable; but this does not excuse trespass by cattle of third persons, nor undomesticated animals. *Deyo v. Stewart*, 4 Denio 101.

*Stafford v. Ingersoll*, 3 Hill. 38; *Phillips v. Corell*, 79 Hun, 210; *Bush v. Brain-*

ard, 1 Cowen, 78 note a, p. 82; Seeley v. Peters, 5 Gilm. 159; Chambers v. Matthews, 18 N. J. L. 368; Wilber v. Closson, 35 Me. 26; Lawrence v. Combs, 37 N. H. 331; Cate v. Cate, 50 N. H. 114; Gilman v. Noyes, 51 N. H. 629; Williams v. Michigan & C. R. Co., 2 Mich. 260; Keenan v. Cavanaugh, 44 Vt. 268; Tower v. Providence & C. R. Co., 2 R. I. 404; Rust v. Low, 6 Mass. Rep. 98; Lyons v. Nurrick, 105 id. 71; Cooley on Torts, 339; N. Y. 1 R. S. 346, sec. 44, Banks' 7th ed., vol. 1, p. 831.

By N. Y. statute, 1 R. S. 353, art. 4, it may be made the duty of owners of adjoining lands to build and maintain certain parts of division fences. The like obligation may also be imposed by contract or prescription, which presupposes an original contract; and when the duty exists and has been violated, the law will give no redress to the party in fault for damages sustained by him in consequences of a defect in the part of the fence he was bound to make or repair. *Tonawanda R. Co. v. Hunger*, 5 Denio, 255.

Citing 1 Chit. Pl. 544; Poole v. Longueville, 2 Saund. 285, note 4; Bush v. Brainard, 1 Cow. 79, note; 13 Am. Dec. 513; Shepherd v. Hees, 12 Johns. 433.

Where fence is undivided, each owner must keep cattle on his own land where common law prevails as to division fences. *Teaksbury v. Bucklin*, 7 N. H. 518.

Avery v. Maxwell, 4 N. H. 36; Thayer v. Arnold, 4 Met. 589; Little v. Lathrop, 5 Greenl. 356; Lawrence v. Combs, 37 N. H. 335.

So when once erected it is removed by both parties, each party must keep his cattle at his peril. *Van Slyck v. Snell*, 6 Lans. 299.

Owner of close need not fence against any cattle save those rightfully upon adjoining land.

Lawrence v. Combs, 37 N. H. 366; Salkwell v. Milwarde, 26 Hen. 6, 23; 10 Ed. 4, 7; Fitzh v. Curiacland, 1, 2; Rust v. Low, 6 Mass. 99; 3 Kent. 438; Avery v. Maxwell, 4 N. H. 37; Haliday v. Marsh, 3 Wend. 147; Wells v. Howell, 19 Johns. 385; Stackpole v. Haley, 16 Mass. 38; Lord v. Wormwood, 29 Me. 282; Hurd v. R. Co., 25 Vt. 122; Dovaston v. Payne, 2 H. Blackstone, 527; Cornwall v. Sullivan R., 28 N. H. (8 Foster) 167.

Common law liability has been restricted by statute, as between the proprietors of adjoining closes, who, under certain circumstances, are each bound to maintain a just proportion of their division fence; and the party in default has no remedy for a trespass committed by the cattle of the other party.

Where one's cattle are lawfully placed on "A.'s" land, and escape thence to the land of another, their owner is entitled to the same exemption from liability that "A." might claim in case the cattle had been his, but nothing more.

Accordingly, where "B.'s" cattle were rightfully pasturing on land owned and occupied by "A." and they escaped thence to the adjoining land of "C." through a defect in the division fence which "A." was bound to repair. Held, that "C." might maintain trespass against "B."

And, *semble*, as the cattle were on "A.'s" land with his consent, he might be treated as owner of them for all the purposes of a remedy, either at the common law or under the statute. *Stafford v. Higersel*, 3 Hill. 38.

A statutory provision prohibiting use of barbed wire in division fences is violated, where it is placed within the corners of a rail fence entirely on his defendant's own land. *Buckley v. Clark*, 21 Misc. 138.

Owner of cattle held not liable, where they were pastured on the land of another, and trespassed through insufficient line fence. *Eck v. Hocker*, 75 Ill. App. 641.

The jury must determine whether a line fence is sufficient to restrain cattle's disposition to rove, under Pa. Act 1812. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Where land owner failed to maintain a proper fence he cannot charge a cattle owner with trespass, simply because he knew of it. *Clarendon Land &c. Co. v. McClelland*, 89 Tex. 483; s. c., 31 L. R. A. 669.

Adjoining owner cannot recover for trespass of cattle through a division fence, insufficient through his neglect. *Heironimus v. Duncan*, 11 Tex. Civ. App. 610.

#### (f). INJURIES COMMITTED ON HIGHWAY.

When animals are lawfully driven or taken along the highway in a proper manner, and without negligence escape upon the premises of another and do damage before they can be removed by the exercise of due expedition, the owner is not liable. But they must be lawfully on highway. *Cooley on Torts*, 341.

Plaintiff was knocked down and injured in a street in the city of B— by a cow belonging to the defendant "W." In an action to recover damages it appeared that the owner had contracted to sell and deliver the cow, and, in pursuance of the contract, employed "F.," a person long accustomed to that kind of business, to take her to the purchasers. "F." was leading the cow by a rope around her horns, when two dogs violently seized upon and frightened her; she kicked, knocked "F." down, pulled away from him and ran, and, while thus beyond his control, inflicted the injury complained of. Held, that, while it was not lawful for any cow to run at large in any street or public place in this state (Laws of 1872, chap. 776), the apparent violation of the law was explained; and in the absence of any evidence of knowledge on the part of said defendants that the cow was unruly, or had previously done similar acts, they were not, under the circumstances, liable.

*Moynahan v. Wheeler*, 117 N. Y. 285.

*Bush v. Brainard*, 1 Cow. 78, note a, pp. 87, 91; *Halladay v. Marsh*, 20 Am. Dec. 678; *Cool v. Crummet*, 13 Me. 250.

Where the defendant negligently permitted his horse to go, loose and unattended, upon the sidewalk of a populous street in a city, and in passing he kicked the plaintiff and injured him, defendant was liable.

To make the owner responsible, it is unnecessary to allege the viciousness of the horse, in committing the injury, except in cases where, but for the vice of the animal, the owner would be free from fault.

It is such negligence for the owner of a horse to turn him loose, to go from the stable into the street of a city, unattended, as will make him

liable for all injuries occasioned thereby. *Dickson v. McCoy*, 39 N. Y. 400.

Defendant was liable, where its horse was left unattended in the street near plaintiff's trees, which it destroyed by girdling. *Lane v. Lamke*, 53 App. Div. 395.

Defendant was liable, where his servant drove a vicious bull, unsecured, along the highway. *Clowdis v. Fresno Flume &c. Co.*, 118 Cal. 315.

Where the injury arises from a steer breaking away while being driven through the street, and injuring person on street, proof of negligent driving or negligent escape on the street would be sufficient. Such causes of action are different. *Cox v. Murphy*, 82 Ga. 623.

*Stackpole v. Healey*, 16 Mass. 35; *Hartford v. Brady*, 114 id. 466; *McDonald v. Pittsfield*, 115 id. 564.

See *Hewes v. McNamara*, 106 Mass. 281.

Owner was liable for injuries by domestic animal unlawfully running at large, when not aware that it was vicious or liked to attack persons. *Klenberg v. Russell*, 125 Ind. 531.

Owner of bull at large on the public highway is liable for all injuries done by it, and it need not be proved that defendant knew bull was vicious, unless injured person be at fault. *Meier v. Shrunk*, 78 Iowa, 17.

A man's mule, known to him to be vicious and inclined to kill young colts, killed a mule while both were unlawfully on third person's land. Owner was liable. *Hill v. Applegate*, 40 Kan. 31.

Defendant was liable, where his bulls were driven loose through a city street. *Phaffinger v. Gilman*, (Ky.) 38 S. W. Rep. 1088; *Byrne v. Morel*, 70 Ky. L. Rep. 1311.

Cattle are not lawfully on highway unless by law allowed to run at large there. *Stackpole v. Healey*, 16 Mass. 33.

*Holladay v. Marsh*, 20 Am. Dec. 678; *Avery v. Maxwell*, 4 N. H. 36; *Harrison v. Brown*, 5 Wis. 27; see *Griffin v. Martin*, 7 Barb. 297; *White v. Scott*, 4 id. 56.

Defendant was liable without proof of viciousness for leaving a horse, which driver had made irritable and vicious, by ill treatment, unhitched and unattended on the sidewalk. *Hardiman v. Wholley*, 172 Mass. 411.

When cattle properly driven upon the highway escape upon unfenced adjoining land, owner is not liable, if he make reasonable effort to remove them and prevent injury. *Hartford v. Brady*, 114 Mass. 466.

Citing *Stackpole v. Healey*, 16 Mass. 33; *Lyman v. Gipson*, 18 Pick. 422; *Little v. Lathrop*, 5 Greenl. 356; *Lord v. Wormwood*, 29 Me. 282; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 id. 512; *Dovaston v. Payne*, 2 H. Bl. 527; *Goodwin v. Chevelev*, 4 H. & N. 631; *Chambers v. Matthews*, 18 N. J. L. 368.

Although up to the time of injury a bull had not been vicious, to



the knowledge of the person *then* driving him, yet if the manner of driving him was negligent, a recovery was allowable, unless plaintiff was negligent. *Barnum v. Terpenning*, 75 Mich. 557.

See *Tillett v. Ward*, Q. B. Div. 22 Am. L. Reg. 245.

Herd of cattle turned, unattended, loose in the highway, contrary to statute, while hooking and pushing overturned a vehicle; owner liable; owner assumed all risks. *Shipley v. Colclough*, 81 Mich. 624.

Plaintiff was entitled to double damages under a statute, giving recovery for injury caused by a dog while traveling on a highway, where it attacked a horse and caused it to kick the driver. *Jenkinson v. Cog-gins*, 123 Mich. 7.

Animals lawfully on highway are not running at large so as to bind owner for injuries incident to cattle running at large. *Calvin v. Sutherland*, 32 Mo. App. 77.

Entry of cattle on private grounds, while passing along the highway, does not impose liability, where they are removed in a reasonable time. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Failure to show that defendant knew of the alleged viciousness of the steer, driven along a city street, did not necessarily defeat recovery; and, on a conflict of evidence, defendant's carelessness in controlling it, was properly submitted to the jury. *Puechner v. Braun*, 10 Pa. Super. Ct. 595.

Liability of owner of a bull inflicting personal injury after it escaped, while being driven through the street, does not depend upon vicious propensities previously existing, and knowledge or notice thereof. *Baird v. Vaughn*, (Tenn.) 15 S. W. 734.

Knowledge of a dog's disposition to bite, is not essential to liability under a statute making a dog owner liable for all damage done by it while on a highway. *Kelly v. Anderson*, 19 R. I. 544.

Mere fact that domestic animal is unattended in highway, is not negligence. *Holden v. Shattuck*, 34 Vt. 336.

As to reasonable time to remove cattle trespassing, while being driven on highway, see *Goodwin v. Cheveley*, 28 L. J. Ex. 298.

S. C., 4 Hurlst. & N. 631.

#### (g). WILD ANIMALS.

Wild animals, by the authority of the decisions, would seem to stand upon the same plane with dogs proven dangerous, so that *feræ naturæ* are kept at the absolute risk of the owner. It has been thought by some modern authors\* whose judgment is authoritative, that while an injury

\* Note — See, Cooley on Torts, 348-9; Bishop on Non-Contr. Law, sec. 1220; and also Wharton on Neg., sec. 918.

by a wild animal escaped from restraint might establish a *prima facie* case of negligence, that the keeper could show that such escape was without fault on his part. The care required may be the highest practicable, like that required of common carriers of passengers, but does care enter into the question?

Owner of an elephant keeps it at his own risk, although ignorant of its dangerous character. *Filburn v. People's Palace &c. Co.*, (C. A.) L. R., 25 Q. B. D. 258.

## VI. Injuries on Railways.

(Unless so stated the question of compulsory fencing by company is not involved.)

By the common law, cattle on a railway track are trespassers, as the company is not, and the owner of the cattle is bound by fencing or otherwise, to keep them from entering thereon. Hence, if they be injured thereon the company, save as hereafter stated, is not liable, as the owner, by his own wrongdoing, has contributed to the injury. The question of the land-owner's negligence is not involved. *Tonawanda R. Co. v. Munger*, 4 N. Y. 349; aff'g 5 Denio, 255; note, p. 261; *Corwin v. N. Y. & E. R. Co.*, 13 N. Y. 42.

**From opinion.** (*Corwin v. R. Co.*, *supra*.)—"By the common law, the owner was bound to take care that his cattle did not leave his own lands and trespass upon those of his neighbor (*Pomfret v. Ricroft*, 1 Wm. Saund. 321); if they did, he was himself liable for damages in an action of trespass. It has long been settled that there can be no recovery in an action on the case for negligence where the negligence or misconduct of the plaintiff contributed to the injury; hence it was repeatedly decided, prior to the general Railroad Act of 1848, that one whose cattle were trespassing upon the railroad at the time they received the injury, could not recover damages of the railroad company." *Spinner v. N. Y. Cent. R. Co.*, 67 N. Y. 153.

*Pittsburg &c. R. Co. v. Stuart*, 71 Ind. 504; *Louisville &c. R. Co. v. Ballard*, 2 Mete. (Ky.) 177; *Knight v. New Orleans &c. R. Co.*, 15 La. Ann. 105; *Baltimore &c. R. Co. v. Lanborn*, 12 Md. 257; *Perkins v. Railway Co.*, 29 id. 307; *Darling v. Boston &c. R. Co.*, 121 Mass. 118; *Williams v. Michigan &c. R. Co.*, 2 Mich. 259; *Woolson v. Northern P. R. Co.*, 19 N. H. 267; *Vandergrift v. Rediker*, 22 N. J. L. 185; *Price v. N. J. &c. R. Co.*, 2 Vroom. 229; 3 id. 19; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Jackson v. Rutland &c. R. Co.*, 25 Vt. 150; *Galpin v. Chicago &c. R. Co.*, 19 Wis. 637.

## VII. Cattle Unlawfully at Large Precludes Recovery.

The same rule applies to cattle unlawfully at large and injured while trespassing on a railway.

*Hance v. Cayuga R. Co.*, 26 N. Y. 428; *Simmons v. Poughkeepsie &c. R. Co.*, 2

App. Div. 117; Alabama &c. R. Co. v. McAlpin, 71 Ala. 545; Denver &c. R. Co. v. Stewart, 1 Col. App. 227; McDonald v. Great Northern R. Co., (Id.) 46 Pac. Rep. 766; Delta Electric Co. v. Whitecamp, 58 Ill. App. 141; R. Co. v. Hunter, 38 Ind. 557; Jeffersonville &c. R. Co. v. Adams, 43 id. 402; Jeffersonville &c. R. Co. v. Foster, 63 id. 342; Vanhorn v. Burlington &c. R. Co., 63 Iowa, 67; Kansas City R. Co. v. Mellenry, 24 Kan. 359; Missouri &c. R. Co. v. McGrath, 7 Kan. App. 710; Weingartner v. Louisville &c. R. Co., (Ky.) 42 S. W. Rep. 839; Eames v. Salem R. Co., 98 Mass. 560; Maynard v. Boston &c. R. Co., 115 id. 458; Schneekloth v. Chicago &c. R. Co., 108 Mich. 1; Mosher v. St. Paul &c. R. Co., 42 Minn. 480; Johnson v. Minneapolis &c. R. Co., 43 id. 207; Averill v. Santa Fe Receivers, 72 Mo. App. 243; Case v. Central R. Co., 59 N. J. L. 471; Doggett v. Richmond &c. R. Co., 81 N. C. 459; Wolsen v. R. Co., 19 id. 267; Pittsburg &c. R. Co. v. Methven, 21 Oh. St. 586; N. Y. &c. R. Co. v. Skinner, 19 Pa. St. 298; R. Co. v. Tower, 2 R. I. 404; Sinkling v. Illinois C. R. Co., 10 S. D. 560; Houston &c. R. Co. v. Nichols, (Tex. Civ. App.) 39 S. W. Rep. 954; Missouri &c. R. Co. v. Russell, 43 id. 576; Texas &c. R. Co. v. Smith, 41 id. 83; Bunnell v. Rio Grande &c. R. Co., 13 Utah, 314.

This doctrine does not apply in action by a passenger. *Sullivan v. Phila. &c. R. Co.*, 30 Pa. St. 234. In absence of action by town under statute, the common law rule prevails, and cattle stray on railway track by the owner's own fault. *Locke v. First Div. R. Co.*, 15 Minn. 283; *Fritz v. Same*, 22 id. 404.

### VIII. Cattle Unlawfully at Large Does Not Preclude Recovery.

But it is also held that the *mere fact that cattle are unlawfully running at large* will not preclude recovery; especially where the company's negligence was the proximate cause of the injury.

This doctrine is more pronounced where the common law does not prevail, or stock are not unlawfully at large. Many of these decisions turn upon the point that the plaintiff's negligence was not proximate, and that the company did not use due care after discovering the stock.

*R. Co. v. Williams*, 65 Ala. 74; Alabama &c. R. Co. v. Powers, 71 id. 487; *R. Co. v. Finlay*, 37 Ark. 569; *Richmond v. Sacramento &c. R. Co.*, 18 Cal. 357; approving *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259; *R. Co. v. Macer*, 40 Cal. 522; *Savannah &c. R. Co. v. Geigner*, 21 Fla. 669; *Cleveland &c. R. Co. v. Ahrens*, 42 Ill. App. 434. Citing *I. & St. L. R. Co. v. Peyton*, 76 Ill. 340; *Toledo &c. R. Co. v. Wickey*, 44 id. 76; *R. Co. v. Irish*, 72 id. 404; *Alger v. R. Co.*, 10 Ia. 268; *Searles v. Milwaukee R. Co.*, 35 id. 491; *Baleom v. R. Co.*, 21 id. 102; *Kuhn v. C. R. &c. R. Co.*, 42 id. 420; *Miller v. Chicago &c. R. Co.*, 59 id. 707; *Mo. Pac. R. Co. v. Wilson*, 28 Kan. 455; (where cattle were lawfully on highway) *R. Co. v. Lebus*, 14 Bush. 518; *R. Co. v. Gorman*, 26 Mo. 44; *Iba v. Hannibal &c. R. Co.*, 45 id. 469; *Turner v. Kansas &c. R. Co.*, 78 id. 578; *Raiford v. Mississippi R. Co.*, 43 Miss. 233; *R. Co. v. Patton*, 31 id. 188; *Bether v. Raleigh &c. R. Co.*, 106 N. C. 279; *Kerwhacker v. R. Co.*, 3 Oh. St. 172; *R. Co. v. Smith*, 22 id. 227; *Moses v. Southern R. Co.*, 18 Ore. 385; *Keeney v. Oregon &c. R. Co.*, 19 id. 291; *Front v. R. Co.*, 23 Gratt. 623; *Murray v. S. Car. &c. R. Co.*, 10 Rich. 227; *Sauls v. Alderman &c. Co.*, 55 S. C. 395; *Blaine v. R. Co.*, 9 W. Va. 253; *Isbell v. R. Co.*, 27 Conn. 393.

But mere right to run at large does not give right to trespass on railway. *Williams v. Michigan &c. R. Co.*, 2 Mich. 259. And owner of cattle takes the risk. *Memphis &c. R. Co. v. Smith*, 9 Heisk. 860; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Oh. St. 172; *Pritchard v. R. Co.*, 7 Wis. 232.

Where horses were unlawfully at large, yet if involuntarily as to the owner, and he used care to recapture them, the doctrine of comparative negligence enabled him to recover. *Chicago &c. R. Co. v. Harris*, 54 Ill. 528.

It is only when the animal is at large by owner's sufferance that the company is relieved from liability for injury thereto. *Pearson v. Milwaukee &c. R. Co.*, 45 Iowa, 497, following *Buckley v. R. Co.*, 27 Conn. 479; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

So held where horses escaped through a hedge fence and got on the track, but the owner did not know; he was not *per se* negligent. *Moriarty v. Central R. Co.*, 64 Iowa, 696.

Mules went out of the stable door, left open so that they could get to water, and went on railroad track; as the owner did not intend them to be at large he was not negligent so as to defeat an action for their injury. *Doran v. R. Co.*, 73 Iowa, 115.

In a stock law district, the railroad's right as to trespassing cattle, is the same as adjoining owners. *Canlon &c. R. Co. v. French*, 75 Miss. 939.

Under Ohio Act of 1865, although cattle be unlawfully at large, yet if it be without the fault of the owner and they enter on the railroad through the hind of another, the owner is not negligent. *Marietta R. Co. v. Stephenson*, 24 Oh. St. 48.

But see *Evans v. Sherman &c. R. Co.*, 14 Tex. Civ. App. 437; *Houston &c. R. Co. v. Hollingsworth*, 68 id. 724; *Texas &c. R. Co. v. Seay*, 69 id. 177.

## IX. Company Liable for Wanton or Wilful Acts or Gross Negligence.

But whether the cattle be trespassers, or lawfully at large, or not trespassers, the company is liable, if injury be done to them through the wanton or wilful act of the company, or its agents or servants, while in the discharge of a service committed to them to do, or if it be done through negligence, so gross, as to be equivalent to wantonness or willfulness.

*Richmond v. Sacramento R. Co.*, 18 Cal. 351; *Headon v. Rust*, 39 Ill. 192; *Pierce v. Wright*, 73 Ill. App. 512; *Pierce v. Rabberman*, 77 id. 619; *Van Stone v. Burlington R. Co.*, 63 Iowa, 67; *Raiford v. Mississippi &c. R. Co.*, 43 Miss. 233; *Smith v. St. Paul City R. Co.*, 79 Minn. 254; *Jewett v. Kansas City &c. R. Co.*, 50 Mo. App. 547; *Hill v. Missouri &c. R. Co.*, 66 Mo. App. 181; *Clem v. Wabash &c. R. Co.*, 72 id. 133; *Moses v. Southern Pac. R. Co.*, 18 Or. 385; *East Tenn. &c. R. Co. v. Sealer* 7, Lea, (Tenn.) 557; *Houston &c. R. Co. v. Nichols*, (Tex. Civ. App.) 39 S. W. Rep. 954; *Texas &c. R. Co. v. Smith*, 41 id. 83; *Missouri &c. R. Co. v. Russell*, 43 id. 576; *Missouri &c. R. Co. v. Meithrein*, 33 id. 1093; *Pritchard v. LaCrosse &c. R. Co.*, 7 Wis. 232; *Stucke v. M. &c. R. Co.*, 9 id. 202; *Chicago &c. R. Co. v. Goss*, 17 id. 428; *Bennett v. C. & N. R. Co.*, 19 id. 145; *Fisher v. Farmers' &c. R. Co.*, 21 id. 73.

## X. Company Should Use Reasonable Care to Prevent Injury to Cattle Known to Be on the Railway.

It is also a usual rule that the company, *when cattle are known to be on the track*, or may reasonably be expected to be found there, should use reasonable and ordinary care to avoid injury to them, whether they be trespassers or otherwise.

Denver &c. R. Co. v. Nye, 9 Colo. App. 94; Georgia R. Co. v. Neely, 56 Ga. 540; Louisville &c. R. Co. v. Hall, 110 id. 49; Chicago &c. R. Co. v. Taylor, 8 Ill. App. 108; Chicago &c. R. Co. v. Hill, 24 id. 619; Lake Erie &c. R. Co. v. Norris, 60 id. 112; Chicago &c. R. Co. v. Smedley, 65 id. 644; Chicago &c. R. Co. v. Patterson, 72 id. 428; Searles v. Milwaukee &c. R. Co., 35 Iowa, 490; Baltimore &c. R. Co. v. Mulligan, 45 Md. 486; Johnson v. Minneapolis &c. R. Co., 43 Minn. 207; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Robins v. St. Louis &c. R. Co., 21 Mo. App. 141; Gorman v. Pacific &c. R. Co., 26 Mo. 441; Turner v. St. Louis &c. R. Co., 76 Mo. App. 261; Walsh v. Virginia &c. R. Co., 8 Nev. 110; Cincinnati &c. R. Co. v. Smith, 22 Oh. St. 227; Lake Erie &c. R. Co. v. Weisel, 55 Oh. St. 155; Louisville &c. R. Co. v. Wainscott, 3 Bush. 149; Kentucky &c. R. Co. v. Lebus, 14 id. 518; Furness v. Union R. Co., 4 Pa. Dist. 784; Front v. Virginia &c. R. Co., 23 Gratt. (Va.) 619; Bemis v. Conn. &c. R. Co., 42 Vt. 375; Washington v. Baltimore &c. R. Co., 17 W. Va. 190.

## XI. Company Should Use Reasonable Care to Discover Cattle and Prevent Injury to Them.

In many states, including some where the common law rule prevails, it is held that a company should use ordinary and reasonable care to prevent injury to cattle. As has been seen, this is a general rule *after the cattle have been discovered or their presence should for any reason be expected*; but there is diversity of judicial opinion as to the care, that the company should use, *to discover* cattle that might have come on the track, and avoiding injury to them, and what degree of negligence must be proven to establish liability.

The following decisions will somewhat illustrate the tendency of the holdings:

ALABAMA.—Company is liable irrespective of its negligence. *Nashville &c. R. Co. v. Peacock*, 25 Ala. 229.

Company should use the care that a very careful person would take of his own affairs. *Ala. &c. R. Co. v. McAlpine*, 75 Ala. 113; *Mobile R. Co. v. Williams*, 53 id. 595.

ARKANSAS.—See *Little Rock &c. R. Co. v. Finlay*, 37 Ark. 562; *Memphis &c. R. Co. v. Kerr*, 52 id. 162.

CALIFORNIA.—If cattle could have been seen at some distance, by conductor, to be on the track, and if he could have managed to get them off unhurt, by employing the usual means, it would be negligent to go on; if suddenly, without notice,

they should run on the track and by ordinary and usual care the collision could not be avoided, the company would not be liable. Company was not obliged to fence. *Rich v. Sacramento R. Co.*, 18 Cal. 351.

COLORADO.—Company is liable absolutely for killing a domestic animal. *Atchison, T. &c. R. Co. v. Betts*, 10 Col. 431.

CONNECTICUT.—Fact that cattle were trespassing does not preclude recovery without actual negligence on the part of the owner proximately contributing to the injury; but if by proper care the company could have avoided the injury, it should have been done. *Isbell v. N. Y. &c. R. Co.*, 27 Conn. 393.

GEORGIA.—See *Georgia &c. R. Co. v. Neely*, 56 Ga. 540.

In Georgia, ordinary domestic animals and railroad trains are equally free, as respects each other, to pass on uninclosed lands. If they come in collision, with damage to either, the diligence of their respective owners will become material on the question of compensation. Corporations are not bound to fence their lines, nor farmers to confine their ordinary domestic animals. Code, sec. 3033, presumes the corporation was altogether in fault. To rebut this it must appear (Code, sec. 3033-4) that plaintiff consented to the injury, or that he caused it by his own negligence, or that the agents of the company exercised all ordinary care and reasonable diligence; when plaintiff's negligence contributed to the injury the damages may be apportioned according to the relative fault of the parties. (Code, sec. 3034). As to personal injuries, "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." (Code, sec. 2972.) *Savannah &c. R. Co. v. Gray*, 77 Ga. 282.

See, also, *Southern R. Co. v. Camp*. (Ga.) 42 S. E. Rep. 56; *Southern R. Co. v. Moore*, id. 82.

ILLINOIS.—When cattle are unlawfully at large in a village, the company should have its trains under control, and more care is required at a place where cattle are known to be lawfully at large. *Gulf &c. R. Co. v. Engle*, 84 Ill. 397.

Statute presumptively fixes liability when train is run in a city or town beyond rate of speed permitted by ordinance. *C. C. &c. R. Co. v. Ahrens*, 42 Ill. App. 437.

Company should use ordinary care *after* seeing animal, but was not obliged to send man ahead to drive it off. *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108; *P. &c. R. Co. v. Camp*, 75 id. 577.

If by reasonable care and skill the injury could have been prevented, it should have been. Company was not bound to fence. *Rockford &c. R. Co. v. Lewis*, 58 Ill. 49.

Whenever danger of a collision with an animal is imminent, by whosoever fault the stock be on the track, an engineer should use whatever proper means he has to avoid it. See *Cleveland &c. R. Co. v. Rice*, 40 Ill. App. 51. When animal is at large by sufferance of owner, and gets on track where company is not required to fence, company is not in general liable, unless its servants, after they discover the animal, might by the exercise of proper care and prudence, have prevented the injury. *Toledo &c. R. Co. v. Barlow*, 71 id. 640.

INDIANA.—As to trespassing cattle, company is only liable for willful or wanton acts or for gross negligence equivalent thereto. *Indianapolis &c. R. Co. v. McClure*, 26 Ind. 370.

IOWA.—Company should use the care of a man of ordinary prudence. This was

stated in a case where the negligence was in not making proper effort to save stock *after* seeing it on track. *Searles v. Milwaukee &c. R. Co.*, 35 Iowa, 490.

Citing *Alger v. R. Co.*, 10 Iowa, 268; *Bancum v. R. Co.*, 21 id. 102.

If cattle be killed where there is a right to fence and none has been erected, liability is absolute; if there be a fence gross negligence must be shown; if the killing is where there is no right to fence, the company is held to reasonable care, and is liable for ordinary neglect. *Davis v. Burlington &c. R. Co.*, 26 Ia. 549.

As to trespassing cattle, the company is only liable for willful or wanton acts, or for gross negligence equivalent thereto. Horses were at large contrary to law. *Van Horn v. Burlington &c. R. Co.*, 63 Iowa, 67.

Held, that in case of animals required to be kept inclosed, company was only liable for the negligence or willful injury. *Alger v. R. Co.*, 10 Iowa, 268.

KANSAS.—If trainmen could, by ordinary care, have seen, or seeing, have avoided striking an animal on the track, they were required to do so. Animal was lawfully at large. *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 455.

KENTUCKY.—*Kentucky R. Co. v. Lebus*, 14 Bush. 518; *Louisville &c. R. Co. v. Waincott*, 3 id. 149.

As to trespassing cattle, company only liable for willful or wanton acts, or gross negligence equivalent thereto. *Louisville &c. R. Co. v. Ballard*, 2 Mete. 177.

Where the train could have been stopped within 75 yards, verdict for plaintiff was held proper, where it appeared that a horse ran for 460 feet before the train without the engineer's seeing it, though his view was unobstructed. *Louisville &c. R. Co. v. Jones*, (Ky.) 52 S. W. Rep. 938.

Presumption of negligence was overcome, by uncontradicted evidence that the horses could not have been discovered in time to have prevented injury by the exercise of ordinary care. *Felton v. Anderson*, (Ky.) 66 S. W. Rep. 182; *Illinois C. R. Co. v. Gholson*, id. 1022.

See, also, *Louisville &c. R. Co. v. Rice*, (Ky.) 60 S. W. Rep. 705.

LOUISIANA.—As to trespassing cattle, company only liable for willful or wanton acts, or gross negligence equivalent thereto. *Knight v. New Orleans &c. R. Co.*, 15 La. Ann. 105.

MARYLAND.—By statute 1838, chap. 244, and 1846, chap. 346, company is liable unless accident was due to unavoidable accident. *Keech v. Baltimore &c. R. Co.*, 17 Md. 32; *Baltimore &c. R. Co. v. Mulligan*, 45 id. 486.

Duty of company to use reasonable care to avoid an injury to stock found on its road. This places burden of exculpating itself on the company. *Baltimore &c. R. Co. v. Woodruff*, 4 Md. 242.

But the rule only applies when stock is on the track without any fault of the owner. *Baltimore &c. R. Co. v. Lamborn*, 12 Md. 257.

Company was bound to use reasonable care to avoid injury to stock found on its road, although there by owner's negligence. *Baltimore &c. R. Co. v. Mulligan*, 45 Md. 486.

MASSACHUSETTS.—As to trespassing cattle, company is only liable for willful or wanton acts, or gross negligence equivalent thereto. *Maynard v. R. Co.*, 115 Mass. 415.

But if found on track, company should exercise reasonable and proper care to avoid injury. *Darling v. R. Co.*, 121 Mass. 118; *Eames v. Salem &c. R. Co.*, 98 id. 560.

MICHIGAN.—Railroad company was not bound to fence, so not liable for injury

to cattle unless the cars were run without proper care, or in an unreasonable manner. *Williams v. Michigan &c. R. Co.*, 2 Mich. 260.

MINNESOTA.—Company should use ordinary care after discovering cow in vicinity of track. In present case company was not liable as cow was unlawfully on highway. *Johnson v. Minneapolis &c. R. Co.*, 43 Minn. 207.

Owner of cattle takes the risk of their going on the railroad, and the company is not bound to presume that they will be there, but should use reasonable care to avoid injury to them. *Wetherill v. Milwaukee &c. R. Co.*, 24 Minn. 410.

Company should use ordinary care to prevent injury to cattle on track. *Baltimore &c. R. Co. v. Mulligan*, 45 Minn. 486.

Reasonable care means making the same effort to avoid injury as a prudent man, owning both cattle and train, would make with proper regard to both, approving *Locke v. First Div. R. Co.*, 15 Minn. 350, but adding that, the duty to passengers is paramount to safety of stock on track. *Wetherill v. Milwaukee &c. R. Co.*, 24 Minn. 410.

Engineer is not bound to keep a lookout to discover trespassing animals, but is bound to use reasonable care to prevent injury, if he *has discovered them*. *Moore v. Northern &c. R. Co.*, 69 Minn. 90.

MISSISSIPPI.—Company should use ordinary care to prevent injury. *Cantrell v. Kansas City R. Co.*, 69 Miss. 435; *New Orleans R. Co. v. Field*, 46 Miss. 573.

Notwithstanding a mule's being at large against the stock law of the district, defendant is bound to exercise reasonable care to prevent injury, after discovering its peril. *Roberts v. Mobile &c. R. Co.*, 74 Miss. 334.

MISSOURI.—Company should use ordinary care to prevent injury. *Robinson v. St. Louis &c. R. Co.*, 21 Mo. App. 141; *Judd v. Wabash &c. R. Co.*, 23 Mo. App. 56; *German v. Pacific &c. R. Co.*, 26 Mo. 441; *Collins v. Atlantic &c. R. Co.*, 65 Mo. 231; *Jewett v. Kansas City R. Co.*, 38 Mo. App. 48; *Turner v. St. Louis &c. R. Co.*, 76 Mo. 261; *Kendig v. Chicago &c. R. Co.*, 79 Mo. 207.

An engineer's duty to exercise all reasonable means to avert an injury to a trespassing cow, begins only upon discovering its danger. *Castor v. Kansas City &c. R. Co.*, 65 Mo. App. 359; *Buckman v. Missouri &c. R. Co.*, 83 Mo. App. 129.

NEW HAMPSHIRE.—Destruction of cattle without owner's fault is *prima facie* evidence of negligence. *Smith v. Eastern R.*, 35 N. H. 356.

NEW JERSEY.—As to trespassing cattle, company is only liable for willful or wanton acts, or gross negligence equivalent thereto. *Vandergrift v. Rediker*, 22 N. J. L. 185.

NEW YORK.—In absence of failure to properly maintain a fence, the company is only liable for reckless, wanton, or malicious conduct. *Boyle v. N. Y. &c. R. Co.*, 115 N. Y. 636, aff'g 39 Hun, 171.

OHIO.—Although cattle were trespassers and road was fenced, the company was bound to use ordinary precautions to discover danger to animals and avoid it. Fact that road was fenced should be considered, but did not relieve engineer from looking ahead. *Cincinnati &c. R. Co. v. Smith*, 22 Oh. St. 227.

Subject to a paramount duty to passengers, conductor should use reasonable care to avoid unnecessary injury to animals. *Cleveland &c. R. Co. v. Elliott*, 40 Oh. St. 174; see *Cincinnati &c. R. Co. v. Waterson*, 4 Oh. St. 424.

Ohio statute creates liability where injury results "by reason of the want or insufficiency of fences, etc., or by any carelessness or negligence of such company, party, agent or agents thereof," but the owner of cattle is liable for all damages



done by them when unlawfully at large, unless done to a railroad company. *Marietta R. Co. v. Stephenson*, 24 Oh. St. 48.

RHODE ISLAND.—As to trespassing cattle, company is only liable for willful or wanton acts, or gross negligence equivalent thereto. Not obliged to use ordinary care and skill in the common and ordinary use of its land for railroad purposes. *Tower v. R. Co.*, 2 R. I. 404.

SOUTH CAROLINA.—Company should use ordinary care to prevent injury. *Walker v. Columbus &c. R. Co.*, 25 S. C. 141.

SOUTH DAKOTA.—Defendant was not liable, where its train's speed and equipment were proper, and it was unable, by the use of reasonable care, after discovering the animal, to prevent the injury. *Kreibach v. Chicago &c. R. Co.*, 11 S. D. 468.

TENNESSEE.—Defendant was not liable, where after seeing the dogs, it blew its whistle and did everything possible to avoid their injury. *Fink v. Evans*, 95 Tenn. 413.

Motorman, failing to use reasonable care after discovering a dog on the track, cannot rely on a dog's natural quickness to get out of the way. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317; s. c., 40 L. R. A. 518.

TEXAS.—*International &c. R. Co. v. Dunham*, 58 Tex. 23.

Where the engineer, from the time he first saw the mules on the track, did all he could to avert injury, he was not chargeable with negligence. *Houston &c. R. Co. v. Hollingsworth*, (Tex. Civ. App.) 68 S. W. Rep. 724.

Where a private crossing was situated on a curve, concealed from view of an approaching train until within 40 feet, defendant was not liable for failure to signal on approaching, where everything possible was done to avert injury after discovering an animal thereon. *San Antonio &c. R. Co. v. Lycock*, (Tex. Civ. App.) 68 S. W. Rep. 1001.

VERMONT.—When engineer runs train with ordinary care and vigilance and watches the track in advance as much as he can consistently with his other duties, he discharges his obligation of care towards trespassing cattle. *Bemis v. Connecticut R. Co.*, 42 Vt. 375.

Company is liable for recklessness and want of ordinary care at the time and after discovering cattle on the track, and for wanton injury thereto. *Jackson v. Rutland R. Co.*, 25 Vt. 150.

VIRGINIA.—*Front v. Virginia &c. R. Co.*, 23 Gratt. 619.

WEST VIRGINIA.—Company should use ordinary care to prevent injury. *Blaine v. Chesapeake &c. R. Co.*, 9 W. Va. 252; *Washington v. Baltimore &c. R. Co.*, 17 id. 190.

Verdict for plaintiff sustained where mule, which could have been seen 250 yards away on a moonlight night, walked 40 feet on the track before being struck, and nothing was done to avert an accident. *Blankenship v. Kenarcha &c. R. Co.*, 43 W. Va. 135.

#### (a). SUITABLE CARE REQUIRES LOOKOUT.

Suitable care requires an outlook to discover cattle on the track. *Western R. Co. v. Sistrunk*, 85 Ala. 352.

*Mobile &c. R. Co. v. Kinsborough*, 96 Ala. 127; *Little Rock &c. R. Co. v. Finley*, 37 Ark. 562, (wrongfully on track); *Atlanta &c. R. Co. v. Hudson*, 62 Ga. 679; *Chicago &c. R. Co. v. Legg*, 32 Ill. App. 218; *Matthews v. St. Paul &c. R. Co.*, 18

Minn. 434; *New Orleans &c. R. Co. v. Bourgeois*, 66 Miss. 3; *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520; *Gulf &c. R. Co. v. Johnson*, 54 Fed. Rep. 474.

Failure to keep a lookout did not permit recovery, where the engineer could not have seen the animal in time to prevent injury if he had. *Choate v. Southern R. Co.*, 119 Ala. 611.

See, also, *Louisville &c. R. Co. v. Brinckerhoff*, 119 Ala. 606.

Engineer must keep such lookout for live stock on the tracks as may be consistent with his other duties. *Central &c. R. Co. v. Dumas*, (Ala.) 39 South. Rep. 867.

Where an animal could have been seen in time to prevent injury at ordinary speed, the engineer was negligent, where, owing to excessive speed, it was impossible. *Central &c. R. Co. v. Stark*, (Ala.) 28 South. Rep. 411.

It is for the jury to say, whether railroad is liable, for killing a horse at a point where the track is straight for many yards. *Southern R. Co. v. Posten*, (Ala.) 31 South. Rep. 21.

A statute, imposing the duty of keeping a constant lookout on all "persons running trains," construed not to require fireman to keep lookout while engineer is doing so. *St. Louis &c. R. Co. v. Russell*, 62 Ark. 182; *Arkansas &c. R. Co. v. Saunders*, 69 id. 619.

Defendant meets the *prima facie* case of negligent killing, by showing that the horse came so suddenly on the track that it could not avoid injury. *St. Louis &c. R. Co. v. Cline*, 69 Ark. 659.

Injury to a hog, lying under cars on a side track, which were set in motion by backing an engine against them, raised no presumption of negligence. *Fink v. Nelson*, (Ark.) 48 S. W. Rep. 897.

Failure of a fireman to keep a lookout while otherwise necessarily engaged, or of the company to have some one exclusively engaged in that duty, held not a ground of liability. *Rogers v. Georgia R. Co.*, 100 Ga. 699.

Where plaintiff's right of recovery rested entirely on a presumption of negligence from the killing of cattle, and was met by uncontradicted evidence on behalf of defendant, judgment for former was reversed. *Southern R. Co. v. Adkins*, 114 Ga. 135.

Presumption of negligent killing of stock is overcome, by uncontradicted evidence, that injury could not be avoided by all ordinarily reasonable care and diligence. *Western &c. R. Co. v. Robinson*, 114 Ga. 159.

No duty to keep lookout for trespassing cattle. *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616.

Railroads are bound to use ordinary care in keeping a lookout for stock on the track. *Missouri &c. R. Co. v. Farrington*, (Ind. Terr.) 43 S. W. Rep. 946.

Where the right of way is fenced in, the engineer has the right to assume that the track is clear and owes no duty but to use care *after discovery*. *Mears v. Chicago &c. R. Co.*, 103 Iowa, 203.

The same duties exist between a railroad and a farmer at a farm crossing, as between it and the public at a highway crossing; including the duty of the former to keep a lookout for cattle on the track. *Atchison &c. R. Co. v. Coulton*, 9 Kan. App. 116.

Where everything possible was done to avoid injury after the discovery of animals, company was held not liable. *Mobile &c. R. Co. v. Whayue*, (Ky.) 64 S. W. Rep. 723.

Railway company is liable for failure to use reasonable care to prevent injury. *Beatyville &c. R. Co. v. Malouey*, (Ky.) 49 S. W. Rep. 545.

Engineer should keep a lookout for stock so far as is consistent with his other duties. *Howard v. Louisville &c. R. Co.*, 67 Miss. 247.

*Bemis v. Conn. R. Co.*, 42 Vt. 375; *Carlton v. Wilmington &c. R. Co.*, 104 N. Car. 365; *Spicer v. Chesapeake &c. R. Co.*, 34 W. Va. 514.

Where the fireman and engineer were not able to keep a lookout at the time because of other duties which absorbed their attention, defendant was not chargeable. *Mobile &c. R. Co. v. Holliday*, 79 Miss. 294.

Failure of engineer to see animals on track in time to avoid injury, due to the glare of light from the fire box, which fireman was coaling, held not negligence. But where a cow was feeding with head towards and 10 feet away from the track, with a cut ahead and escape to the sides cut off by a fence and an embankment, the circumstances required caution. *Cantrell v. Kansas City &c. R. Co.*, (Miss.) 24 South. Rep. 871.

A special watchman must be kept on the engine (by statute). *Louisville &c. R. Co. v. Stone*, 7 Heisk. 468.

An instruction, that defendant was liable if it did not use ordinary care to discover an animal in time to stop, was improper as ordinary care did not necessarily involve stopping. *Houston &c. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114.

#### (b). SPECIAL WATCHMAN NEED NOT BE KEPT.

Special watchman or patrols for the track need not be kept. *Memphis &c. R. Co. v. Kerr*, 52 Ark. 162.

*Witherill v. Milwaukee &c. R. Co.*, 24 Minn. 410.

#### (c). TRAIN AGENT NEED NOT KEEP A LOOKOUT.

Where proper fence has been built and maintained, the railway company was not obliged to keep an outlook for trespassing cattle. *Illinois Central R. Co. v. Noble*, 142 Ill. 578.

Train agents need not keep any outlook for the discovery of cattle on track. This would be subject to the qualification that there was no notice or knowledge that cattle were on the track. *Palmer v. Northern Pac. &c. R. Co.*, 31 Minn. 223.

*Stacey v. Winona &c. R. Co.*, 42 Minn. 158.

(d). BELL SHOULD BE RUNG OR WHISTLE SOUNDED WHEN CATTLE ARE SEEN.\*

Bell should be rung or whistle sounded when cattle are seen on or near the track. *Western &c. R. Co. v. Sistrunk*, 85 Ala. 352.

*Macon &c. R. Co. v. Lester*, 30 Ga. 911; *St. Louis &c. R. Co. v. Hurst*, 25 Ill. App. 181; *Chicago &c. R. Co. v. Killam*, 92 Ill. 245; *Lawson v. Chicago &c. R. Co.*, 57 Iowa, 672; *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 455; *Wallace v. St. Louis &c. R. Co.*, 74 Mo. 594; *Hippin v. Wilmington &c. R. Co.*, 75 N. C. 626; *Bemis v. Conn. &c. R. Co.*, 42 Vt. 375; *Washington v. Baltimore &c. R. Co.*, 17 W. Va. 190; *Stucke v. Milwaukee &c. R. Co.*, 9 Wis. 202.

Failure to give the statutory signals, held not ground for recovery, where no danger was apparent until accident was inevitable, and it took place beyond the crossing. *Southern R. Co. v. New*, 105 Ga. 481.

Circumstances may require signals and slackening of speed, but not when it would be useless or injure train. *Searles v. Milwaukee &c. R. Co.*, 35 Iowa, 490.

Dogs held within protection of a statute requiring whistles to animals on the track. *Fink v. Erans*, 95 Tenn. 413.

Failure to give the statutory signals, not ground for recovery, where there was no danger apparent until accident became unavoidable. *Mobile &c. Co. v. Thompson*, 101 Tenn. 197.

Defendant was not *per se* free from negligence in failing to give stock alarm, to frighten cattle off the track, 100 to 150 feet away when discovered. *Galveston &c. R. Co. v. Dyer*, (Tex. Civ. App.) 38 S. W. Rep. 218.

(e). TRAIN SHOULD BE AT ONCE STOPPED.

When cattle are seen the train should be at once stopped. *Savannah &c. R. Co. v. Jarris*, 95 Ala. 149.

If necessary train should be stopped, and burden is on company to show compliance. Under Ala. Code, see, 1144. *Kansas City &c. R. Co. v. Watson*, 91 Ala. 483.

By statute in Tennessee this is imperative and no excuse is received. *Nashville &c. R. Co. v. Thomas*, 5 Heisk. 262.

But, see, *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Newman v.*

\* N. T. E. As to crossing signals, see "Crossings," *ante*, p. 779.

Vicksburg &c. R. Co., 64 Miss. 115; *Holder v. Chicago &c. R. Co.*, 11 Lea, (Tenn.) 176.

Mere failure to stop does not show negligence where the engineer used proper efforts and judgment. *Hot Springs &c. R. Co. v. Newman*, 36 Ark. 607.

*Pittsburg &c. R. Co. v. Stuart*, 71 Ind. 504.

Failure to stop in time to avoid apparent danger was negligence, where there was plenty of opportunity to do so. *Potter Co. v. New York &c. R. Co.*, 22 Misc. 10.

Engineer was negligent in failing to have his engine in such control, on seeing a colt running on the track ahead, as to prevent injury on its getting caught in cattle guard. *Atchison &c. R. Co. v. Bartlett*, 2 Kan. App. 167.

#### (f). COMPANY NOT LIABLE FOR FAILURE TO STOP.

But company is not liable for failure to stop train, if the cattle came suddenly upon track and so near as to make stopping impossible before hitting them, without negligence in keeping outlook for them. *Kansas City &c. R. Co. v. Watson*, 91 Ala. 483.

*Little Rock &c. R. Co. v. Holland*, 40 Ark. 336; *St. Louis &c. R. Co. v. Bashan*, 47 id. 321; *Chicago &c. R. Co. v. Bradfield*, 63 Ill. 220; *Durham v. Wilmington &c. R. Co.*, 82 N. Car. 352; *East Tenn. &c. R. Co. v. Scales*, 2 Lea, (Tenn.) 688; *Louisville &c. R. Co. v. Brinkerhoff*, 119 Ala. 606; *Mobile &c. R. Co. v. Weems*, 74 Miss. 513; *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. App. 228; *Lovejoy v. Chesapeake &c. R. Co.*, 41 W. Va. 693.

#### (g). ON ACCOUNT OF DARKNESS OR FOG.

Or if, on account of the darkness, fog or storm, they were not discovered in due time to stop. *Tonawanda R. Co. v. Munger*, 49 Am. Dec. note, page 267.

Citing *St. Louis &c. R. Co. v. Vincent*, 36 Ark. 451; *Michigan &c. R. Co. v. Fisher*, 27 Ind. 96; *Durham v. Wilmington &c. R. Co.*, 82 N. Car. 352. See, also, *Vincent v. Chicago &c. R. Co.*, 29 Iowa. 592; *Central R. Co. v. Bryant*, 89 Ga. 457. And see 78 Ga. 603.

It is negligent to run a train at night at such speed, that it cannot be stopped within the distance at which cattle on the track can be discovered by means of its headlight. *Louisville &c. R. Co. v. Kelton*, 112 Ala. 533.

And the fact that a dense fog somewhat shortened that distance, did not excuse defendant, where the train could not have been stopped in time: even under ordinary circumstances. *Alabama Midland R. Co. v. McGill*, 121 Ala. 230.

Engineer was not negligent, where the train could not be stopped within 400 yards, though he could see but 100, where he was keeping a lookout: and when he saw the horse he gave the alarm and set the brakes. *Kansas City &c. R. Co. v. King*, 66 Ark. 439.

Failure to attempt to stop, where an animal when seen, was only 150 feet ahead, was not negligence, where the train was going about 50 miles per hour in the dark. *Illinois C. R. Co. v. Greaves*, 75 Miss. 360.

Failure to signal at a crossing gives no recovery for injury not due to that cause. *St. Louis &c. R. Co. v. Zachary*, (Ind. Terr.) 53 S. W. Rep. 327.

#### (h). SAFETY OF PASSENGERS IS PARAMOUNT.

Train need not be stopped, if it would endanger train, as the safety of passengers is paramount. And, indeed, the speed of train may be increased if the safety of the train demand. *Cleveland v. Chicago &c. R. Co.*, 35 Iowa, 220.

*Baltimore &c. R. Co. v. Lamborn*, 12 Md. 257; *Chicago &c. R. Co. v. Jones*, 59 Miss. 465; *Owens v. Hannibal &c. R. Co.*, 58 Mo. 386; *O'Connor v. Chicago &c. R. Co.*, 27 Minn. 166.

Safety of train is paramount to that of cattle on track. *Parker v. Dubuque &c. R. Co.*, 34 Iowa, 399; *Bellefontaine &c. R. Co. v. Schruyhart*, 10 Oh. St. 116; *Pittsburg &c. R. Co. v. Maurer*, 21 id. 421; *Bemis v. Conn. &c. R. Co.*, 42 Vt. 375.

As to trespassing cattle, engine need not be reversed, if it would result in injury to train, or to the detriment of the company. *Sandham v. R. Co.*, 38 Iowa, 88; *Proctor v. R. Co.*, 72 N. C. 579; *Texas R. Co. v. Ballard*, 2 Mete. (Ky.) 177.

Engine need not be reversed if it will endanger life, but mere injury to machinery will not excuse. *East Tennessee &c. R. Co. v. Selcer*, 7 Lea, (Tenn.) 557.

Nor need such acts be done as would interrupt time appointments. Wharton on Negligence, see. 894.

Citing 1 Redf. on R. 498; *Keech v. R. Co.*, 17 Md. 92; *Fisher v. Farmers' L. Co.*, 21 Wis. 73.

The only duty owing to trespassing cattle, is that which is consistent with the safety of the defendant and its patrons. Need not reduce speed if it would jeopardize passengers. *Denver &c. R. Co. v. Dirchbliss*, 13 Colo. App. 304.

Where an engineer is unable to stop in time to avoid injury, it is proper for him to increase his speed so as to prevent the derailment of the train, though it decreases the cattle's chances of escape. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

No liability for failure to attempt to stop train, where accident could not thereby have been averted. *Kirk v. Norfolk &c. R. Co.*, 41 W. Va. 722; s. c., 32 L. R. A. 416.

#### (i). SPEED OF TRAIN.

A failure to diminish the speed of train, or even stop train, when necessary to prevent injury to cattle, may constitute negligence. *Searles v. Milwaukee &c. R. Co.*, 35 Iowa, 490.

Aycock v. Wilmington &c. R. Co., 6 Jones L. 231; Zeigler v. North Eastern R. Co., 7 S. C. 402; Bemis v. Connecticut R. Co., 42 Vt. 375.

It is sometimes held that train should not be run at such rate of speed as to prevent stopping to save cattle on track. *Memphis &c. R. Co. v. Lyon*, 62 Ala. 71; *Central &c. R. Co. v. Ingram*, 98 id. 395; *Rockford &c. R. Co. v. Rafferty*, 73 Ill. 58; *Bullington v. Newport News &c. R. Co.*, 32 Va. 346.

The requirements of the statute are not full measure of care required of a company running at full speed on a part of the road frequented by cattle. The train struck a cow causing derailment and injury to plaintiff, a passenger.

It is gross negligence for the defendant to run over any part of their road known to be frequented by cattle, at full speed, unless that part of the track is properly guarded from that invasion. Plaintiff was a passenger and was injured by the train colliding with a cow. *Brown v. Central R. Co.*, 34 N. Y. 404.

**From opinion.**—"The statute has imperatively required certain things to be done; but such requirements are by no means the measure of the defendant's care or conduct in the transportation of passengers. These requirements the road must comply with; but it cannot, therefore, neglect other necessary and proper precautions. The defendant here was bound to exercise all the care and skill which human prudence and foresight could suggest. This language is broad and comprehensive, but it is the language of the law. (*Bowen v. The New York Central Railroad Company*, 18 N. Y. 408.) This care extends to all measures necessary and proper to secure the safety of the train and passengers, as well as to the management of the train itself."

If the train be running at a speed forbidden by statute or ordinance, the company is doing an unlawful act, and if it in any part caused the injury the company may be liable, as in any other case where injury results from an unlawful act. *Fritz v. First Div. &c. R. Co.*, 22 Minn. 404; *T. P. & W. R. Co. v. Dealon*, 63 Ill. 91; *C. B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Houston &c. R. Co. v. Terry*, 42 Tex. 451.

*Cleve. R. Co. v. Ahrens*, 44 Ill. App. 434; *Miller v. R. Co.*, 59 Iowa, 707; *Story v. Chicago R. Co.*, 79 id. 402; distinguishing *Monahan v. R. Co.*, 45 id. 523.

The fact that a cow was running at large and strayed on the track at the crossing does not excuse the defendant if the guards were so far beyond the limits of the highway as to allow the cows to get on the track. The rate of speed in such case is not relevant and evidence thereof should be excluded. *White v. U. & B. R. Co.*, 15 Hun. 333.

A company is not obliged to moderate the speed of its trains to protect cattle that may come upon its tracks, without fault on its part. *Toledo &c. R. Co. v. Barlow*, 71 Ill. 610.

A panel of a fence was taken down by some one, not in the employ of the defendant, a few hours before the accident happened, and in the night the plaintiff's horse got on the track. The jury found the defendant not negligent in the matter of repairing the fence. The engineer saw the horse on the track off and on for half a mile and did not reduce the speed. Held, that there was no duty to do so, if he did not act wantonly. *Boyle v. N. Y., L. E. & W. R. Co.*, 39 Hun. 171; *aff'd*, 115 N. Y. 636.

Lafayette &c. R. Co. v. Shriner, 6 Ind. 141; Plaster v. Illinois Central R. Co., 35 Iowa, 449; Raiford v. Mississippi &c. R. Co., 43 Miss. 233; New Orleans &c. R. Co. v. Field, 46 id. 573; Stern v. Michigan &c. R. Co., 76 Mich. 591; Wallace v. St. Louis &c. R. Co., 74 Mo. 594; Price v. N. J. R. Co., 31 N. J. L. 229; Leawell v. Raleigh &c. R. Co., 106 N. C. 272; Central Ohio R. Co. v. Lawrence, 13 Oh. St. 66; Pittsburg &c. R. Co. v. McMillan, 37 id. 554; N. Y. &c. R. Co. v. Skinner, 19 Pa. St. 298.

Company is not obliged to expect cattle on track not to anticipate their presence. *Illinois Central R. Co. v. Noble*, 142 Ill. 578.

As to speed of train at crossing, see "Crossing," *ante*, p. 773; see, also, "Evidence," "Ordinance "

The unlawful operation of the train will not make defendant liable, where it was not the proximate cause of the accident. *Central &c. R. Co. v. Neidlinger*, 110 Ga. 329.

Though the defendant could not have stopped upon seeing the animals, an instruction was proper, that it was liable, if there was a prior act of negligence leading up to the accident which was the proximate cause of it, where the defendant, knowing them to be on the track, started his engine at such a speed that he could not stop where they were likely to be. *Louisville &c. R. Co. v. Hall*, 110 Ga. 49.

Defendant was not, *per se*, relieved of its violation of law as to speed of its trains by reason of plaintiff's violation of law, in letting his cows run at large. *Atchison &c. R. Co. v. Cupello*, 61 Ill. App. 432.

In common law action negligence must be shown.

Where a heavy freight train could not have been stopped in time to avoid injury to a cow on the track 40 or 50 feet ahead if it had been going at ordinary speed, the fact that it was going at excessive speed was immaterial. *Wasson v. McCook*, 80 Mo. App. 483.

Violation of ordinance regulating speed is an act of negligence, *per se*. *Chicago &c. R. Co. v. Erwin*, (Tex. Civ. App.) 65 S. W. Rep. 496.

#### (j). COMPANY SHOULD KEEP TRACK FREE FROM OBSTRUCTIONS.

Company should keep track free from obstructions so that stock, if on track, may not be concealed thereby. *Ohio &c. R. Co. v. Clutter*, 82 Ill. 123.

Ward v. Wilmington &c. R. Co., 113 N. Car. 566; Eames v. Texas &c. R. Co., 63 Texas, 660.

*Contra*, Kansas City &c. R. Co. v. Kirksey, 48 Ark. 366.

#### (k). BEST APPLIANCES NOT REQUIRED.

Appliances: not required to furnish the best. *Natchez &c. R. Co. v. McNeil*, 61 Miss. 131.

Nor air brakes. *Cutrell v. Kansas &c. R. Co.*, 69 Miss. 435.



But proper brakes. *Partley v. Georgia &c. R. Co.*, 60 Ga. 182.

See *Seawell v. Raleigh &c. R. Co.*, 106 N. Car. 272.

A railroad does not owe the duty of exercising "every effort" to avoid injury. *Savannah &c. R. Co. v. Wideman*, 99 Ga. 245.

#### (1). BRAKES MUST BE APPLIED.

Brakes must be applied. *Nashville &c. R. Co. v. Thomas*, 5 Heisk. (Ky.) 262.

#### (II). SUFFICIENT EQUIPMENT OF MEN NECESSARY.

Sufficient equipment of men to handle trains is necessary. *Parker v. Dubuque &c. R. Co.*, 43 Iowa, 399.

*Joyner v. South Car. &c. R. Co.*, 26 S. Car. 47.

But only ordinary prudence therefor is required. *Cantrell v. Kansas &c. R. Co.*, 69 Miss. 435.

#### (III). INSUFFICIENCY OF LOCOMOTIVE DOES NOT ESTABLISH NEGLIGENCE.

Insufficiency of locomotive to control train does not establish negligence. *Central &c. R. Co. v. Rockafellow*, 17 Ill. 541.

#### (IV). SUBSTANCES ON RIGHT OF WAY ATTRACTIVE TO CATTLE DOES.

Substances on right of way attracting cattle have been held sufficient to establish negligence, if injury resulted to cattle therefrom.

*Salt*.—*Crafton v. Hamibal &c. R. Co.*, 55 Mo. 580; *Kirk v. Norfolk &c. R. Co.*, 41 W. Va. 722; s. c. 32 L. R. A., 416.

*Cotton Seed*.—*Little Rock &c. R. Co. v. Dick*, 52 Ark. 402.

*Molasses*.—Attracting hogs killed by train *negligently started*. *Page v. North Carolina &c. R. Co.*, 71 N. Car. 222.

## XII. Cattle Near Track.

Company is liable for negligent failure to avoid injury to cattle in such proximity to track as to be likely to incur injury therefrom, and care should be taken to discover them and drive them away. *South & North Ala. &c. R. Co. v. Jones*, 56 Ala. 507.

*Missouri Pac. &c. R. Co. v. Gedney*, 44 Kan. 329; *Snowden v. Norfolk &c. R. Co.*, 95 N. Car. 93.

An animal grazing 25 yards from the track, does not raise the duty to whistle to frighten it away. *Chattanooga &c. R. Co. v. Daniel*, 122 Ala. 362.

But where a cow feeding with head towards and 10 feet from the track, with a cut ahead and escape to the sides cut off by a fence and an em-

bankment, the circumstances require caution. *Chattanooga Southern R. Co. v. Wilson*, 124 Ala. 444.

Defendant was negligent in not seeing horse by the track in daylight, where track was straight for two miles in either direction. *Kansas City &c. R. Co. v. Henson*, (Ala.) 31 South. Rep. 590.

A statute imposing the duty to keep a constant lookout "for persons and property on the track," applies to animals so close to it as to be within the range of vision while looking along it. *St. Louis &c. R. Co. v. Russell*, 64 Ark. 236.

Engineer need not stop on seeing cattle in a pasture. *Peoria R. Co. v. Champ*, 15 Ill. 577.

Although horses may be approaching the track, no duty of care arises until danger is apparent. Engineer not required to anticipate that they will break into a run and cross his track. *Wabash R. Co. v. Arrig*, 66 Ill. App. 146.

Train need not be stopped for cattle seen running along the track, and which turn suddenly thereon too near train to prevent timely stopping. *East Tennessee &c. R. Co. v. Baylis*, 11 Ind. 429.

A statute requiring the ringing of signals at a crossing held applicable to an animal upon the highway approaching it. *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

There was no apparent danger, where a horse 80 yards ahead, stood on the highway 18 feet from the track, with its head pointing from the train, and no necessity for blowing warning whistle. *Louisville &c. R. Co. v. Bowen*, (Ky.) 39 S. W. Rep. 31.

Otherwise where they were seen running diagonally toward the train. *Kean v. Chenault*, (Ky.) 41 S. W. Rep. 24.

The negligence of a motorman was such as to permit recovery, where, after seeing a dog on the track in time to stop, he continues at excessive speed; not stopping even after killing it. *Smith v. St. Paul City R. Co.*, 19 Minn. 254.

An engineer was not negligent in assuming that a horse drinking at a pond 10 or 12 feet below and 12 feet away from the track, would not run up the embankment and upon it. *Yazoo &c. R. Co. v. Whittington*, 14 Miss. 410.

See, also, *Railroad Co. v. Brumfield*, 64 Miss. 637; *Railroad Co. v. Thornton*, 65 id. 256.

Or where stock are grazing 30 or 45 feet from the track. *Yazoo &c. R. Co. v. Wright*, 78 Miss. 125.

Failure to stop a train, unless the circumstances suggest danger, is not negligence. *Yazoo &c. R. Co. v. Brumfield*, 64 Miss. 637; *Sloop v. St. Louis &c. R. Co.*, 22 Mo. App. 593.

The presence of a cow feeding alongside the track, does not raise the duty of taking precautions, where there is no apparent danger. *Wassou v. McCook*, 80 Mo. App. 483.

While an engineer is not bound to presume that cattle quietly feeding near the track will suddenly go upon it, if he sees them actually do so, he is bound to use every means available to secure their safety, consistent with that of the train. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

That horses near the track are uneasy is not such an apparent danger as to make a motorman negligent in failing to slow up or stop, where, up to the last moment, the driver had control of them. *Flaherty v. Harrison*, 98 Wis. 559.

### XIII. Injury from Fright, Excavations, or Structure and not from Actual Collision with Cars.

Company was liable for failure to fence a deep rock cut into which cattle fell from adjoining lot.

*Graham v. D. & H. C. Co.*, 46 Hun, 386; distinguishing *Knight v. N. Y. &c. R. Co.*, 99 N. Y. 25; *Lowercy v. St. Louis &c. R. Co.*, 40 Mo. App. 514; *Meeker v. Northern Pacific R. Co.*, 21 Or. 513 (neglect to fence); *Knight v. N. Y., L. E. & W. R. Co.*, 30 Hun, 415.

Where an engineer had reason to believe a mule would leave the track before reaching a distant culvert, he was not liable for moving along behind it. *St. Louis &c. R. Co. v. Bragg*, 66 Ark. 248.

Railroad company was not liable, where it had discontinued the use of its bridge and properly guarded it to prevent passage, but plaintiff's horse, in fright, broke past the guard and was injured on the bridge by work incident to its repair. *St. Louis &c. R. Co. v. Scott*, 68 Ark. 415.

A railroad company is not liable for injury resulting to an animal from fright, unless actually struck by train. *Louisville &c. R. Co. v. Thomas*, 106 Ind. 10.

*Lafferty v. Hannibal &c. R. Co.*, 44 Mo. 291; *Burlington &c. R. Co. v. Shoemaker*, 18 Neb. 369.

The liability of the railroad company does not depend upon the cattle having been struck by the train.

*Young v. St. Louis &c. R. Co.*, 44 Iowa, 172 (there was negligence in fencing). *Schertz v. Indianapolis &c. R. Co.*, 107 Ill. 577 (neglect to fence).

Defendant was not chargeable with negligence in running a horse upon a bridge, where train was stopped one-half mile from the bridge and a man sent ahead to assist in turning it off, and thereafter, carefully continued to within one-quarter of a mile of the bridge and stopped. *Baruhart v. Chicago &c. R. Co.*, 97 Iowa, 651.

So, if it had been shown that animals were driven by fright into cattle guards. *Moon v. Burlington &c. R. Co.*, 72 Iowa, 75.

Company was liable, when, by fright, horse jumped from trestle, when it could have been prevented by due care. *Newman v. Vicksburgh &c. R. Co.*, 64 Miss. 115.

Engineer was not negligent in failing to stop in starting up a grade, where the dog saw him coming and he tried to scare it off by blowing steam. *Richardson v. Florida &c. R. Co.*, 55 S. C. 334.

Liability for failure to fence arises only from contact with engines or cars, and not from frightening stock so as to cause them to run into a bridge or culvert.

See as holding same doctrine, *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108; *Lafferty v. H. & C. R. Co.*, 44 Mo. 291; *Ohio &c. R. Co. v. Cole*, 41 Ind. 331; *B. P. &c. Co. v. Thomas*, 60 Ind. 108; 1 Redfield on R., sec. 493; Wharton on Neg., p. 757, sec. 828; Billiard on Torts 385; *Knight v. N. Y. &c. R. Co.*, 99 N. Y. 25, rev'g 30 Hun, 415; *Hyatt v. N. Y. &c. R. Co.*, 64 Hun. 542; *Lowrey v. St. Louis &c. R. Co.*, 40 Mo. App. 514; *Turner v. Thomas*, 71 Mo. 596; *New Orleans &c. R. Co. v. Thornton*, 65 Miss. 256; *Nashville &c. R. Co. v. Saddler*, 91 Tenn. 508; *International &c. R. Co. v. Hughes*, 68 Texas 290.

A statute regulating speed in cities, construed not limited in its application to collision; but to extend to frightening horses. *Illinois C. R. Co. v. Crawford*, 169 Ill. 554; aff'g s. c., 68 Ill. App. 355.

Railway fencing statute, construed to give no remedy, unless damage is done by actual contact with engine or cars. *Stump v. Chicago &c. R. Co.*, 84 Ill. App. 28.

The reverse is held in Nebraska. *Chicago &c. R. Co. v. Cox*, 51 Neb. 479.

Engineer's negligence in continuing his train about 100 yards behind a horse without stopping till it reached a trestle, which it fell through, was for the jury, when it appeared that it could not leave the track without jumping over a ditch two feet deep with a bank one foot above it. *Brinkley v. Wilmington &c. R. Co.*, 126 N. C. 88.

Defendant was not liable, where the train was stopped before the horse reached the trestle. It ran upon the trestle while those in charge of the train were trying to drive it off the track. *Southern R. Co. v. Phillips*, 100 Tenn. 130.

The Tennessee railway fencing act gives no remedy without proof that the damage was done by a "moving train or engine or cars." Recovery was denied for loss of stock falling into an unfenced cut. *Jones v. Nashville &c. R. Co.*, 104 Tenn. 119; *Sinard v. Southern R. Co.*, 101 Tenn. 473.

#### XIV. Barbed Wire Fences.

The use of a twisted ribbon of wire with small saw teeth projecting from its edges at intervals, was held not to be in violation of a statute

forbidding erection of "barbed wire" fence. *Slisser v. New York &c. R. Co.*, 32 App. Div. 98.

Company were held liable for frightening horses so that they ran into barbed wire fence and were injured. *Louisville &c. R. Co. v. Upton*, 18 Ill. App. 605.

Missouri Pacific &c. R. Co. v. Gill, 49 Kan. 441.

Company not liable. *St. Louis &c. R. Co. v. Ferguson*, 37 Ark. 16; *Gillman v. Sioux City &c. R. Co.*, 62 Iowa, 299.

Knowledge that an adjoining owner had negligently placed barbed wire on his side of the division fence, did not make it contributory negligence in turning a horse into the lot. *Gooch v. Bowyer*, 62 Mo. App. 206.

A statute, prohibiting the erection of barbed wire fences without a railing on the top thereof along highways, construed not to apply to railroad's right of way. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

Though defendant was not bound to fence, it was liable where a dangerous one of barbed wire on rotten cross ties, ill strung, was permitted to remain. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

In a suit under a statute forbidding erection of barbed wire fences without rail on top. Knowledge that a railroad had fenced in its right of way with defective fence, held not to make it contributory negligence to turn a horse on a highway intersecting it. *Siglin v. Coos Bay Co.*, 35 Or. 79.

## **XV. Rule of Liability Where It Is the Duty of Railway Company to Fence.**

If cattle enter upon the track at a point where it is the duty of the railroad company to fence, and are injured, the company is liable, provided there be no fence at such point, or if a sufficient fence had been once erected and the company did not, in maintaining the same, use the care that a man of ordinary prudence and good business capacity would use under the circumstances. However, the plaintiff's action may, under some circumstances, be defeated, if his own negligence has contributed to the injury.

An agreement on the part of the company to fence makes it liable, although there be no statute requiring it. *Chicago &c. R. Co. v. Barnes*, 116 Ind. 126; *Lee v. Minneapolis &c. R. Co.*, 66 Iowa, 131.

If by statute or contract with the adjoining owner, the company be required to fence its road, and also to maintain such fence, and it fulfill its duty, cattle are trespassers if they enter on the railway track, for the cattle would be, in such case, unlawfully on the track and the rules

heretofore given as to trespassing cattle could be invoked. *Ind. &c. R. Co. v. Irish*, 26 Ind. 268.

*Dennis v. Louisville &c. R. Co.*, 116 Ind. 42; *Jones v. Sheboygan R. Co.*, 42 Wis. 206.

Where a railroad fails to fence in its track, as required by law, whereby a horse strays thereon, it is no defense that it was killed by a train of another company. *Haas v. New York &c. R. Co.*, 11 App. Div. 625.

Failure to fence out children, held not negligence, in the absence of statute. *Western &c. R. Co. v. Rogers*, 104 Ga. 224.

The railroad fencing statute in Idaho held to inure to the benefit of the public in general, and not merely adjoining owners. *Johnson v. Oregon Short-Line R. Co.* (Id.) 63 Pac. Rep. 112.

Where an animal is killed at a place where a railroad is bound to fence and which it has not, it is liable, though the animal entered at a place where the company was not bound to fence. *Wabash R. Co. v. Pickrell*, 72 Ill. App. 601; *Chicago &c. R. Co. v. Blair*, 75 Ill. App. 659.

Where defendant ran over another company's road under a trackage arrangement, it was not relieved from liability for lack of a statutory fence, because it was not the owner of the road. *Pittsburg &c. R. Co. v. Thompson*, 21 Ind. App. 355.

Railway fencing statute, construed to require fencing of track, and not whole right of way. Not liable, where fence prevented cattle getting on track, but permitted them to pass over its right of way onto an adjacent highway, whence they wandered to a crossing and were injured. *Cagwin v. Chicago &c. R. Co.*, 113 Iowa, 175.

A railway fencing statute, imposing liability regardless of negligence, is constitutional. *Louisville &c. R. Co. v. Kice*, (Ky.) 60 S. W. Rep. 705.

See, also, *Railroad Co. v. Belcher*, 89 Ky. 198; *Railway Co. v. Humes*, 115 U. S. 512.

Railroad was not liable for removing cattle guards from points at which it was not bound to maintain them. *McKee v. Cincinnati &c. R. Co.*, 102 Ky. 253.

Failure to comply with railway fencing statute, held to inure to the benefit of a small child straying on the track. *Rosse v. St. Paul &c. R. Co.*, 68 Minn. 216; s. c., 37 L. R. A. 591; *Nickolson v. Northern P. R. Co.*, 80 id. 508.

Railroad held not bound to maintain statutory stock gaps and cattle guards through inclosed land in a stock law district; owners there, being bound to confine their cattle. *Canton &c. R. Co. v. French*, 75 Miss. 939.

Liability under a railway fencing statute for failure to properly fence by leaving a culvert under the roadbed unprotected extends to the in-

jury done to crops of an adjoining owner by the swine of another, though in a county where they are required to be confined. *Kingsbury v. Missouri &c. R. Co.*, 156 Mo. 379.

Liable for the loss of an animal escaping from an adjoining field through defective fence, though not lost through collision with a train. *Boggs v. Missouri &c. R. Co.*, 156 Mo. 389.

Where cattle enter at a point where the track is properly fenced, defendant is not liable for failure to discover them; as no duty arises unless they are actually seen. *Hill v. Missouri &c. R. Co.*, 66 Mo. App. 184.

Where the injury was caused by the failure to comply with such statute, it was immaterial whether the train doing the damage was operated by defendant or its lessee. *Price v. Barnard*, 70 Mo. App. 175; *Sinclair v. Missouri &c. R. Co.*, 70 Mo. App. 588 (licensee).

Liable where stock enter through defective fence, though injured at a crossing, to which it strayed. *Warden v. Missouri &c. R. Co.*, 78 Mo. App. 664.

In the absence of evidence, it will be presumed that animal entered on the track at the place where it was killed. *Ellis v. Mississippi &c. R. Co.*, 89 Mo. App. 241.

Where cattle enter through defective guards, it is immaterial what defendant's duty was at the place at which it was killed. *Sappington v. Chicago &c. R. Co.*, (Mo. App.) 69 S. W. Rep. 32.

Though defendant was not bound to fence, it was liable for maintaining a dangerous one. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

Point of entry and not of injury governs liability, under a railway fencing statute. *Eaton v. McNeil*, 31 Or. 128.

In the absence of statute, there is no duty to fence. *Sinard v. Southern R. Co.*, 101 Tenn. 473.

Proof of negligence is necessary to a recovery for killing stock at a point not required to be fenced. *Missouri &c. R. Co. v. Willis*, (Tex. Civ. App.) 52 S. W. Rep. 625.

Liability under a railway fencing statute, extends to injury to crops. *St. Louis &c. R. Co. v. Blackwell*, (Tex. Civ. App.) 40 S. W. Rep. 860.

Failure to fence at a point required by statute, did not make defendant liable, where the horse entered at a place not so required. *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. App. 228.

See, also, *Houston &c. R. Co. v. Hufflines*, (Tex. Civ. App.) 39 S. W. Rep. 625.

The Virginia railway fencing statute, construed to be for the protection of stock only, and not to inure to the benefit of railway employes. *Newson v. Norfolk &c. R. Co.*, 81 Fed. Rep. 133; aff'g s. c., 78 Fed. Rep. 91; s. c., 35 L. R. A. 135.

Failure to fence must be the proximate cause of the accident. *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23; *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157.

No recovery where the fence would have been burned by a fire occurring just before the accident, had it been built. *Cook v. Minneapolis &c. R. Co.*, 98 Wis. 624; s. c., 40 L. R. A. 457.

(a). FAILURE TO FENCE MAKES COMPANY LIABLE FOR INJURY CAUSED THEREBY.

Failure of company to fence when required by statute makes the company liable for injury caused thereby. This generally does not involve the question of the company's negligence, but creates an absolute liability. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Hance v. Cayuga &c. R. Co.*, 26 N. Y. 428; *Shepherd v. Buffalo &c. R. Co.*, 35 id. 641; *Tracey v. Troy &c. R. Co.*, 38 id. 433; *Kelver v. N. Y. &c. R. Co.*, 126 id. 365; *McCoy v. Cal. Pac. R. Co.*, 40 Cal. 532; *Bulkley v. N. Y. &c. R. Co.*, 27 Conn. 480; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Toledo &c. R. Co. v. Cory*, 139 id. 218; *Toledo &c. R. Co. v. Loben*, 71 Ill. 191; *Toledo &c. R. Co. v. Wickery*, 44 id. 76; *Hopkins v. Kansas &c. R. Co.*, 18 Kan. 462.

So held as to cattle guards. *Gorman v. Pacific &c. R. Co.*, 26 Mo. 441; *Carey v. St. Louis &c. R. Co.*, 60 id. 213; *Gillum v. Sioux City R. Co.*, 26 Minn. 268; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Union Pacific R. Co. v. High*, 14 Neb. 14; *Eaton v. Oregon &c. R. Co.*, 19 Ore. 371; *Johnson v. Baltimore &c. R. Co.*, 25 W. Va. 570; *Veerhusen v. Chicago &c. R. Co.*, 53 Wis. 689.

Proof of killing of stock by railroad raised presumption of negligence. *Western &c. R. Co. v. Robinson*, 114 Ga. 159.

Illinois Laws 1879, page 224: "And when such fences \* \* \* are not made as aforesaid, or when such fences \* \* \* are not kept in good repair such railroad corporation shall be liable for all damages which may be done by the agents, engines or cars of such corporation to such cattle, horses, sheep, hogs or other stock thereon; but *when such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently and willfully done.*" *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108.

Statutory direction to securely fence the right of way, requires erection and maintenance of sufficient cattle guards. *New York &c. R. Co. v. Zumbaugh*, 17 Ind. App. 171.

Statute does not impose abstract obligation to fence, yet on failure so to do, statute fixes absolute liability for injuries in operation of road by reason of want of fence. *Welsh v. Chicago &c. R. Co.*, 53 Iowa, 632; *Krebs v. Minneapolis &c. R. Co.*, 61 id. 670, as to cattle running at large.

No liability for failure to erect statutory fence unless injury is caused thereby. *Norman v. Chicago &c. R. Co.*, 110 Iowa, 283.

Citing *Small v. Railroad Co.*, 50 Iowa, 340; *Manwell v. Railway Co.*, 80 id. 662; *Croddy v. Railway Co.*, 91 id. 598.



Where public interest in a highway crossing renders the statutory requirements to fence in its right of way improper at that point, a railroad must comply with the intent of the statute as far as possible by the erection of other guards or barriers. And the burden is on the company to show justification for not fencing. *Chicago &c. R. Co. v. Green*, 4 Kan. App. 133.

Statutory presumption of negligence overcome by uncontradicted testimony of employes, that the accident was unavoidable by ordinary care. *McGhee v. Gwyn*, 98 Ky. 209.

As to notice required before railroad company can be held for injuries from lack of cattle guards, see *Younger v. Louisville &c. R. Co.*, (Ky.) 41 S. W. Rep. 25.

Where evidence shows that a horse was injured, either by being struck by a train or by running over an embankment, plaintiff cannot recover. *Southern R. Co. v. Forsythe*, (Ky.) 64 S. W. Rep. 506.

The imposition of duty to fence, held an exercise of the police power of the state for protection of persons as well as property. *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

Where defect existed in original construction, company is not entitled to notice. *McMillan v. Chicago &c. R. Co.*, 70 Mo. App. 568.

Where accident happens through failure to erect statutory fence, a railroad cannot excuse itself on the ground, that it used even the greatest diligence in the management of its train in trying to avoid injury to cattle on the track by reason thereof. *Cincinnati &c. R. Co. v. Stonecipher*, 95 Tenn. 311.

See, also, *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

Railroad company must replace fences torn down in constructing the road. *Chicago &c. R. Co. v. Yarrowborough*, (Tex. Civ. App.) 35 S. W. Rep. 422.

Plaintiff cannot recover where there was no evidence that the mule killed was killed by defendant's train. *Henry v. Missouri &c. R. Co.*, (Tex. Civ. App.) 65 S. W. Rep. 644.

Freedom from negligence in running the train was immaterial in action under fencing statute. *Norfolk &c. R. Co. v. Johnson*, 91 Va. 661.

#### (b). COMPANY'S LIABILITY FOR NEGLIGENCE IN MAINTAINING FENCE.

When a sufficient fence has been erected it is the company's duty to use the care stated in the main rule in maintaining it; that is, it is only liable for negligence. *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108.

*Toledo &c. R. Co. v. Nelson*, 77 Ill. 160 (gates); *Pittsburg &c. R. Co. v. Eby*, 55 Ind. 567 (cattle guards); *Lemmon v. Chicago &c. R. Co.*, 32 Iowa, 151; *Gould v. Bangor &c. R. Co.*, 82 Maine 122; *Grand Rapids &c. R. Co. v. Monroe*, 47 Mich.

152; *Case v. St. Louis &c. R. Co.*, 75 Mo. 668; *Wait v. Burlington &c. R. Co.*, 61 Vt. 268 (Cattle guards).

After fence has been constructed company is only bound to use reasonable care and diligence in maintaining same, and it is not therefore liable for injury when cattle came on track through a break in the fence caused by a heavy wind, freshet or fire, without showing that the company was negligent in regard to the strength of the fence, or in the length of time taken to repair or rebuild it, or that the injury was due to the willfulness or negligence of company or its servants.

MICHIGAN.—Company must fence under Howell's General Statute, see. 3377 (Laws 1872, page 72).

*Robinson v. Grand Trunk R. Co.*, 32 Mich. 332; *Stephenson v. Grand Trunk R. Co.*, 34 id. 323; *Grand Rapids &c. R. Co. v. Judson*, id. 506; *Toledo &c. R. Co. v. Eder*, 45 id. 329; *Grand Rapids &c. R. Co. v. Monroe*, 47 id. 152. But see *Tracey v. Troy &c. R. Co.*, 38 N. Y. 433.

Hence, the inquiry would be whether the company had notice or knowledge, or in the exercise of the requisite care should have had knowledge that the fence had become insufficient. *Hodge v. N. Y. &c. R. Co.*, 27 Hun, 394.

*McGuire v. Ogdensburgh &c. R. Co.*, 63 Hun, 632; *Indianapolis &c. R. Co. v. Hall*, 88 Ill. 368; *Cleveland &c. R. Co. v. Brown*, 45 Ind. 90; *Davis v. Chicago &c. R. Co.*, 40 Iowa, 292; *Brentner v. Chicago &c. R. Co.*, 58 id. 625; *Barkow v. Chicago &c. R. Co.*, 30 Minn. 18; *Chullock v. Hannibal R. Co.*, 77 Mo. 591; *Vineyard v. St. Louis &c. R. Co.*, 80 id. 92; *King v. Chicago &c. R. Co.*, 90 id. 520; *Goddard v. Chicago &c. R. Co.*, 54 Wis. 548.

After due discovery of defect, not caused by its negligence, company has reasonable time to repair. *Murray v. N. Y. &c. R. Co.*, 3 Abb. Ct. App. Dec. 339.

*Indianapolis &c. R. Co. v. Truitt*, 24 Ind. 162; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322.

Constructive knowledge of defect will be inferred, as in other cases, from length of time sufficient to enable company to have discovered the defect, had it used proper care. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Ohio &c. R. Co. v. Clutter*, 82 Ill. 123; *Laney v. Kansas City &c. R. Co.*, 83 Mo. 466.

Unless the company has actual or constructive notice of defect in fences, or is guilty of negligence in not making proper examination for the purpose of repairing if necessary, it is not liable for cattle injured on the tracks. *Hodge v. N. Y. &c. R. Co.*, 27 Hun, 394.

Where the horses of an adjoining owner go upon the defendant's tracks through bars, the plaintiff must show that the defendant had actual notice that the bars were down, or that the bars had been down such a length of time that such notice might be presumed. *Hungerford v. S. B. & N. Y. R. Co.*, 46 Hun, 339.

Citing *Wheeler v. The Erie R. Co.*, 2 Thomp. & Cook 634; *Hodge v. N. Y. C. & C. R. Co.*, 27 Hun, 394; *Olmstead v. Watertown & C. R. Co.*, cited in *Sherman v. Western Trans. Co.*, 62 Barb. 158. See, also, *McDowell v. N. Y. Cent. R. Co.*, 37 Barb. 196.

Company is liable if it does not seasonably repair same. (Gates).

*Spinner v. N. Y. & C. R. Co.*, 67 N. Y. 153; *Brady v. Rensselaer & C. R. Co.*, 1 Hun, 378. But, see, *Bowman v. Troy & C. R. Co.*, 37 Barb. 516; *Louisville & C. R. Co. v. Shelton*, 43 Ill. App. 220; *Chicago & C. R. Co. v. Magee*, 60 Ill. 529; Ill. Cent. R. Co. v. *Swearingen*, 47 id. 206.

Company should keep such force as may discover breaks and openings in fence and close them within a reasonable time. Neglect for a week creates liability. *Chicago R. Co. v. Harris*, 54 Ill. 528.

*Hammond v. Chicago & C. R. Co.*, 43 Iowa, 168; *Bell v. Chicago & C. R. Co.*, 64 id. 321; *Morrison v. Kansas City & C. R. Co.*, 27 Mo. App. 418; *Ridenor v. Wabash & C. R. Co.*, 81 Mo. 227.

Company is not liable when some one not in its employ took down fence a few hours before passage of train. *Boyle v. N. Y., L. E. & C. R. Co.*, 39 Hun, 171.

In some jurisdictions the company is liable for failure to maintain fences, irrespective of any negligence on its part. *Atchison & C. R. Co. v. Betts*, 10 Col. 431. (Liable absolutely for killing domestic animal).

*Lake Erie & C. R. Co. v. Fishback*, 5 Ind. App. 403; *Grand Rapids & C. R. Co. v. Jones*, 81 Ind. 523 (railroad is not securely fenced in absence of suitable cattle pits); *Smith v. Eastern & C. R. Co.*, 35 N. H. 356, (also destruction of cattle, without fault of owner, is *prima facie* evidence of company's negligence); *Pittsburg & C. R. Co. v. Smith*, 38 Oh. St. 410; *Brown v. Milwaukee & C. R. Co.*, 21 Wis. 39. But, see, *contra*, *Curry v. Chicago & C. R. Co.*, 43 Wis. 665, reversing former decision.

Where there was a good and lawful fence, defendant was not liable, in the absence of proof of negligence in the management of its trains. *Atchison & C. R. Co. v. Cahill*, 11 Colo. App. 245.

Where it appeared from the evidence, that defendant was not negligent in the maintenance of its stock gap, it was not liable for death of a mule in passing over it. *Southern R. Co. v. Watson*, 114 Ga. 174.

Maintenance in reasonable repair only requires reasonable inspection. *Peirce v. Rabberman*, 77 Ill. App. 619.

Less than 24 hours, is not sufficient to charge defendant with notice of the necessity for repair. To charge the company, it must appear that the animals escaped through the defective fence. *Cleveland & C. R. Co. v. Dugan*, 18 Ind. App. 435.

Failure to repair, held not negligent, where there was no obligation to maintain. *Chicago & C. R. Co. v. Woodsworth* (Ind. Terr.) 35 S. W. Rep. 238.

Sectionmen were not negligent, where, having closed a gate in the fence

at 3.30 p. m., they failed to return, though a short distance to inspect, before leaving for the night, where plaintiff had himself, in the meantime, left it open. *Harding v. Chicago &c. R. Co.*, 100 Iowa, 677.

Defendant was liable, where, except for its defective cattle guard, a horse would not have escaped from its right of way on to a highway where it was killed. *Riley v. Chicago &c. R. Co.*, 104 Iowa, 235.

Cattle guard was held defective, where it had been allowed to become so full of sand that cattle could walk across it. *Pothast v. Chicago &c. R. Co.*, 110 Iowa, 458.

The duty to repair fences includes gates therein. *Missouri &c. R. Co. v. Pftrang*, 7 Kan. App. 1.

Allowing weeds to overgrow a cattle guard so that cattle cannot detect its presence, is negligence. *Louisville &c. R. Co. v. Becuchamp*, (Ky.) 55 S. W. Rep. 716.

Railroad is bound to keep in repair the cattle guards connecting division fences of adjoining owners. *Fortune v. Chesapeake &c. R. Co.*, (Ky.) 58 S. W. Rep. 711.

The duty to repair fences, extends to gates therein for private crossings. *Freet v. Kansas City &c. R. Co.*, 63 Mo. App. 548.

Railroad must have notice of the defective condition of a fence, a sufficient time to enable it to repair. *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36; or the defect must have existed for a long enough time to charge it with notice. *Schlottzhaner v. Missouri &c. R. Co.*, 89 Mo. App. 65.

The question of whether a fence has been out of repair a sufficient time to impute notice, is for the jury. *Hendrickson v. Philadelphia &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 232.

Mere suffering a line ditch, substituted for a fence, to become filled with refuse from the railroad, did not make defendant liable, where it did not willfully cause such result. *Brooks v. Pennsylvania R. Co.*, 2 Pa. Super. Ct. 581.

Railroad is bound to exercise ordinary care to keep its fence, including gates therein, in good repair. *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

Negligence is basis of recovery where company is not required to fence. *Gulf &c. R. Co. v. Blankenbecker*, 13 Tex. Civ. App. 219.

Where a railroad has complied with the statute as to the erection of its fence and the construction of its crossings, it is not liable, in the absence of proof of negligence in the management of its trains. *Galveston &c. R. Co. v. Dyer*, (Tex. Civ. App.) 38 S. W. Rep. 218.

See, also, *San Antonio &c. R. Co. v. Robinson*, 17 Tex. Civ. App. 400.

Especially at a private crossing, constructed at the request of the adjoining owner. *Gulf &c. R. Co. v. Mitchell*, 18 Tex. Civ. App. 380.

Or where the railroad makes all substantial repairs in the gate in such a crossing; the adjoining owner assuming the repair of all defects too trivial to mention and which may be made practically without labor or expense. *St. Louis &c. R. Co. v. Adams*, (Tex. Civ. App.) 58 S. W. Rep. 1035.

## XVI. Contributory Negligence.

(a). WHEN COMPANY FAILS TO ERECT FENCE, ACTION IS NOT USUALLY DEFEATED BY NEGLIGENT ACT OF OWNER.

The purpose of the statute is to protect the train as well as the landowner, or even the public, and when the company has failed to erect a fence, it is often, if not usually, held that the action is not defeated by any negligent act of the plaintiff, adjoining landowner, not indicating such reckless indifference to the injury as to be tantamount to a consent thereto. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Bradley v. Buffalo &c. R. Co.*, 34 N. Y. 427; *Brady v. Rensselaer &c. R. Co.*, 1 Hun, 378; *Louisville &c. R. Co. v. Whitesell*, 68 Ind. 297.

*Krebs v. Minneapolis &c. R. Co.*, 64 Iowa, 670; *Davidson v. Central &c. R. Co.*, 75 id. 22; *Holland v. West End &c. R. Co.*, 16 Mo. App. 172; *Burlington &c. R. Co. v. Franzen*, 15 Neb. 365; *Mead v. Burlington &c. R. Co.*, 52 Vt. 278; *Heller v. Abbott*, 79 Wis. 409.

When company has failed to fence, contributory negligence establishes no defense.

*Flint &c. R. Co. v. Lull*, 28 Mich. 510; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Indiana Cent. R. Co. v. Leamon*, 18 id. 175; *McCall v. Chamberlain*, 13 Wis. 637; *Horn v. Atlantic &c. R. Co.*, 35 N. H. 169; *Indianapolis &c. R. Co. v. Parker*, 29 Ind. 472; *La Flamme v. Detroit &c. R. Co.*, 109 Mich. 509.

But where it is a common law suit and not founded on the statute as to fencing, contributory negligence is a defense. *L. S. & M. S. R. Co. v. Miller*, 25 Mich. 274.

In some instances the statute itself states what contributory negligence shall defeat the statutory action. *Nashville &c. R. Co. v. Spence*, 99 Tenn. 218.

### CATTLE RUNNING AT LARGE.

Usually the company is liable, although the cattle be wrongfully running at large, in case defendant's neglect to build fences, as required, contributed to the accident.

*Rogers v. Newberryport &c. R. Co.*, 1 Allen 16; *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo &c. R. Co.*, 35 id. 641; *Spinner v. N. Y. &c. R.*

Co., 67 N. Y. 153; Rabberman v. Hunt, 88 Ill. App. 625; Neversorry v. Duluth &c. R. Co., 115 Mich. 146; Winkler v. Carolina &c. R. Co., 126 N. C. 370; Harwood v. Bennington &c. R. Co., 67 Vt. 664; Quimby v. Boston &c. R. Co., 71 id. 301; Herrell v. Chicago &c. R. Co., (Wis.) 90 N. W. Rep. 1071.

The reverse is held in New Hampshire. Hill v. Concord &c. R. Co., 67 N. H. 449.

A boy left a cow in an open lot adjoining the defendant's track near crossing, where the fences were temporarily and necessarily down to repair roadway. Cow strayed on track and was killed. Defendant liable. *Brady v. R. & S. R. Co.*, 1 Hun. 378.

Distinguishing *Bowman v. Troy &c. R. Co.*, 37 Barb. 516, and following *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 49; *Bradley v. N. Y. &c. R. Co.*, 34 id. 432.

*Cairo &c. R. Co. v. Woolsey*, 85 Ill. 370; (question was for jury) *Spence v. Chicago &c. R. Co.*, 25 Iowa, 139; *Fritz v. Milwaukee &c. R. Co.*, 34 id. 337; *Welsh v. Chicago &c. R. Co.*, 53 id. 632; *Krebs v. Minneapolis &c. R. Co.*, 64 id. 670; *Flint &c. R. Co. v. Low*, 28 Mich. 510; *Gillam v. Sioux City R. Co.*, 26 Minn. 268; *Bowman v. Chicago &c. R. Co.*, 85 Mo. 533; *Chicago &c. R. Co. v. Sims*, 17 Neb. 365; *Cressey v. Northern R. Co.*, 59 N. H. 564; *F. &c. R. Co. v. Lull*, 28 Mich. 510.

But it has been frequently held that the negligence of the adjoining owner of the cattle will defeat his recovery.

*Baltimore &c. R. Co. v. Wood*, 47 Oh. St. 431, 436; *Central Branch &c. R. Co. v. Lea*, 20 Kan. 353; *Kansas &c. R. Co. v. Landis*, 24 id. 293, distinguishing *Central R. Co. v. Lea*, 20 id. 353; *Illinois &c. R. Co. v. Middleworth*, 43 Ill. 64.

*Moser v. St. Paul &c. R. Co.*, 42 Minn. 480; citing *Johnson v. R. Co.*, 29 id. 425; *Watier v. R. Co.*, 31 id. 91.

When cow was illegally at large and road was not properly fenced, there was no recovery. *Branch R. Co. v. Lea*, 20 Kan. 353. Citing *P. P. &c. R. Co. v. Champ*, 75 Ill. 577 (no fence and horse at large); *Perkins v. East. R. Co.*, 29 Me. 307 (no fence and cow wrongfully in adjoining close); *Jackson v. R. & B. R. Co.*, 25 Vt. 150 (no fence and trespassing cattle).

In an action against a railroad for injury occasioned by failure to *erect* or to *maintain* fences on the line of its road as in other actions of negligence, contributory negligence of plaintiff is a defense. *Curry v. Chicago &c. R. Co.*, 43 Wis. 665, overruling, or limiting *Brown v. R. Co.*, 21 Wis. 39; *Lika v. R. Co.*, 21 id. 370; *Schmidt v. R. Co.*, 23 id. 186.

See *McCandless v. Chicago &c. R. Co.*, 45 Wis. 540; *Goddard v. Chicago &c. R. Co.*, 54 id. 548.

Contrary doctrine was held where gate was left open in *Lander v. R. Co.*, 33 Wis. 640; *Pitzner v. Shinnick*, 39 id. 129; *Jones v. R. Co.*, 42 id. 306.

Reckless indifference on the part of owner of cattle to their injury will prevent his recovery. *Ind. &c. R. Co. v. McKinney*, 24 Ind. 283.

*Welty v. Ind. &c. R. Co.*, 105 Ind. 55; *Moody v. Minneapolis &c. R. Co.*, 77 Iowa, 29; *Missouri &c. R. Co. v. Roads*, 33 Kan. 640; *Spence v. Chicago &c. R. Co.*, 25 Ill. 139. See *Louisville &c. R. Co. v. Cahill*, 63 id. 640; *Dickey v. Northern P. R. Co.*, 19 Wash. 350; *La Flamme v. Detroit &c. R. Co.*, 109 Mich. 509.

Where one habitually turns cattle upon the railroad's right of way, there is no liability. *Fort Wayne &c. R. Co. v. Woodward*, 112 Ind. 118.

*Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; *Louisville &c. R. Co. v. Goodbar*, 102 id. 596; *Bond v. Evansville R. Co.*, 100 id. 301; *Penn. R. Co. v. Dunlap*, 112 id. 93; see, also, *Sherman v. Anderson*, 27 Kan. 333; *Cincinnati &c. R. Co. v. Waterson*, 4 Oh. St. 424; *Logansport &c. R. Co. v. Caldwell*, 38 Ill. 280; *Chicago &c. R. Co. v. Seirer*, 60 id. 295.

But may use his lot although he knows that there is no fence. *McCoy v. California &c. R. Co.*, 40 Cal. 532; *Wilder v. Maine &c. R. Co.*, 65 Me. 332.

(b). IF SUFFICIENT FENCE HAD BEEN ONCE ERECTED ACTION IS DEFEATED BY NEGLIGENT OWNER OF CATTLE.

If, however, a sufficient fence has been once erected, the action may be defeated by the negligence of the owner of cattle, if it contribute to the injury.

It was the duty of the defendant to maintain fences, gates, &c., yet, if the adjoining proprietor had knowledge of the defective fences, it was his duty to give the defendant notice, and it was for the jury to say who was negligent. The gate got out of repair and the owner patched it up and left his cattle to be protected by it. The question of the negligence of the parties was for the jury. *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476; see, *Shanchan v. N. Y. &c. R. Co.*, 10 Abb. Pr (N. Y.) 588.

*Cleveland &c. R. Co. v. Ducharme*, 49 Ill. App. 520; *Toledo &c. R. Co. v. Thomas*, 18 Ind. 215; *Welty v. Ind. &c. R. Co.*, 105 id. 55; *Louisville &c. R. Co. v. Stoumnd*, 126 id. 35; *Grove v. Burlington &c. R. Co.*, 75 Iowa, 163; *Fisher v. Farmers' &c. Co.*, 21 Wis. 73; *Martin v. Stewart*, 73 id. 553.

But it is not contributory negligence for owner to use adjoining field, when he knows fence is absent or defective. *Shepard v. Buffalo &c. R. Co.*, 36 N. Y. 641.

*Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42, 49, 54; *Cook v. Champlain Truss Co.*, 1 Denio, 91, 101; *Brady v. Rensselaer &c. R. Co.*, 1 Hun, 378; *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; *Rogers v. Newburyport R. Co.*, 1 Allen, 16; *McCoy v. California &c. R. Co.*, 40 Cal. 532; *Bellefontaine &c. R. Co. v. Reed*, 33 Ind. 476; *Wilder v. Maine &c. R. Co.*, 65 Me. 332; *F. & P. &c. R. Co. v. Lull*, 28 Mich. 510; *Cressey v. Northern R.*, 59 N. H. 564; *Kerwhaker v. C. C. &c. R. Co.*, 3 Oh. St. 172; *Pittsburg &c. R. Co. v. Smith*, 38 id. 410; *Cleveland &c. R. Co. v. Scudder*, 46 id. St. 173; *Mead v. Burlington &c. R. Co.*, 52 Vt. 278.

A tenant was not permitted to recover for cattle escaping to right of way through panel of fence chopped down by son of landlord. *Best v. Ulster &c. R. Co.*, 35 App. Div. 623.

Bars left open. *Illinois &c. R. Co. v. Arnold*, 47 Ill. 173.

The owner nailed on a defective board, leaving the fence still defective, and gave the company no notice, but continued to use the field. The

question of owner's negligence should have been submitted to the jury. *Chicago &c. R. Co. v. Seirer*, 60 Ill. 295.

Where one sees the gate of his neighbor open, the latch insecure, a board off the fence, or any other defect which can be at once remedied without any considerable cost or labor, and his own stock is liable by reason thereof to escape from his premises and receive injury, it is his duty to protect himself against the threatened danger by closing the open gate, securing the defective fastening, nailing on a loose board, or otherwise securing himself against loss. *Chicago &c. R. Co. v. Buck*, 14 Ill. App. 394.

Where owner knowingly permits cattle to go, or drives them, on track company is not liable. *Fort Wayne &c. R. Co. v. Woodward*, 112 Ind. 118.

*Connyers v. Sioux City R. Co.*, 78 Iowa, 410; *Forbes v. Atlantic &c. R. Co.*, 76 N. C. 454; *Louisville &c. R. Co. v. Ballard*, 2 Mete. (Ky.) 177.

If animal was killed at a place where company was bound to fence, and had not securely fenced, contributory negligence is no defense. *Baltimore &c. R. Co. v. Everts*, 112 Ind. 533.

*Jebb v. Chicago &c. R. Co.*, 67 Mich. 160.

Owner may by his conduct in leaving open a gate release company from liability for injury resulting therefrom even to tenant occupying land jointly with owner, and knowing of owner's conduct. *Manwell v. Burlington &c. R. Co.*, 80 Iowa, 662.

The fact of insecure inclosure, by reason of which animals escaped to and were killed on the track will not excuse company's negligence. *Leavenworth &c. R. Co. v. Forbes*, 37 Kas. 445.

*Missouri Pac. R. Co. v. Roads*, 33 Kas. 640; *Missouri Pac. R. Co. v. Bradshaw*, 33 id. 533; *A. T. &c. R. Co. v. Shaft*, id. 527.

Plaintiff was not negligent *per se*, where the gate in defendant's fence was defective, because he used it a short time before the accident without complaint. *Missouri &c. R. Co. v. Pftrang*, 7 Kan. App. 1.

Plaintiff with knowledge that there were no gates, turned his sheep into his field and they were killed on track, defendant was liable. *Horn v. Atlantic &c. R. Co.*, 35 N. H. 167.

But see contra, *Joliet &c. R. Co. v. Jones*, 20 Ill. 221.

That defendant was negligent in not fencing and the owner of cattle was not negligent in preventing their escape, did not permit recovery, where they were at large in violation of an ordinance. *Evans v. Sherman &c. R. Co.*, 14 Tex. Civ. App. 131.

Plaintiff is not negligent in turning his cattle into a pasture, though he knows that his adjoining corn field is unprotected by reason of a defective cattle guard. *St. Louis &c. R. Co. v. Blackwell*, (Tex. Civ. App.) 40 S. W. Rep. 860.

The owner allowed a colt to run where he knew fence was defective



and there was nothing to prevent his going on the track, and did not recover. *Martin v. Stewart*, 13 Wis. 553.

Plaintiff is negligent, where he turns cattle into a field, the fences of which were burned by a forest fire, and permitted access to another with a defective railroad fence. *McCann v. Chicago & C. R. Co.*, 96 Wis. 664.

## XVII. Rights of Others than Adjoining Owners.

The statutes as to fencing are not so especially for the benefit of the adjoining owners as to exclude actions by the owners of cattle that, trespassing or otherwise, have entered upon the track through adjoining land, or the highway.

A railroad company is liable for injury to cattle on account of defective fences even if such cattle do not belong to adjoining owners and even if it does not appear how or where the cattle got on the road. Although not lawfully on the highway or adjacent grounds, if they go from thence through a defective fence on to the track, the company is liable. *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42.

Disapproving contrary doctrine in *Brooks v. N. Y. C. & E. R. Co.*, 13 Barb. 594; *Marsh v. N. Y. & E. R. Co.*, 14 id. 364, and following *Faucett v. The York & E. R. Co.*, 2 Eng. L. & E. R. 289, and distinguishing *Ricketts v. Railway Co.*, 12 id. 520; *S. P. Tracey v. Troy & E. R. Co.*, 38 N. Y. 433; *Browne v. Providence & E. R. Co.*, 12 Gray, 55; *Chicago & E. R. Co. v. Harris*, 54 Ill. 528; *Ind. & E. R. Co. v. Guard*, 24 Ind. 222; *Missouri & E. R. Co. v. Roads*, 33 Kas. 640; *Watier v. Chicago & E. R. Co.*, 31 Minn. 91; *Sawyer v. Vermont & E. R. Co.*, 105 Mass. 196; *Humes v. Missouri Pac. R. Co.*, 9 Mo. App. 588; *Summers v. Hannibal & E. R. Co.*, 29 id. 41; *Kinion v. Kansas City & E. R. Co.*, 39 id. 574; *Giles v. Boston & E. R. Co.*, 55 N. H. 552; *Pittsburg & E. R. Co. v. Howard*, 40 Oh. St. 6; *Dunkirk R. Co. v. Mead*, 90 Pa. St. 454; *Morse v. Rutland & E. R. Co.*, 27 Vt. 49; *Curry v. Chicago & E. R. Co.*, 43 Wis. 665.

See *Brady v. Reusselaer R. Co.*, 1 Hun, 378; *Crawford v. N. Y. C. R. Co.*, 18 id. 108; *Leggett v. Rome & E. R. Co.*, 41 id. 80; see *Illinois & E. R. Co. v. Houghton*, 126 Ill. 233.

When the defendant had duly constructed and maintained cattle guards it was not bound to keep them free from snow as against the owner of cattle negligently allowed to go on the track; otherwise, if the cattle be lawfully on the highway. *Hance v. Cayuga & Susquehanna R. Co.*, 26 N. Y. 428.

An employé of company may recover when injured by a wreck caused by cattle entering the track through a defective fence. *Donnegan v. Erhardt*, 119 N. Y. 468, overruling *Langlois v. B. & E. R. Co.*, 19 Barb. 364.

Negligence of the owner in permitting cattle to stray upon the land of another adjoining the track, or to run in the highway crossing the track is no defense if the company neglects fences and cattle guards. *Rhodes v. U. I. & E. R. Co.*, 5 Hun. 344.

Even though they be straying on highway, and come upon track. *Waldron v. Reusselaer & E. R. Co.*, 8 Barb. 390; *Dunkirk & E. R. Co. v. Mead*, 90 Pa. St. 454. See *Chapin v. Sullivan & E. R. Co.*, 39 N. H. 53.

*Contra*, *Eames v. Salem &c. R. Co.*, 98 Mass. 560; *Clark v. Chicago &c. Co.*, 62 Mich. 358; *Ellis v. Pacific &c. R. Co.*, 55 Mo. 278.

Duty to keep gates and bars closed, applied in a case where horses escaped from their own pastures and strayed to one, a half mile distant, adjoining the track, where they entered the right of way, through bars left down all winter. *Connolly v. Central Vermont R. Co.*, 4 App. Div. 221; S. C., aff'd, 158 N. Y. 675.

Horses allowed to run at large in the night time when no legal right to do so existed, were injured on the railroad track. No liability. *Van Horn v. B. C. &c. Co.*, 59 Iowa, 33.

See, also, *Halloran v. R. Co.*, 2 E. D. Smith, 257; *Bowman v. R. Co.*, 37 Barb. 37; *Kuhn. v. R. Co.*, 42 Iowa, 420.

Owners of cattle trespassing on the land of an adjoining owner, can not recover for violation of fencing statute, where such adjoining owner cannot. *Rouse v. Osborne*, 3 Kan. App. 139.

The failure to fence improved property adjoining the track as required by statute, held not to inure to the benefit of cattle trespassing thereon. *Allen v. Boston &c. R. Co.*, 81 Me. 326.

Insufficiency of statutory railway fence erected by land owner under agreement with company, gives him no right of action, but imposes liability to third parties for loss of stock, though trespassing on his land. *Never sorry v. Duluth &c. R. Co.*, 115 Mich. 146.

The owner of land adjoining an adjoining owner, held not entitled to the benefit of a fencing statute, where his animals were not on the latter's land by lease or license. *Geiser v. St. Louis &c. R. Co.*, 61 Mo. App. 459.

Otherwise, where they were. *Payne v. Current River R. Co.*, 15 Mo. App. 14.

If the animal were a trespasser, no recovery. *Bradenburg v. St. Louis &c. R. Co.*, 44 Mo. App. 224; *Johnson v. Mo. Pac. &c. R. Co.*, 80 Mo. 620.

The N. H. statute is only for protection of adjoining land-owner. *Woolsen v. North. R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 id. 363; *Giles v. Boston &c. R. Co.*, 55 id. 552; *Casista v. Boston &c. R. Co.*, 69 id. 649.

Tenant held entitled to same rights as landlord under a fencing statute. *Greer v. Nashville &c. R. Co.*, 104 Tenn. 242.

But trespasser not entitled to same rights as owner.

As Tex. R. S. Art. 4421 providing for openings in inclosures of adjoining owners is for their protection only, and not the public at large, a third person, trespassing on such, cannot complain that the opening was not provided with a cattle guard such as are required at highway crossings. *Missouri &c. R. Co. v. Hanacek*, 93 Tex. 446.

Although company has omitted to fence road as required by statute it is not liable for cattle of third person strayed and injured thereon in absence of negligence. *Morse v. Rutland &c. R. Co.*, 27 Vt. 49; *Jackson v. Rutland &c. R. Co.*, 25 id. 150.

## XVIII. Agreement of Adjoining Owner to Fence or Waive Fence.

Where the adjoining owner conveyed the land for the road through his farm and was bound by his covenant with the defendant to erect and maintain fences, yet the plaintiff, whose cattle, straying, passed over such land upon the railroad and were injured, was not bound to such covenant, although such covenant would have estopped the owner under the same circumstances. *Corwin v. New York & Erie R. Co.*, 13 N. Y. 42.

The acts of 1850 and 1854 relating to fences were for the protection of the traveling public and adjoining owners and the defendant was liable for cattle killed although the plaintiff was liable, to build the fence, under covenant of his grantor which ran with the land. But in this case there was no covenant on part of land owner to build fence, but a release of the railroad to build fence, and this was not held to be within the provision of the act which requires "an owner of land adjoining any railroad who or whose grantor has received a specific sum for fencing along the line of land taken for the purpose of said railroad, and who has agreed to build a lawful fence on the line of said railroad, to build and maintain" the same; and, in case of neglect, the railroad may build and maintain it at his expense. (1 Statute at Large by Edmunds, sec. 9, Laws of 1854.) The railroad act of 1850 and the act as amended in 1854, section 8, makes the railroad company liable for damages done to cattle, etc., so long as the fences, etc., shall not be made and when not in good order." But even then it would have been no defense. *Shepard v. Buffalo, New York & Erie R. Co.*, 35 N. Y. 641.

*Cincinnati & C. R. Co. v. Ridge*, 54 Ind. 39; *Indianapolis & C. R. Co. v. Thomas*, 84 id. 194; *Warren v. Keokuk & C. R. Co.*, 41 Iowa, 484; *Berry v. St. Louis & C. R. Co.*, 65 Mo. 172; *Gill v. Atlantic & C. R. Co.*, 27 Oh. St. 240; *Jeffersonville & C. R. Co. v. Nichols*, 30 Ind. 321; and see *Hunt v. Lake Shore & C. R. Co.*, 112 id. 69; *Baltimore & C. R. Co. v. Wood*, 47 Oh. St. 431.

Where lessor was bound to maintain fence to prevent cattle trespassing, so was his tenant, and no recovery could be had unless tenant was free from fault in this regard. *Baynes v. Chastain*, 68 Ind. 376.

*Twoksbury v. Bucklin*, 7 N. H. 518 (occupier and not owner of close must keep fence in repair).

But one using the land of an adjoining owner is subject to the defense that negligence of such owner contributed to the injury of cattle on his land. *McCoy v. Southern Pacific R. Co.*, 94 Cal. 568; *Manwell v. Burlington & C. R. Co.*, 80 Iowa, 662; *Indiana & C. R. Co. v. Adkins*, 23 Ind. 340; but, see, *Indiana & C. R. Co. v. Thomas*, 84 id. 194.

Where the owner agrees to erect a fence and does not do so, tenant with full knowledge of the agreement and the condition of the fence was negligent in placing his cattle in the adjoining land and did not recover. *Corwin v. N. Y. & C. R. Co.*, 13 N. Y. 42, 49.

*Pohler v. N. Y. & C. R. Co.*, 16 N. Y. 476; *Tracy v. Troy & C. R. Co.*, 38 id. 433; *Diamond & Brick Co. v. N. Y. & C. R. Co.*, 55 Hun. 605; *Duffy v. N. Y. & C. R. Co.*, 2 Hilt. 496; *St. Louis & C. R. Co. v. Washburn*, 97 Ill. 253; *Gorman v. Pacific R. Co.*, 26 Mo. 441; but, see, *Shepard v. Buffalo & C. R. Co.*, 35 N. Y. 641; *Pitts-*

burg &c. R. Co. v. Allen, 40 Oh. St. 206; see Potter v. N. Y. &c. R. Co., 60 Hun, 313 (*post*, 557).

But this did not apply to a tenant who had not such knowledge. *Thomas v. Hannibal &c. R. Co.*, 82 Mo. 538.

A person succeeding to the enjoyment of land by lease or otherwise, is entitled to same and no greater protection than owner. *French v. Western &c. R. Co.*, 72 Hun, 469.

*Warren v. Keokuk &c. R. Co.*, 41 Iowa, 484.

Where owner of land had agreed to fence, tenants were estopped to claims for loss. *Smith v. Barre*, 64 Vt. 21; *Veerhusen v. Chicago &c. R. Co.*, 53 Wis. 689.

Where it is the duty of the owner to fence and he fails, whereby cattle escape, the company is not liable for its failure to erect cattle guards. *Talmadge v. Rensselaer &c. R. Co.*, 13 Barb. 493.

*Warren v. Keokuk &c. R. Co.*, 41 Iowa, 484; *Pittsburg &c. R. Co. v. Smith*, 26 Oh. St. 124.

So, where in appraising land, compensation has been made for building a fence. *Georgia &c. R. Co. v. Anderson*, 33 Ga. 110; *Toledo &c. R. Co. v. Pense*, 71 Ill. 174.

If the adjoining land owner waive the fence and injury happen to his cattle thereby, he cannot recover. *Enright v. San Francisco &c. R. Co.*, 33 Cal. 230.

Nor can a third person whose cattle trespassing thereby come upon a railroad track. *Tower v. Providence R. Co.*, 2 R. I. 404.

Where the adjoining land-owner has agreed to construct or maintain a fence, he cannot recover for any injury to cattle arising from his failure to so do. *Bond v. Evansville &c. R. Co.*, 100 Ind. 301.

*Pittsburg &c. R. Co. v. Smith*, 26 Oh. St. 124; *Ellis v. Pacific &c. R. Co.*, 48 Mo. 231.

Plaintiff cannot complain that a fence is defective, where he has himself constructed it for the defendant. *Rabbermann v. Pierce*, 77 Ill. App. 405; *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

Where, in conveying the right of way the grantor required that the railroad should not fence without his permission, he cannot complain of the death of stock, after denying the request for such permission. *San Antonio &c. R. Co. v. Adams*, (Tex. Civ. App.) 45 S. W. Rep. 844.

**From opinion.**—"The sole object of the statute is to protect owners of stock and to make the owners of railroads responsible for the value of animals killed upon an unfenced track. *Ward v. Bommer*, 80 Tex. 168. Since the provision is for his benefit it would seem to follow that a particular owner by a valid contract can free the company from the necessity of fencing as a condition of its immunity from liability. Thus, a particular land owner might undoubtedly make a contract with the company, valid between themselves binding him to maintain a fence through his enclosure and in case of his failure to comply with it, he could not hold the other party liable because of absence of a fence.

The authorities elsewhere thoroughly sustain this proposition. It would seem to be also true that a contract between them, dispensing with the necessity of a fence through such an enclosure, should be clearly effectual and only the parties to it are concerned. *Hurd v. Railway Co.*, 25 Vt. 116; *Whittier v. Railway Co.*, 24 Minn. 394; *id.* 26 *id.* 484; *Eames v. Railroad Co.*, 105 Mass. 193; *Warren v. Railway Co.*, 41 Iowa, 484. In some states the fencing statutes are considered to have been enacted for the protection of the public, generally and full effect is consequently not given to such agreements as is done elsewhere. *Railway Co. v. Ridge*, 54 Ind. 39; *Railway Co. v. Johnson*, 59 Ind. 188; *Railway Co. v. Mailen*, 12 Ind. 10; *Shepard v. Railway Co.*, 35 N. Y. 641. But even in these states, it is recognized that when he has agreed to keep up the fence and fails to do so, he cannot recover for stock killed without proof of negligence and we cannot see why an agreement that there should be no fence ought not to have like effect."

### XIX. Gates, &c.—Who Must Keep Shut.\*

The gate of the adjoining proprietor was used by the public to get to the freight depot: the defendant knew of this use and acquiesced in it; it knew that it was often open and was *prima facie* liable for its being open. The rule requiring fences allows no exception for openings or gates for the use of the corporation or public, but only for the adjoining owners. *Spinner v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 153; 2 Hun. 421.

If the gate, for the convenience of the adjoining owner, is left open by the company's servants or patrons, the company is liable for damages therefrom. *Semble* if left open by adjoining owner. *Spinner v. N. Y. C. & H. R. Co.*, 6 Hun. 600; *s. c.*, 2 *id.* 421, *aff'd* 67 N. Y. 153.

Where gates are put in for the accommodation of the adjoining owner, he must keep them closed. *Diamond Brick Co. v. N. Y. &c. R. Co.*, 55 Hun. 605.

*Indianapolis &c. R. Co. v. Adkins*, 23 Ind. 340; *Louisville &c. R. Co. v. Goodbar*, 102 *id.* 596; *Jeffersonville &c. R. Co. v. Dunlap*, 112 *id.* 93.

Where a gate has been properly built for an owner of land adjoining a railroad, the company need not, as regards such owner, close the same, although it has notice that it is open: nor is it liable to the owner of a horse which, pastured in such adjoining land by a third party, strayed through the gate and was killed. The plaintiff pastured its horse on land-owner's lot adjoining railway. *The Diamond Brick Co. v. N. Y. C. & H. R. R. Co.*, 58 Hun. 396.

Plaintiff cannot recover for damages resulting from the failure of those in charge of his cattle to close the gate at a farm crossing after using it. *Ranney v. Chicago &c. R. Co.*, 59 Ill. App. 130.

Plaintiff's negligence, in permitting an animal to escape from one

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\* NOTE.—A gate being part of the railway fence, must be properly constructed and maintained in reasonable repair. See *ante*, p. 1035.

field to another, did not prevent recovery for defendant's negligence, in leaving a farm crossing gate broken down and out of repair for months at a time. *Lake Erie &c. R. Co. v. Beam*, 60 Ill. App. 68.

Railroad company bound only to use ordinary care to keep gates at farm crossings closed. Defendant held not liable for killing horses that had come on right of way through open gate, which was seen closed ten days before, and there was no evidence as to how long it had been open, and everything possible was done to prevent the accident after the animals were discovered. *Chicago &c. R. Co. v. Patterson*, 72 Ill. App. 428.

So, where gate is left open by landowner. *Indianapolis &c. R. Co. v. Shimer*, 17 Ind. 295.

See *Hook v. Worcester &c. R. Co.*, 58 N. H. 257.

Owner of cattle is not guilty of contributory negligence where he goes out of the state, leaving cattle in pasture, and the gates were left open by third person. *Toledo &c. R. Co. v. Milligan*, 52 Ind. 512.

Where gates are maintained for the convenience of the adjoining owner, yet company must keep the gates closed against third persons. *Wabash &c. R. Co. v. Williamson*, 104 Ind. 154.

But, see, *Hunt v. Lake Shore &c. R. Co.*, 112 Ind. 69.

But company is not obliged to keep gates closed, unless there be a contract or statute requiring it. *Cransville &c. R. Co. v. Mosier*, 114 Ind. 147.

*Bars.*—See *Illinois &c. R. Co. v. Arnold*, 47 Ill. 173; *Perry v. Dubuque &c. R. Co.*, 36 Iowa, 102.

If the gates at a farm crossing were left open by the landowner or by a wrongdoer other than the railroad company, that is a matter of defense. *Chicago &c. R. Co. v. Barnes*, 116 Ind. 126.

Where gate to private crossing is left open, without defendant's fault, by third person, company is not liable. *Perry v. Dubuque &c. R. Co.*, 36 Iowa, 102.

*Davenport v. Chicago &c. R. Co.*, 76 Mo. 399; *Johnson v. Mo. Pac. R. Co.*, 80 id. 620.

Where a gate is broken by a horse, it is not a willful act of the owner, within the meaning of a railway fencing statute, imposing liability for loss of stock from its violation unless caused by willful act of owner. *Enix v. Iowa C. R. Co.*, 114 Iowa, 508.

Third person is entitled to no greater protection as regards gates than adjoining owner. *Adams v. Atchison &c. R. Co.*, 46 Kas. 161.

*Diamond Brick Co. v. N. Y. C. &c. R. Co.*, 58 Hun. 396.

In any case, it must be shown that the injury arose without the owner's fault. *Kelliher v. Connecticut &c. R. Co.*, 107 Mass. 411.

Where it is the company's duty to erect and maintain gates, it will be liable for any injury resulting from its neglect in leaving the same open. *Lemon v. Chicago &c. R. Co.*, 59 Mich. 618.

*Chicago R. Co. v. Harris*, 54 Ill. 528.

It is the duty of the adjoining owner to keep the gate of his private crossing closed. *Swanson v. Chicago &c. R. Co.*, 79 Minn. 398; s. c., 49 L. R. A. 625.

Defendant was not liable, where it had, a short time before the accident, closed the latch of the gate at a farm crossing separating a highway from the tracks. *Moovers v. Northern P. R. Co.*, 80 Minn. 24.

A gate, as part of the railway fence, must be maintained in proper condition. *Hill v. Missouri P. R. Co.*, 66 Mo. App. 184.

Where the owner agrees to maintain a gate, defendant owes him only the duty of refraining from willfulness or gross negligence in the running of its trains. *Lake Erie &c. R. Co. v. Weisel*, 55 Oh. St. 155.

No liability where a stranger leaves a gate open, and the company has not had notice within a reasonable time to enable it to close it. *Greer v. Nashville &c. R. Co.*, 104 Tenn. 242.

Company held liable for injury to stock of third party entering through private crossing gate, left open by adjoining land owner. *Galveston &c. R. Co. v. Wesendorf*, (Tex. Civ. App.) 39 S. W. Rep. 132; *International &c. R. Co. v. Richmond*, 67 id. 1029. But see *Houston &c. R. Co. v. Hollingsworth*, 68 id. 724.

Defendant was responsible, where it exercised control over the gate and assumed the duty of keeping it closed. *Missouri &c. R. Co. v. Bellows*, (Tex. Civ. App.) 39 S. W. Rep. 1000.

The duty of seeing that a gate at a private crossing is closed, does not rest upon the railroad. *San Antonio &c. R. Co. v. Robinson*, 17 Tex. Civ. App. 400.

The railroad completes its duty, under the railway fencing act, by properly erecting and keeping in repair, fences. *Missouri &c. R. Co. v. Hanacik*, 23 Tex. Civ. App. 394.

And so, defendant is not liable, where the gate is left open by some third person. Burden on plaintiff, to show negligence. *St. Louis &c. R. Co. v. Adams*, (Tex. Civ. App.) 58 S. W. Rep. 1035; *International &c. R. Co. v. Erwin*, 67 id. 466.

Where such a crossing is required to be left open, by plaintiff's request or demand, defendant is not liable. *Missouri &c. R. Co. v. Chenault*, (Tex. Civ. App.) 60 S. W. Rep. 55.

No recovery where plaintiff's son, at night, left the gate open while he went into the pasture to find the cows, though no regular train was

due and he did not know of the special. *Clark v. Oregon Short-Line R. Co.*, 20 Utah, 401.

See, also, *Richardson v. Chicago &c. R. Co.*, 56 Wis. 347.

A statute making a person, willfully leaving a gate open after using it, liable for the consequences, held not to make land owner liable for death of a horse that entered on right of way through a farm crossing, the gate of which, had shortly before been broken down by his runaway horses. *Oeflein v. Zautcke*, 92 Wis. 176.

A railway sectionman, under no duty to close gates, was allowed to recover for loss of his stock entering the right of way through a gate he knew to be open. *May v. Chicago &c. R. Co.*, 102 Wis. 673.

It was held not contributory negligence, while horses were grazing 10 rods away, to leave a gate to a pasture a mile and a half from a railroad crossing, open for half an hour with knowledge that the cattle guards at the crossing were defective. *Herrell v. Chicago &c. R. Co.*, (Wis.) 90 N. W. Rep. 1071.

## XX. In What Places Company Must Fence.

Railroad companies are required to erect and maintain fences on the sides of their roads, and to construct cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs, from getting on such railroad track.

The fact that the road crossing is at or near the depot, and that, to make such cattle guard there, would inconvenience the company, will not excuse them from complying with the positive requirements of the statute. *\*Bradley v. The Buffalo, New York & Erie R. Co.*, 34 N. Y. 427; *Tracey v. Troy & Boston R. Co.*, 38 id. 433.

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\*NOTE.—The present law in New York is as follows: Sec. 4. "Sec. 32. FENCES, FARM-CROSSINGS AND CATTLE-GUARDS.—Every railroad corporation, and any lessee or other person in possession of its roads; shall, before the lines are opened for use, and as soon as it has acquired the right of way for its roadway, erect and thereafter maintain on the sides of its road, fences of the length and strength of a lawful division fence, with openings or gates or bars therein, at the farm crossings, for the use of the owner, and occupants of the adjoining land and shall also construct, where not already done, and hereafter maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs, from going upon its railroad. So long as such fences are not made or not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines, or cars, to any domestic animals thereon, but when made and in good repair, they shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section, but barbed wire shall not be used in constructing the same, and no railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs, from going upon its track from the adjoining land. Every adjoining land owner who, or whose grantor has received compensation for fencing the line of land taken for a railroad and has agreed to build and maintain a lawful fence along such line shall build and maintain such fence; and if such owner, his heir or assign, shall not build such fence, or if built shall neglect to maintain the same, during the period of thirty days after he has been notified so to do by the railroad corporation, such corporation may thereafter build and maintain such fence, and may recover of the person neglecting to build and maintain it, the expense thereof." Sec. 32, chap. 565, L. of N. Y. 1890, as amended by chap. 367, L. 1891.



Plaintiffs' agent drove a team to the mill and left it standing unattended at the platform and partly on the strip. The horses escaped, ran upon the railroad tracks, and were killed by a passing train. Under the exception contained in the statute which declares that "no railroad corporation shall be required to fence the sides of its road except when such fence is necessary to protect horses, cattle, sheep and hogs, from going on to the track of the railroad from the lands adjoining the same," defendant was not required to fence its road at the point in question. *Dolan v. N. D. & C. R. Co.*, 120 N. Y. 511.

The provision of the General Railroad Act requiring the erection and maintenance of fences along the sides of its tracks, imposes the duty upon every company to so fence its road unless a natural or artificial barrier exists which will prevent animals from reaching the track.

The defendant was one of five railroad companies whose tracks ran parallel for some distance with only sufficient separation to permit the passage of trains. The defendant's tracks were in the center. No fences had been built along the exterior of the outer tracks and there was no natural or artificial barrier.

The plaintiff's cattle strayed from the adjoining farm over to the defendant's tracks and were killed. The defendant was liable. The fact that fences would be dangerous to passengers of passing trains was no defense. *Kelner v. N. Y. C. & St. L. R. Co.*, 126 N. Y. 365, following *Shepard v. Buffalo & C. R. Co.*, 35 id. 641.

The defendant's railway passed in a deep rock cut adjoining land where the plaintiff's horse was pasturing. No fence at the top of the cut, whereby the horse fell into the cut and was killed. Defendant liable. *Graham v. President &c. D. & H. C. Co.*, 46 Hun, 386.

Distinguishing *Knight v. N. Y. & C. R. Co.*, 99 N. Y. 25.

**From opinion.**—"The plaintiffs, in a proper case, could invoke the aid of equity to enforce its performance (*Jones v. Seligman*, 81 N. Y. 190), or obtain mandamus (*People ex rel. Garbutt v. R. & S. L. R. R. Co.*, 76 id. 294), or maintain their action for damages if their freehold was rendered less valuable, or they were deprived of its use, because of defendant's neglect to maintain the fences. *Thomas v. Utica & B. R. R. Co.*, 97 N. Y. 245; *Leggett v. Rome, W. & O. R. R. Co.*, 41 Hun, 80. These various remedies imply that the plaintiffs as adjoining owners, are entitled to full protection to both their land and cattle from any injury resulting from neglect to maintain fences."

Defendant leased lands of its own adjoining its tracks, and it was under no obligation to fence such lands against the dangers of its railroad. The lessee was bound to take and use lands as he found them. There seems to be no American case in point, and the English authorities, under a statute similar to our own, are against the proposition. *Roberts v. Great Western Ry. Co.*, 4 C. B. (N. S.) 504; *Marfall v. South Wales*

R. Co., 8 id. 525; 2 Sher. & Redf. on Neg. 434; *Potter v. N. Y. C. & H. R. R. Co.*, 60 Hun, 313.

But see *Klock v. N. Y. Cent. & C. R. Co.*, 62 Hun, 291, where in a similar case, the defendant claimed that it was not obliged to fence additional land bought of plaintiff, and bounded by the Mohawk river; but the court held that the question was one of fact for the jury.

A colt in a pasture separated from the defendant's railroad by a river not fordable at that point, escaped from the pasture, crossed at a ford one-half mile below and finally came to the platform used for loading cars, passed through an opening required to be left unfenced for the convenience of shippers, and reached the track, went down it a distance of 500 feet to the bridge and was found dead on the bridge. Along the tracks for this distance of 500 feet, and about 100 feet in breadth, there was no fence on the river side, as that side was used for storing logs. Held that the place through which the colt passed was required for the approach of teams to the loading platform and that it was not the duty of the defendant to fence it. *Hyatt v. N. Y., L. E. & W. R. Co.*, 64 Hun, 542.

Citing *Dolan v. N. D. & C. R. Co.*, 120 N. Y. 591.

Where the side tracks were not a part of depot yards, or within the corporate limits of a town, railroad company was required to fence. *Toledo & C. R. Co. v. Franklin*, 159 Ill. 99.

Whether the convenience of the public requires a track to be unfenced, held a question of fact. Company was held not justified in omitting to erect a fence at a point 900 feet from its station in a village. *Cleveland & C. R. Co. v. Green*, 65 Ill. App. 414.

Beyond limits of station grounds, track must be protected by fence and cattle guards. *Terre Haute & C. R. Co. v. McCullough*, 65 Ill. App. 444.

So, exemption by reason of public convenience as to one side of its track, does not relieve railroad from its duty as to the other. *Cleveland & C. R. Co. v. Capoot*, 69 Ill. App. 163.

That a railroad overlaps a highway, does not relieve it of its statutory duty to fence, where there is room to do so. *Lake Erie & C. R. Co. v. Rooker*, 13 Ind. App. 600.

Defendant was "operating" its road without the statutory fences, where it carried material thereon for the purpose of its further extension. *Chicago & C. R. Co. v. Totten*, 1 Kan. App. 558.

That freshets may at times wash parts of a fence away, does not relieve a railway company of the duty of attempting to maintain one. *Wichita & C. R. Co. v. Hart*, 7 Kan. App. 554.

Where a village lot has a house and other buildings thereon it is improved land within a statute requiring a fence where road passes through "inclosed or improved land," though a portion on one side of the road is unimproved. *Osborne v. Canadian P. R. Co.*, 87 Me. 303.

Fences and cattle guards are required in incorporated cities and villages. *Croft v. Chicago &c. R. Co.*, 72 Minn. 47.

Where defendant fenced within its yard limit and put in a guard it was liable for failure to maintain it. *Hathaway v. Detroit &c. R. Co.*, 124 Mich. 610.

Failure to erect a fence and cattle guards at a distance of 1,500 feet from a switch yard was not excused by the fact that the track was crossed by a number of streets. *Nickolson v. Northern P. R. Co.*, 80 Minn. 508.

Defendant had burden of showing it could not maintain a fence at a given point without jeopardizing the lives of its employés. *Spooner v. St. Louis &c. R. Co.*, 66 Mo. App. 32.

That the adjoining premises are properly fenced, does not relieve a railroad from also fencing off a portion of its right of way, which it permits the public to use as a road. *Jones v. St. Louis &c. R. Co.*, 65 Mo. App. 442.

Whether a railroad was bound to fence at a given point, is a question of law for the court, and not of fact for the jury. *Fraysher v. Mississippi &c. R. Co.*, 66 Mo. App. 573.

Railroad must fence at such places about a station as may be fenced without danger or inconvenience to its employés or patrons. *Southern &c. R. Co. v. McKay*, (Tex. Civ. App.) 47 S. W. Rep. 479.

Must fence along a public highway. *Gulf &c. R. Co. v. Cole*, (Tex. Civ. App.) 35 S. W. Rep. 525.

It being the statutory duty of a railroad company to make farm crossing without request, due diligence after request was made was held not a proper issue. *San Antonio &c. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

Where a railroad track is 2 feet 2 inches above the street level, a question of whether it is "approximately even" therewith, under a statute requiring such tracks to be fenced, held to be for the jury. *Baltimore &c. R. Co. v. Cumberland*, 176 U. S. 232; aff'g s. c., 12 App. D. C. 598.

Statutory duty to construct cattle guards "wherever a fence may be necessary or proper," construed to extend to private crossings. *Russell v. Louisville &c. R. Co.*, 93 Va. 322.

It was a question of fact for the jury, whether an unfenced switch, adjacent to a highway, where stock was unloaded, 1400 feet from a depot, was within depot grounds. *Grosse v. Chicago &c. R. Co.*, 91 Wis. 482.

#### IN WHAT PLACES COMPANY IS NOT REQUIRED TO FENCE.

As to places where railway company need not fence. *Brady v. Rensselaer &c. R. Co.*, 1 Hud. 378.

Evansville &c. R. Co. v. Willis, 93 Ala. 507; Chicago &c. R. Co. v. Engel, 58 Ill. 381; Davis v. Burlington &c. R. Co., 26 Iowa. 549; Long v. Central Iowa R.

Co., 64 id. 657; *Peyton v. Chicago &c. R. Co.*, 70 id. 522; *Indianapolis &c. R. Co. v. Crandall*, 58 id. 365; *Indianapolis &c. R. Co. v. Quick*, 109 id. 295; *Cox v. Minneapolis &c. R. Co.*, 41 Minn. 101; *Hooper v. Chicago &c. R. Co.*, 37 id. 52; *Roberts v. Quincy &c. R. Co.*, 43 Mo. App. 287.

No duty to fence in the vicinity of the station or at places required to be kept open for convenience of the public or safety of its employes. *Cleveland &c. R. Co. v. Umphenour*, 63 Ill. App. 642; *Terre Haute &c. R. Co. v. Grissom*, 60 id. 114.

In an action for value of stock killed by train at a shed in violation of a city ordinance, the *de facto* limits of the city govern, and the question of its *de jure* limits cannot be raised. *Cleveland &c. R. Co. v. Dunn*, 63 Ill. App. 531.

Where an injury arose at a point where the company is not required to fence, the rules of liability would not be affected by the statute requiring fencing at that place, but would depend upon principles of law applicable if no statute existed. *Louisville &c. R. Co. v. Quade*, 101 Ind. 364.

*Pennsylvania &c. R. Co. v. Mitchell*, 124 Ind. 473; *Nance v. St. Louis &c. R. Co.*, 79 Mo. 196.

Whether cattle guards can be maintained without danger to employes, is a question of fact for the jury. *Chicago &c. R. Co. v. Clouch*, 2 Kan. App. 728.

A triangle adjacent to the track at the intersection of cross roads, where stops are made when necessary for passengers and freight traffic, held depot grounds that need not be fenced, though no building or agent is maintained. *Schueckloth v. Chicago &c. R. Co.*, 108 Mich. 1.

A point a mile from the depot, in a well settled district, held to be within depot grounds. *Rabidon v. Chicago &c. R. Co.*, 115 Mich. 390; s. c., 39 L. R. A. 405.

No fence required at a loading place in a timber district a mile and a half from any station. *Cornell v. Mauistee &c. R. Co.*, 117 Mich. 238.

A statute requiring a fence "on each side," construed to mean on the extreme limits of the right of way. *Gould v. Great Northern R. Co.*, 63 Minn. 37; s. c., 30 L. R. A. 590.

Statutory duty to fence at farm crossings, applies only to such as exist by the intersection of parcels of land owned at the time of its construction, and not such as arise by reason of subsequent acquisition. *Stumpe v. Missouri &c. R. Co.*, 61 Mo. App. 357.

No duty to fence at a switching point which would jeopardize employes. *Schafer v. St. Louis &c. R. Co.*, 65 Mo. App. 201.

A railroad is exempted as to fencing at a public crossing, whether

*de facto* or *de jure*. *Gill v. St. Louis &c. R. Co.*, 65 Mo. App. 445; *Jackson v. Kansas City R. Co.*, 66 Mo. App. 506.

For example, one in use by the public ten years though still unrecognized by the county court. *Carter v. Kansas City &c. R. Co.*, 69 Mo. App. 295.

Not required within switch limits, where it endangers lives and limbs of switchmen. *Ellis v. Mississippi &c. R. Co.*, 89 Mo. App. 241.

The reasonableness of switch limits and depot grounds, is for the jury. *Riley v. St. Louis &c. R. Co.*, 89 Mo. App. 375.

Necessary use of station yard, held sufficient excuse for omission of cattle guards at crossing within yard limits. *Pierce v. Andrews*, 13 Oh. C. C. 513.

A statute prohibiting the obstruction of private ways construed to relieve a railroad company from liability for failure to fence them. *Mobile &c. R. Co. v. Thompson*, 101 Tenn. 197.

Public necessity requires that railways should not be fenced along streets of a town, depots and contiguous grounds. *International &c. R. Co. v. Dunham*, 68 Tex. 231.

*International &c. R. Co. v. Cocke*, 64 Tex. 151; *R. Co. v. Schriener*, 6 Ind. 141; *R. Co. v. Rowland*, 50 id. 353; *R. Co. v. Kinney*, 8 id. 402; *Davis v. R. Co.*, 26 Iowa, 554; *Soward v. R. Co.*, 30 id. 552; *Soward v. R. Co.*, 33 id. 387; *Davis v. R. Co.*, 45 Mo. 473. See, also, *R. Co. v. Lull*, 28 Mich. 510; *Moses v. Southern &c. R. Co.*, 18 Ore. 385; *Galena &c. R. Co. v. Griffin*, 31 Ill. 303.

Statutory fence not required within switch limits. *Gulf &c. R. Co. v. Blankenbecker*, 13 Tex. Civ. App. 249.

For example along a spur switch used by the public to load and unload merchandise. *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. 228.

Portions of a city, which are regularly platted and partially occupied by dwellings, are not required to be fenced, and stock owner must show negligence. *San Antonio &c. R. Co. v. Yeager*, (Tex. Civ. App.) 43 S. W. Rep. 25.

Otherwise at such places about a station as may be fenced without danger or inconvenience to its employes or patrons. *Southern &c. R. Co. v. McKay*, (Tex. Civ. App.) 47 S. W. Rep. 479.

Statute requiring railway fences through enclosed lands, construed to include lands uninclosed with a fence, though insufficient to turn stock. *Kimball v. Carter*, 95 Va. 77; s. c., 38 L. R. A. 570.

A side track without depot building, where stops are regularly made for passenger and freight traffic, may be left unfenced for a reasonable distance. *Mills &c. Co. v. Chicago &c. R. Co.*, 94 Wis. 336.

But good faith in laying out depot grounds, does not relieve the company of liability for failure to fence beyond limits required by reasonable necessity for station purposes. *Cole v. Duluth &c. R. Co.*, 104 Wis. 460.

## XXI. Sufficiency of Fence.

The defendant had originally built for a land owner a fence four feet and upwards in height, and which, subsequently, in places had been allowed to remain broken down to the height of two feet and eight inches, and through this the plaintiff's cows had strayed on the track and were killed. The original height of the fence was sufficient evidence that the diminished height was insufficient, and no expert evidence was needed to justify a verdict for the plaintiff upon the ground that this barrier of two feet and eight inches was insufficient to turn peaceful cattle. *Leyden v. N. Y. C. & H. R. R. Co.*, 55 Hun, 114.

A bridge extended from the side of a highway crossing away therefrom to the distance of forty feet. The top was six feet above the water and was composed of ties seven and one-half inches apart, whereon a horse wandered from a highway and fell off. This was not a sufficient lawful cattle guard. *Han v. Newburgh, Dutchess & Conn. R. Co.*, 69 Hun, 137.

Knowledge gained by frequent use of a defect in a gate fastening due to lack of repair and not original construction, held to require submission of plaintiff's contributory negligence to the jury. *Magilton v. New York &c. R. Co.*, 11 App. Div. 373.

Under Idaho railway fencing statute, the company is required to fence on both sides of private land through which it passes. *Patrie v. Oregon Short-Line R. Co.*, (1d.) 56 Pac. Rep. 82.

A fenced strip of track several hundred feet long, with a cattle guard at one end and connecting at the other with unfenced depot grounds where there is no cattle guard, held negligent construction. *Wabash R. Co. v. Crews*, 65 Ill. App. 442.

Where defendant incorporates in its line, a fence already erected on the adjoining owner's land, it becomes liable for its proper construction and repair. *Wabash R. Co. v. Randol*, 69 Ill. App. 432.

A fence is sufficient, if it will turn ordinary stock or stock not usually breachy. *Leggett v. Illinois C. R. Co.*, 72 Ill. App. 577.

One that will turn unruly cattle not required. *Wabash &c. R. Co. v. Ferris*, 6 Ind. App. 30.

In fencing a crossing, the wing fences and cattle guard were drawn across the track beyond the edge of the highway instead of on the line of the highway. The company was held liable for cattle killed in the intervening space. *Sarber v. Chicago &c. R. Co.*, 104 Iowa, 59.

It was for the jury to say whether a gate was sufficient, which was without a fastening and required but a slight shake to open. *Kling v. Chicago &c. R. Co.*, (Iowa) 88 N. W. Rep. 355.

Company not obliged to build fence that will turn hogs. *Atchison &c. R. Co. v. Yates*, 21 Kas. 613.

A gate, with fastening lengthened out with a piece wire to make it reach the gate post, held defective. *St. Louis &c. R. Co. v. Kinnaman*, 9 Kan. App. 633.

Statutory cattle guards on division fences, are required to extend across entire right of way. *Grace v. Gulf &c. R. Co.*, (Miss.) 25 South. Rep. 875.

Railroad company's duty to provide statutory cattle guards held complied with if they are ordinarily sufficient for the purpose. Defectiveness of cattle guards for two months is sufficient to impute notice. *Sappington v. Chicago &c. R. Co.*, (Mo. App.) 69 S. W. Rep. 32.

A gate must be up to the same standard of efficiency in turning stock as the fence. *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

A fence, inclosing an adjoining field, is not a compliance with the statute. *Louisville &c. R. Co. v. Patton*, 104 Tenn. 40.

## ELECTRICAL APPLIANCES—INJURIES FROM.

The liability of a person using electrical appliances to one injured by the same depends primarily upon the question whether the former owes a duty to the latter to protect him therefrom, and this would be determined by the usual rules applicable to injuries arising under similar conditions from other causes. If it be established that such duty exist, the degree of care, required in the discharge thereof, would be such as a man of ordinary prudence would observe under the circumstances in view of the relation of the parties and the diligence exacted by such relation, the dangerous nature of the agency used, the time and place of such use and the probability of injury therefrom.

A person using electricity in a manner or form that may be dangerous to others, towards whom such obligation to use care exists, should employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element, and the probable consequences of its application for a particular purpose. *Ennis v. Gray*, 87 Hun. 355; *Giraudi v. Electric L. Co.*, 107 Cal. 120; *Godfrey v. The Streator R. Co.*, 56 Ill. App. 378; *Larson v. Central R. Co.*, 56 Ill. App. 263.

These cases, except the first, state that very great care is required in stringing electric wires on roofs (*Giraudi case*) and over streets for railway purposes (*Godfrey and Larson cases*.)

Injuries to persons using buildings from electric wires strung in or on the same. *Ennis v. Gray*, 87 Hun. 355; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120; 28 L. R. Ann. 596; *McMullan v. Edison Elec. L. Co.*, 13 Misc. 392; 68 N. Y. S. R. 126; *Clements v. Louisiana Elec. L. Co.*, 44 La. 692; 11 South. 51; *Sullivan v. Boston & A. R. Co.*, 156 Mass. 378; *Hector v. Boston E. L. Co.*, 161 id. 558.

Injury to telephone wires by electric wires. Relative rights of companies. *Central Pa. T. & S. Co. v. Wilkesbarre & W. S. R. Co.*, 11 Pa. County Court, 417; 1 Pa. Dist. R. 628; 6 Kulp. 383; *Hudson R. T. Co. v. Watervliet T. & R. Co.*, 61 Hun. 140; 135 N. Y. 393. See 121 N. Y. 397; *Cincinnati I. R. Co. v. City & S. T. Association*, 48 Oh. St. 390; *State, Wis. T. Co. v. Janesville St. R. Co.*, 87 Wis. 72; *Cumberland T. & T. Co. v. United Elec. R. Co.*, 93 Tenn. 492; 42 Fed. Rep. 273; *National Telephone Co. v. Baker*, 68 L. T. Rep. (N. S.) 283; 47 Albany L. J. 411; *Rutland E. L. Co. v. Marble City E. L. Co.*, 65 Vt. 377.

See *Taggart v. Street R. Co.*, 16 R. I. 668; *Nebraska Tel. Co. v. York Gas & E. L. Co.*, 27 Nebraska, 284; *Thompson Elect. SS.* 36, 39, 43; *Keasby Electric Wires*, 35.

See notes of cases, N. Y. Law Journal, vol. 14, pp. 1336, 1400.

Owner of telegraph pole was held not liable to pedestrian struck by defective insulator thrown from an arm, in the exclusive use of a licensee, by a third person while adjusting wire. *Quill v. Empire State Teleg. & C. Co.*, 159 N. Y. 1; rev'g s. c., 92 Hun. 539.

Electric wires not properly insulated are a public nuisance. *U. S. I. Co. v. Grant*, 55 Hun. 222.

Evidence of defective insulation and wiring which might have transmitted current to lamp which caused the accident, was held sufficient to



carry case to the jury. *Harroun v. Brush Electric Light Co.*, 12 App. Div. 126; appeal dismissed, 152 N. Y. 212; s. c., 38 L. R. A. 615.

The doctrine of *res ipsa loquitur* was applied, where the span wire of a trolley line, strung close to an electric light wire, burned, broke and injured a pedestrian. *Jones v. Union R. Co.*, 18 App. Div. 267.

Defendant's electric wire, carrying a deadly current, came in contact with an iron brace supporting the arm of a telegraph pole, and, through the worn insulation, communicated to it a charge which threw a lineman to the ground. Negligence and contributory negligence were for the jury. *Dwyer v. Buffalo General Electric Co.*, 20 App. Div. 184.

Evidence that defendant used a device which shut off the current the moment a wire broke and fell to the ground, was not sufficient to rebut the presumption of negligence arising from the fall of a wire which communicated two shocks to plaintiff. *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74; s. c., aff'd, 165 N. Y. 624.

City held liable for death of pedestrian caused by the loose end of a broken uninsulated wire of an abandoned patrol system hanging over a trolley wire into the street. Other fatalities had been caused by it and it was being removed at the time. *Twist v. Rochester*, 37 App. Div. 307; s. c. aff'd, 165 N. Y. 619.

Stringing an electric light wire on an elevated railway structure within eighteen inches of the stairway, was held negligent. In absence of proof of right of defendant to so use the structure, the fact that plaintiff was trespassing was no defence. *Wittleder v. Citizen's &c. Illum. Co.*, 47 App. Div. 410; s. c., aff'd, 50 id. 418.

Electric light company was held liable for death caused by shock received from awning frame in an attempt to extinguish a fire in the awning set by electricity communicated to the frame from feed wires of a disconnected lamp left so that the wind rubbed them against the supporting rod of the lamp, connected with the frame, and wore away the insulation. *Caglione v. Mt. Morris &c. Light Co.*, 56 App. Div. 191.

It was negligent to string a high current wire so that an ordinary wind could force it into contact with telegraph wires; not negligence, in one handling the latter, to fail to test for high voltage, in absence of knowledge that they had become so charged. *Pogue v. Electric Illum. &c. Co.*, 64 App. Div. 477.

Trolley company held liable to employé of lessee of wiring privileges on its system for injury from shock received from one of the lessee's wires charged from lessor's wire at a point where insulation had been worn by contact with an iron brace, which had lasted a year. *Wagner v. Brooklyn &c. R. Co.*, 69 App. Div. 319.

*Res ipsa loquitur*, applied, where pedestrian received a shock from step-

ping on a trolley car rail while crossing street. *Braham v. Nassau &c. R. Co.*, 72 App. Div. 456.

So, of a slot rail of an under-trolley. Defendant is entitled to a reasonable time to repair after notice of defect, actual or constructive. *Ludwig v. Metropolitan Street R. Co.*, 75 N. Y. Supp. 667.

Telephone company held not liable, where a chimney to which its wire was attached fell when the wire was struck by a derrick. *Leeds v. New York &c. R. Co.*, 32 Misc. 671.

It was negligence on the part of a telephone company to allow an insecurely fastened telephone wire to remain suspended across a dangerously charged trolley wire. *McKay v. Southern &c. Teleph. Co.*, 111 Ala. 337; s. c., 31 L. R. A. 589.

See, also, *Jones v. Finch*, 128 Ala. 217.

It is not necessary that there be actual contact where the wires are near enough to transmit a dangerous current. While the trolley company is not an insurer, it must use such care to prevent the escape of such a dangerous current as is commensurate with the great danger in such a case. *City &c. Street R. Co. v. Couery*, 61 Ark. 381; s. c., 31 L. R. A. 570.

Liability for injury to pedestrian in street from fall of brick, loosened by telephone wire fastened to chimney, was held to be determined by lack of care in making and maintaining the fastening, and not by the fact that it was of a dangerous character. *Southwestern Teleg. &c. Co. v. Beatty*, 63 Ark. 65.

Liability for violation of ordinance in stringing wires to a building was not altered by the fact that their position was changed by the breaking of an insulator. *Wales v. Pacific &c. Motor Co.*, 130 Cal. 521.

The care required in maintaining electric wires in streets is commensurate with the danger involved. *Denver &c. Electric Co. v. Simpson*, 21 Colo. 371; s. c., 31 L. R. A. 566.

An electric light company, furnishing power for light, was held not liable for damage from defective wiring done by another. *National Fire Ins. Co. v. Denver &c. Electric Co.*, (Colo. App.) 63 Pac. Rep. 949.

Doctrine of *res ipsa loquitur*, applied, where boy of twelve was shocked while attempting to replace an insulator on an uninsulated wire, fastened to a house fourteen inches below a bath room window. *Walters v. Denver &c. Light Co.*, (Colo. App.) 68 Pac. Rep. 117.

A telephone lineman, with knowledge that a telephone wire on the same pole with trolley wires might become charged through guy wires, and supplied with a tester, was negligent in failing to test. *Bergin v. Southern &c. Teleg. Co.*, 70 Conn. 51; s. c., 39 L. R. A. 192.

It was negligence, for trolley to fail to stop a contact of its wire with

a telephone wire, though caused by another's negligence. *Atlanta &c. Street R. Co. v. Owings*, 97 Ga. 663; s. c., 33 L. R. A. 798.

Both a telegraph company and an electric railway company are negligent, where snow has so weighed down their respective wires that they come in contact with one another, some having fallen and lain across the street for 13 days. *Western &c. Teleg. Co. v. Griffith*, 111 Ga. 551.

Company is not negligent, where, after discovering the dangerous sagging of a wire with reasonable promptness, it takes immediate steps to remedy it.

Notice to a motorman of the sagging of an electric wire so as to endanger travelers, is not notice to the company. *Read v. City &c. R. Co.*, 115 Ga. 366.

Pedestrian slipped on a defective sidewalk and fell against a live wire. An unsatisfied judgment against the electrical company for the injury did not bar action against the city. *Roodhouse v. Christian*, 158 Ill. 137; aff'd s. c., 55 Ill. App. 107.

Company operating street cars with electricity must use such high care as is commensurate with the danger.

Permitting an electric wire to hang in the street where people are passing raises a presumption of negligence. *Larson v. Central R. Co.*, 56 Ill. App. 263.

Trolley company, held not liable to telephone lineman shocked by a telephone wire he was stringing over the trolley system, when it came in contact with an uninsulated feed wire placed out of danger to pedestrians. *Calumet Street R. Co. v. Grosse*, 70 Ill. App. 381.

The escape of electricity injuring a passenger on a street car is *prima facie* evidence of negligence. *Eickhof v. Chicago &c. Street R. Co.*, 77 Ill. App. 196.

Electric light companies are charged with a very high degree of care and skill in delivering electricity. *Alton R. &c. Co. v. Foulds*, 81 Ill. App. 322.

The degree of care is commensurate to the dangers to be avoided. *Economy Light &c. Co. v. Stephen*, 87 Ill. App. 220; s. c. aff'd, 187 Ill. 137.

Failure to use insulation prescribed by ordinance is negligence. *Knowlton v. Des Moines &c. Light Co.*, (Iowa) 90 N. W. 818.

That an electric light wire lay upon the street in a broken and dangerous condition three weeks was sufficient to charge the company with knowledge and liability for failure to repair. *Kansas City v. Fife*, 60 Kan. 157.

An electric light company, permitting a house owner to string a telephone wire on its poles, was held not liable to one injured in the street by the fall of the telephone wire, which had set fire to the house when

charged from an uninsulated wire of the light company. *Consolidated Electric &c. Co. v. Koepp*, (Kan.) 68 Pac. Rep. 608; s. c., 64 Kan. 735.

Duty to use the highest degree of care, imposed upon an electric light company. Plaintiff not *per se* negligent, upon seeing a live burning wire likely to set a building afire, in trying to remove it with a wooden bat. *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150.

Perfect insulation of live wire is required at points where persons go for work or pleasure. Painter was justified in relying upon appearance of proper insulation of wire strung along face of building. *McLaughlin v. Louisville &c. Light Co.*, 100 Ky. 173; s. c., 34 L. R. A. 812.

Charge requiring highest degree of care exercised by prudent persons, held insufficient. Perfect protection is required at such points. *Overall v. Louisville Light Co.*, (Ky.) 47 S. W. Rep. 442.

See, also, *Schweitzer v. Louisville &c. Light Co.*, (Ky.) 52 S. W. Rep. 830; *O'Donnell v. Louisville &c. Light Co.*, 55 id. 202.

A gas company supplying a current was held liable for neglect of the company it supplied, to properly insulate its wires before turning on the current. *Thomas v. Maysville Gas Co.*, (Ky.) 56 S. W. Rep. 153.

Electric street railway was negligent in placing one of its guy wires in dangerous proximity to the cars of an adjoining steam railroad. *Erslew v. New Orleans &c. Co.*, 49 La. Ann. 86.

*Res ipsa loquitur*, applied to injury to pedestrian from broken telephone wire hanging over trolley feed wire into street. Evidence of such condition for two weeks, held sufficient to charge defendant with notice. *Western &c. Teleg. Co. v. Nelson*, 82 Md. 293; s. c., 31 L. R. A. 572.

Electric light company, held liable for the defective insulation of a high tension wire, where it entered a house above the roof of a projecting window. *Brown v. Edison &c. Illum. Co.*, 90 Md. 400; s. c., 46 L. R. A. 745.

Recovery not allowed where a mother placed her infant child within reach of a wire which she knew was or might be dangerous. *Cumberland v. Lottig*, (Md.) 51 Atl. Rep. 841.

Injury from electric wires to employes of other electrical companies in the course of their duties. *Illingsworth v. Boston E. L. Co.*, 161 Mass. 583; *Hector v. Boston E. L. Co.*, id. 558.

Electric light company held liable for injury to tinsmith from defective insulation of wires strung along face of building. *Griffin v. United Light Co.*, 164 Mass. 492; s. c., 32 L. R. A. 400.

*Reagan v. Boston &c. Light Co.*, 167 Mass. 406.

But not to a telephone lineman, who, without permission, attempted to string a telephone wire on a standard belonging to the light company on a roof. *Hector v. Boston &c. Light Co.*, 174 Mass. 212.

Cutting wires. When cutting electric wires is trespass. *Saginaw Union St. R. Co. v. Michigan Central R. Co.*, 94 Mich. 657.

Duty of electrical company to its employes while handling wires. *Kraatz v. Brush Electric L. Co.*, (Mich.) 3 Am. R. & Corp. Rep. 345.

Electric light company, held not liable for death of one going upon private premises in spite of warning sign of danger and coming in contact with a guy wire from a wire pole that had become charged without the company's knowledge. *McCaughna v. Orosso &c. Electric Co.*, (Mich.) 89 N. W. Rep. 73.

Verdict for plaintiff sustained, where he was injured by unexplained escape of electricity while sitting in wagon near an electric light pole. *Shultz v. Faribault &c. Electric Co.*, 82 Minn. 100.

That a wire carrying a deadly current over a street broke and fell thereon, is *prima facie* evidence of negligence. *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502.

A bright boy of seventeen was negligent *per se* in attempting to pick up an electric light wire with no other insulation than that made by his handkerchief. *Frauenthal v. Laclede Gaslight Co.*, 67 Mo. App. 1.

Boy of seventeen was not chargeable with negligence *per se* though he handled a wire, knowing it was charged with electricity, in spite of warnings, where others had handled it in his presence only a few moments before with impunity. *South Omaha Waterworks Co. v. Vocassek*, 62 Neb. 710.

Electric light company, held liable for death of patrolman caused by contact with reel used to raise and lower electric lights, placed on side of pole within easy reach. *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658; s. c., 32 L. R. A. 700.

The escape of electricity from a street railway to a horse on the street is *prima facie* evidence of negligence. *Trenton &c. R. Co. v. Cooper*, 60 N. J. L. 219; s. c., 38 L. R. A. 637.

Reasonable care, required to insulate electric light wires in an air shaft. *Anderson v. Jersey City &c. Light Co.*, 63 N. J. L. 387.

But, where plaintiff, simply to assure a fellow workman of safety, deliberately touches it, he cannot recover. *Anderson v. Jersey City &c. Light Co.*, 64 N. J. L. 664.

Recovery was denied to a lineman, who, after a broken electric light wire was tested and found dead, attempted to handle it with bare hands and was killed by a current turned into the wire by the restoration, at the power house, of a fuse that had burned out when the wire was broken. *Newark Electric &c. Co. v. McGilvery*, 62 N. J. L. 451; s. c. aff'd, 63 id. 591.

That an electric light wire was trailing broken on the sidewalk was

*prima facie* evidence of negligence. *Newark Electric &c. Co. v. Ruddy*, 62 N. J. L. 505.

An electric light company and a telegraph company are each bound to see that the uninsulated wire of one does not come in contact with the other so as to allow the insulation to wear off and the current to be transmitted from one to the other. *Hamilton v. Bordentown &c. Light Co.*, (N. J. L.) 52 Atl. Rep. 290.

Injury from wires hanging or lying in the street. *Haines v. Raleigh Gas Co.*, 114 N. C. 203; 19 S. E. 344; *Block v. Milwaukee St. R. Co.*, 89 Wis. 311; *Godfrey v. Streator R. Co.*, 56 Ill. App. 318; *W. U. T. Co. v. Thorn*, 64 Fed. Rep. 287; *Light Co. v. Orr*, 59 Ark. 215; *City Elec. Street R. Co. v. Connery*, 33 S. W. R. 426; *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.*, 87 Wis. 72; *Cook v. Wilmington City E. Co.*, 9 Houst. 306.

Failure to comply with ordinance requiring insulation of wires is *prima facie* evidence of negligence. *Mitchell v. Raleigh E. Co.*, 129 N. C. 166; s. c., 55 L. R. A. 398.

Highest degree of care, required to protect live wires in places where people are apt to come in contact with them. *Perham v. Portland &c. Electric Co.*, 33 Or. 451; s. c., 40 L. R. A. 799.

Reasonable care in repairing defect does not necessarily require sufficient force to promptly replace many wires that had been blown down in an unusual storm. *Boyd v. Portland &c. Electric Co.*, 37 Or. 567.

It was for the jury to say whether a boy of 11 was negligent in not seeing a suspended wire where he bent his head to keep the wind out of his face. He did not know of its presence though he saw a suspended wire at a pole 150 feet away the evening before. *Boyd v. Portland &c. Electric Co.*, (Or.) 68 Pac. Rep. 810.

It was for the jury to say whether defendant was negligent, where its wires were inspected every other day and, on the night of the storm when the accident occurred, were tested every half hour, and the most approved appliances failed to disclose a break. The wire had been down an hour. *Chapelon v. Portland &c. Electric Co.*, (Or.) 67 Pac. Rep. 928.

Electric light company, held liable for death of policeman killed by a live wire in the street while trying to move it out of the way of pedestrians with his mace. *Dillon v. Allegheny &c. Light Co.*, 179 Pa. St. 182.

Injury to persons on the street from wires. *Cook v. Wilmington City Electric Co.*, 9 Houst. 306.

The breaking of a trolley wire held not *prima facie* evidence of negli-

gence, where it frightened but did not touch plaintiff's horse. *Kepler v. Harrisburg T. Co.*, 183 Pa. St. 24.

Flames and sparks emitted from a point in defendant's wire, where insulation had been rubbed off by contact with a guy wire, for months, was sufficient to charge it with notice thereof. *Turton v. Powelton Electric Co.*, 185 Pa. St. 406.

Recovery denied to one, who, simply to show the safety of a wire screen he was told was charged with electricity, deliberately touched it. *Wood v. Diamond Electric Co.*, 185 Pa. St. 529.

As to liability of city for live wires in the street, see *Mooney v. Luzerne*, 186 Pa. St. 161.

In the absence of notice of the defective insulation of the wire on a house or the cause thereof, no recovery was allowed for death caused thereby. *Smith v. East End &c. Light Co.*, 198 Pa. St. 19.

Highest degree of care, required to protect dangerous wires, where people may be lawfully in proximity to them. *Weil v. Edison &c. Light Co.*, 200 Pa. St. 540.

Girl of eleven climbed out of a window in her house and went upon the jet of the adjoining house where she came in contact with wires of the tenant thereof. She was not allowed to recover from the company furnishing the current. *Keefe v. Narragansett &c. Lighting Co.*, 21 R. I. 575.

Falling of telephone wire on trolley wire and injury to horse therefrom. Electric R. Co. and Telephone Co. were both liable. *Electric R. Co. v. Shelton*, 89 Tenn. 423. See similar accident. *Block v. Milwaukee St. R. Co.*, 89 Wis. 371; *Godfery v. The Streator R. Co.*, 56 Ill. App. 378.

Where wires were 16 feet above the pavement, the fact that they were only two feet from a wooden awning without a railing and not used as a resort, was not negligence, there being no reason to apprehend any one would have occasion to go there. *Brush Electric &c. Co. v. Lefevre*, 93 Tex. 604; s. c., 49 L. R. A. 771.

An electric street railway is not an insurer of the safety of those using the street. *Citizen's R. Co. v. Gifford*, 19 Tex. Civ. App. 631.

In an action for injury by electric guy wire, the proper guide for the jury was declared to be the simple standard of ordinary care. *Honey Grove v. Lamaster*, (Tex. Civ. App.) 50 S. W. Rep. 1053.

Violation of ordinance as to insulation was held the proximate cause of shock received while taking down a dead wire charged by falling against a live one with defective insulation. *San Antonio Gas &c. Co. v. Speegle*, (Tex. Civ. App.) 60 S. W. Rep. 884.

Placing a heavily charged wire so near as to charge another running

near the sidewalk was proximate cause of injury to pedestrian. *International Light &c. Co. v. Maxwell*, (Tex. Civ. App.) 65 S. W. Rep. 78.

Defendant was negligent in allowing a wire to hang from one of its poles within reach of the sidewalk for two weeks, charged by another wire in contact with its live wire where the insulation was worn. *Wehner v. Lagerfelt*, (Tex. Civ. App.) 66 S. W. Rep. 221.

Negligence to string a heavily charged uninsulated electric light wire over an awning on which parties were apt to go to repair, paint, &c. *Rucker v. Sherman Oil &c. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 818.

Electric light company was held liable for death of lineman, due to defective insulation of its wires, while stringing wires of another company on poles used by them in common. *Newark Electric &c. Co. v. Garden*, 78 Fed. Rep. 74; s. c., 37 L. R. A. 725.

Brakeman knowing that his cars passed beneath a trolley wire, which crossed the track and sagged within a few feet thereof, was not allowed to recover for shock received. His ignorance of the danger of contact did not excuse his negligence in failing to avoid it. *Danville Street Car Co. v. Watkins*, 97 Va. 713.

A lineman, knowing that a wire might be charged, was negligent in not employing the testing apparatus with which he was provided. *Anderson v. Inland Teleg. &c. Co.*, 19 Wash. 575.

The presumption of negligence arising from the breaking and falling of an electric wire is met by proof that it was due to an accident, which no reasonable human care could have prevented. *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661; s. c., 39 L. R. A. 499.

See, also, *Huber v. La Crosse City R. Co.*, 92 Wis. 636; s. c., 31 L. R. A. 583.



## ELEVATORS.

Defendants operated a cotton mill, to the management of which they gave no personal attention, but intrusted it entirely to a general agent, who had full power. In the mill was an elevator, used by the employes in passing from one floor to another. This elevator became out of repair and unsafe, of which said agent had notice. He neglected to repair, and plaintiff, an employé, using the elevator in the course of her work, was injured by its fall. Held, that the defendants were liable. *Corcoran v. Holbrook*, 59 N. Y. 517, aff'g judg't for pl'ff, and rev'g order general term.

Section 16, chapter 625 of the Laws of 1871, amended by section 5, chapter 547 of the Laws of 1874, provides that doors on elevators shall be kept closed "by the occupant, etc., of the building having the use and control of the same." Where there are several occupants, the one whose use requires the operation and whose disuse permits closing the doors, must do so, so that it must appear by evidence who used it last to enable one injured to recover. *Harris v. Perry*, 89 N. Y. 308, rev'g 23 Hun, 244, and judg't for pl'ff.

By the negligence of the engineer, the platform of a grain elevator was raised until it struck against a beam; the rope broke and it fell, injuring the plaintiff, an employé on it. The apparatus was usual and the makers were experienced. There had been no previous trouble and there was no liability. *Stringham v. Hilton*, 111 N. Y. 188, rev'g judg't for pl'ff.

Citing *McCosker v. L. I. R. Co.*, 84 N. Y. 77.

In *Stringham v. Stewart*, 100 N. Y. 516, judgment of general term affirming nonsuit was reversed upon the ground that by admission on the trial the elevator was not sufficient to carry passengers, that it was operated by a negligent system and that if the engineer was negligent, so was the defendant, and that case should have been submitted to the jury.

The omission of the owner of a building in the city of New York to comply with chapter 547 of the Laws of 1874, that hoisting elevator shafts shall have railings and trap door is *prima facie* evidence of negligence. The plaintiff went in the wrong door on his own business and did not look to see anything. Under the law, the owner of the elevator must not wait for the superintendent of buildings to prescribe plans but must procure them from him. For the jury. *McRickard v. Flint*, 114 N. Y. 222; aff'g 13 Daly, 641, and judg't for pl'ff, s. c., 97 N. Y. 641.

An elevator in a building need not be approached with caution as a place of danger, and if the door be opened by an attendant, one may enter without stopping to look or listen or examine.

A boy, not shown to have been in defendant's service, opened the door, but, the elevator not being in place, caused the plaintiff to fall. Judgment for plaintiff affirmed. *Tousey v. Roberts*, 114 N. Y. 312, aff'g 21 J. & S. 446, and judg't for pl'ff.

An employé, coming up from the hold of a vessel in an elevator, was caught between the elevator and the combing of the hatch. There was room enough for him to stand on the elevator without exposure to danger and the evidence did not permit the inference that he used proper precautions. It was error to charge that the jury could assume in the absence of evidence, that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the absence of known danger. *Riordan v. Ocean S. S. Co.*, 124 N. Y. 655, aff'g order general term, rev'g judg't for pl'ff.

Distinguishing *Galvin v. Mayor*, 112 N. Y. 223.

The omission of safety appliance upon a freight elevator, never carrying passengers, from the well of which the master excludes his servants, is not negligence.

A part of an elevator fell and wedged the platform of the elevator against the walls, so as to stop it. This had happened before, but the difficulty could have been removed without danger to anybody by reversing the movement of the cable. From neglect to do this, the platform fell and a part of the apparatus shot out of the well and injured the plaintiff who was at work on one of the floors. Held that the defendant was not negligent and that the proximate cause of the injury to the plaintiff was the negligence of the engineer, a co-servant. *Kern v. De C. & D. S. R. Co.*, 125 N. Y. 50, rev'g judg't' for pl'ff.

There was evidence that the drum of the elevator would hold the chain if wound tight, but that through the improper revolving of the drum the chains wound loosely and thus got off the shaft, causing the elevator to tip and an employé was thereby thrown down the elevator hole. Elevator had been in use six years and was properly inspected by owner and manufacturer, in the absence of notice of defect. The master was liable. *Hart v. Naumburg*, 123 N. Y. 641; rev'g s. c., 50 Hun. 392.

Passenger in an elevator without doors, grasped the grating enclosing the shaft and was drawn between the elevator and the side of the shaft. Nonsuit was sustained. *McGrell v. Buffalo &c. Build. Co.*, 153 N. Y. 265; rev'g s. c., 90 Hun. 30.

**From opinion.**—"While it was the defendant's duty to provide a safe and suitable car, appliances and other machinery for the operation of its elevator and for the accommodation of its passengers and to exercise strict diligence in that respect, still the law did not impose upon defendant the duty of providing for their absolute safety, so that they should encounter no possible danger or meet with no casualty in the use of the appliances provided. (*Dongan v. Champlain*

Transportation Co., 56 N. Y. 1; Crocheron v. N. S. S. I. F. Co., 56 N. Y. 656; Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; Loftus v. Union Ferry Co., 84 N. Y. 455; Lallin v. Buffalo & S. W. R. Co., 106 N. Y. 136; Morris v. New York C. & H. R. R. Co., 106 N. Y. 678; Frobisher v. Fifth Ave. Transportation Co., 151 N. Y. 431). "It is said that the foregoing authorities have no application to the case, but that the defendant was bound to exercise the utmost care and diligence and was liable for the slightest neglect which human prudence and foresight might have guarded. It may be that, as to the machinery and appliances with which the elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and that he is, in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery, but, as to the surroundings and other structures forming a part of the elevator plant, where less danger is to be apprehended, we think the rule is less strict and the doctrine of the cases sighted applies. In the latter case, the rule is satisfied with that degree of care which a reasonably prudent man would exercise. This is considered in some of the cases to which we have already referred. The requirement of the greater degree of care is dependent, not so much upon the actual apprehension of danger as upon the consequences likely to result from a defect in the machinery and appliances. In cases where less serious results are to be expected and in cases where danger is not to be apprehended, if due and proper care is observed by the passenger, the owner is responsible only for the want of ordinary and reasonable care. (Kelly v. Manhattan R. Co., 112 N. Y. 443; Miller v. O. S. S. Co., 118 N. Y. 199, 211.) In this case no such serious results were to be expected from any defect or insufficiency of the bars or grating, and, besides, with the exercise of due and proper care on the part of the passenger riding in its elevator, no danger of such an accident could have been apprehended and no such injury would have occurred. Hence the defendant is responsible only for want of ordinary and reasonable care."

Owner had provided a chain fastened on one end and hooked to a staple as a guard to protect parties from falling into a freight elevator shaft. The chain was a sufficient compliance with a statutory requirement of "a substantial railing," and owner was not liable for accident caused by tenant leaving chain down. *Malloy v. New York &c. Asso.*, 156 N. Y. 205; s. c., 41 L. R. A. 487; rev'g s. c., 13 Misc. 496.

*Res ipsa loquitur*, applied to fall of an elevator in an office building. Owner of such building held not a common carrier of passengers, as to employes of tenants, and his duty confined to reasonable care. *Griffin v. Manice*, 166 N. Y. 188; rev'g s. c., 47 App. Div. 70.

**From opinion.**—"In determining the correctness of the rule laid down by the trial court," (that governing common carriers of passengers), "the relation of the parties, which I think not controlling on the application of the maxim '*res ipsa loquitur*,' is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But

the defendant was not a common carrier and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as owner of the property, is deemed to have extended to all, who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering. (2 *Sherman & Redfield*, sec. 704; *Beck v. Carter*, 68 N. Y. 283). But 'the measure of his duty is reasonable prudence and care.' (*Larkin v. O'Neill*, 119 N. Y. 221; *Hart v. Grennell*, 122 N. Y. 371). If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator no doubt involves danger, and, if accident occurs, it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings."

Plaintiff, at dusk, entered an unfinished building, with which he was familiar, to get his pay. To get to the office he crossed over an elevator standing at the floor. On his return, he fell into the shaft, the elevator having in the meantime been removed. Judgment for plaintiff was reversed. *Kennedy v. Friederich*, 168 N. Y. 379; rev'g s. c., 45 App. Div. 631.

An employé unnecessarily crossed the bottom of an elevator shaft and was struck by a piece of iron negligently allowed to fall from the elevator. Verdict for plaintiff was set aside. *Burk v. Edison &c. Electric Co.*, 89 Hun. 498.

An elevator was of a plan approved by long use; its selection was carefully considered by the defendant and was placed in the building by manufacturers of large experience and high reputation; it was made of the best material and had been in daily and successful use without accident or interruption or reasonably caused apprehension of defect. It suddenly fell and injured the plaintiff, who was defendant's employé. No liability. *Kaye v. Rob Roy Hosiery Co.*, 51 Hun. 519, rev'g judgt for pl'ff.

Two of the defendant's employés were on a freight elevator on which persons were, by a sign at the entrance, forbidden to ride. The men tried to start the elevator but this was prevented by a brick wedged between the side of the elevator and the wall; the plaintiff told his companions to remove it, and, this being done, by reason of the slack in the rope occasioned by the effort to start it, the elevator fell eight feet and the plaintiff was injured. The device known as a clutch would have prevented the falling. The defendants were tenants and the accident happened on the first day of their possession. The two defendants were not negligent in not observing the absence of the clutch. The plaintiff,

being three years in this country, was considered able to read the notice as to the use of the elevator where the accident occurred. *Hanson v. Schneider and others*, 58 Hun, 60, aff'g judg't for def't on nonsuit.

The deceased, working at the bottom of an elevator shaft, put his head into the shaft in an effort to load a heavy grindstone upon the elevator platform and was struck by an oil barrel standing in the upper room of the mill which was upset by the jarring of the machinery and fell into and through the shaft. There were not self-closing doors to the shaft as required by ch. 462, L. 1887. The failure to furnish the doors was *prima facie* evidence of negligence, and the alleged contributory negligence of the workmen, in not placing a bar which would have prevented the barrel from falling, should have been submitted to the jury, as well as the question whether the deceased had knowledge of the danger likely to arise from the barrel. The act of leaving the barrel where it was, was an act of the master's and affected the safety of the place. *Freeman v. Glens Falls Paper Mill Co.*, 61 Hun, 125, rev'g judg't for def't on nonsuit.

Hoisting a sale in an elevator by signals to engineer, if manufacturers and engineer regard that as the safest, is not negligent. *Murphy v. Hays*, 68 Hun, 450.

Boy leaned against chain across entrance to shaft of elevator, on which he had no right to ride, and was injured by the chain giving way; boy was negligent and could not recover although the hook that fastened the chain was defective. *Knor v. Hall Steam Power Co.*, 69 Hun, 231, rev'g judg't for pl'ff.

It was the duty of plaintiff's intestate to place a barrier to close the entrance to the shaft of an elevator on upper floor; he did not do so, whereupon several empty barrels, temporarily placed on such floor, were disturbed by the jarring of the mill machinery, rolled into the shaft and fell upon deceased while he was loading the elevator on the lower floor. Verdict for defendant sustained. Section 8, chapter 462, Laws of 1887, requiring defendant to maintain a trap or automatic door at elevator opening, did not release plaintiff from showing that there was no contributory negligence on the part of the deceased. It was also held that the deceased, having full knowledge of appliances, assumed the risk. *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun, 530, aff'g judg't for def't; aff'd, 112 N. Y. 639.

While an elevator, below the level of the floor, was stopped for repairs, the door to the shaft was left open, and a man was stationed there to pass in tools and to guard the doorway, when a mail carrier, on his rounds, rushed to the shaft door, crowded past the man, fell down the shaft and was injured. The man at the shaft gave no warning and made

no resistance against the passage of the deceased, and it did not appear that he had any means of knowing why the man was stationed there. The question was for the jury. *Morrison v. Met. Tel. Co.*, 69 Hun, 100, rev'g nonsuit. The plaintiff thereafter recovered and the judg't was aff'd, 72 Hun, 194; aff'd, 144 N. Y. 703.

Boy of eight, negligent *per se* in putting his head over the gate of the elevator and into the descending car in spite of warning. *Guichard v. New*, 9 App. Div. 485.

That there existed defects in an elevator apparatus of which the owner knew but which took no part in the accident did not affect his responsibility. *Sellers v. Dempsey*, 26 App. Div. 22.

Ashman, in replacing emptied barrels back on an elevator, running from the cellar to the sidewalk, put one foot on the platform thereof when a cable gave way. *Res ipsa loquitur* held to apply, and the duty of ordinary care as to elevators, to embrace reasonable inspection. *Kennedy v. McAllaster*, 31 App. Div. 453.

Negligence was for the jury, where operator, by a second pull of the controlling cable, shut off the power and released the car, which fell and injured plaintiff riding on the car to assist operator in storing goods delivered by the former. *Miller v. Brewster*, 32 App. Div. 559.

Whether the use of elevator shaft door, shutting automatically, and uncontrollable when released by operator by taking his foot from a button in car floor, is negligence, is for the jury. *Auld v. Manhattan Life Ins. Co.*, 34 App. Div. 491; s. c. aff'd, 165 N. Y. 610.

Not negligence *per se* to lean against a substantial wooden bar used as a guard to an elevator shaft without knowledge that it was insecure. *Weiss v. Jenkins*, 39 App. Div. 567.

An elevator loaded with passengers was stuck between two floors by a cloth tangled in the machinery. The engineer, in manipulating the cables in an attempt to extricate it, slipped the governing cable from its pulley and the car fell. It was not error to charge that defendant's duty was the "highest degree of care and skill." *Savage v. Bauland Co.*, 42 App. Div. 285.

**From opinion.**—"In the case at bar, the danger to be apprehended, if control of the car was lost, was great. The car was heavily laden with human beings and was suspended between the second and third floors above the basement. If it fell and the safety appliances failed to work, there was every reason to believe that many of the passengers would be seriously injured, and the degree of care which the defendant was bound to exercise was measured by the danger which was to be apprehended from the circumstances as they were disclosed to the defendant. We are of opinion that the evidence was sufficient to justify the conclusion of the jury, if the rule of law laid down was correct; and upon this point we are satisfied that the learned trial court was not in error. The defendant

could not permit the elevator car to get beyond its control where it had the means and the opportunity to prevent it, under the circumstances of this case, and rely upon its safety appliances to protect the persons in the car. It owed these passengers a higher duty than trying experiments; it should have taken every precaution reasonably possible, and, having failed in this duty, it must answer in damages to those who have suffered through its negligence."

Where it appeared that the elevator shaft was so constructed that the elevator rope which started the car could be reached from any floor, the operator was negligent in leaving the car while passengers were within it. *Ingrafia v. Samuels*, 71 App. Div. 14.

The burden imposed by the application of the rule of *res ipsa loquitur* to the unexplained fall of an elevator was removed by proof that it was purchased by a reputable maker, was in charge of a competent engineer and operator, properly inspected and worked properly before and after the accident. *Hubener v. Heide*, 73 App. Div. 200.

Owner of manufacturing establishment need only provide enclosure for the shaft under N. Y. L. 1887, chap. 462, sec. 8, amended Laws 1886, chap. 409, after inspection has disclosed that it is necessary to protect life and limb. *Boehm v. Mace* (C. P.) 28 Abb. New Cases, 138; 18 N. Y. Supp. 106.

The owner of an elevator is not bound to so provide for the safety of passengers that they shall encounter no possible danger and meet with no casualty in the use of the elevator, and although the car might have been constructed, with reasonable expense, so that an unusual, unforeseen and apparently impossible accident could not have happened, yet this will not render the owner liable. *Egan v. Berkshire Apartment Association* (C. P.) 31 N. Y. S. R., 545; 10 N. Y. Supp. 116.

Where, if the plaintiff had looked, he would have seen and known of the condition of a hoistway no recovery was allowed. *Brewster v. Mattison*, 10 Daly, 336.

Elevator man unloading a vessel should keep machinery in so reasonably safe and secure a condition and operate the same as not to injure employes engaged in sweeping the floors of the vessel. *Minor v. Clark* (Sup. Ct.) 28 N. Y. S. R., 184; 18 N. Y. Supp. 616.

Owner is not liable to employe for a contractor injured on an elevator operated by defendant's employe, without her knowledge and authority, unless another proper elevator had been furnished. *Ferris v. Aldrich*, 47 N. Y. S. R., 40; 19 N. Y. Supp. 353.

Boy 15 years of age was standing beneath elevator when operating it; it fell by the breaking of the rope which was so worn that casual inspection would have shown its defective condition. Owner was liable. *Krey v. Schlusser*, 42 N. Y. S. R., 917.

A person stepped into the well of an elevator, the door being open and the elevator boy nodding beside it. For jury. *Davidson v. Sloan*, 49 N. Y. Super. Ct. 304.

A blind man, by mistake, entered a door and fell down a hatchway. He could not recover without proving negligence. *Osherbank v. Gardiner*, 49 Sup. Ct. 263.

Elevator to floor, occupied by different tenants, was left open whereby injury ensued. Action against a tenant, in the absence of proof, that he left it open or used it exclusively, was not maintained. *Donnelly v. Jenkins*, 9 Daly 41.

A boy sent to help load an elevator undertook to ride thereafter upon it with its load, and, on account of his heel projecting over the platform, he was injured. The elevator was solely for hoisting freight and was in good repair and had been in use for eight years without accident. The complaint should have been dismissed. *Hochmann v. Moss Engraving Co.*, 4 Misc. 160, rev'g non-suit.

Where the elevator had been built fourteen years and out of use for a year, it was not error to charge that ordinary care might involve unusual inspection. *Stott v. Churchill*, 15 Misc. 80; s. c. aff'd, 151 N. Y. 692.

Owner was not liable for defect in piston rod, not discoverable in a reasonable and careful search according to the best known practicable tests. *Treadwell v. Whittier*, 80 Cal. 514.

A plaintiff, a customer, injured through the fall of an hydraulic elevator, operated by defendants in their store, in which he was being carried as a passenger, need only prove that he sustained injury by the breaking of the machinery, and that such machinery was under control and management of defendants, in order to raise a presumption of negligence.

Defendant was to be treated as carrier of passengers, with same duties and responsibilities as to care and diligence as other carriers of passengers, by stage coach or railway, and must use utmost care and diligence of very cautious persons, as far as human care and foresight can go, and is liable for slightest neglect. *Treadwell v. Whittier*, 80 Cal. 514.

To same effect is *Goodsell v. Taylor*, 41 Minn. 207.

Ordinance requiring elevator shafts to be protected, held valid and admissible on question of negligence. *Shayer v. Lowell*, 134 Cal. 357.

See, also, *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Man put his head through opening in door to elevator shaft and was



killed. No recovery on account of contributory negligence. *Mau v. Morse*, 3 Colo. App. 359.

Owner was not liable for injury to tenant attempting to operate defective elevator, though forbidden to do so. *Dashiell v. Washington Market Co.*, 10 App. D. C. 81.

See, also, *Hansen v. State & Co. Build. Co.*, 100 Iowa, 672.

Where fire patrol, breaking in building at time of fire, was injured by fall of a weight on elevator. *Gibson v. Leonard*, 37 Ill. App. 344; 143 Ill. 182.

Where children are allowed to be about the premises, an owner is bound to protect them by guarding the shaft, as a moving elevator is an attraction to children. *Siddall v. Jansen*, 168 Ill. 43; rev'g s. c., 67 Ill. App. 102.

The rules applicable to carriers of passengers in general, apply to passenger elevators. *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222; aff'g s. c., 70 Ill. App. 166.

Cables pulled out at the same time defective safety apparatus failed. Both were the proximate cause of fall of elevator. *McGregor v. Reid & Co.*, 178 Ill. 464; rev'g s. c., 76 Ill. App. 610.

See, also, *Western & Co. Teleg. Co. v. Woods*, 88 Ill. App. 375; *Springer v. Ford*, id. 529; *Field v. French*, 80 id. 78.

The care required in their operation, is the highest degree that is practically consistent with their efficient use. There is no analogy between the case of an elevator approaching a landing and a railroad crossing. The passenger may enter without stopping to look and listen or make examination when the door is thrown open. *Chicago & Co. Build. Co. v. Nelson*, 98 Ill. App. 189; s. c. aff'd, 197 Ill. 334.

Owner of factory must keep guard or barrier around an elevator shaft, as regards persons rightfully entering building. *Gibson v. Sziepienski*, 37 Ill. App. 601.

Ordinary care, the rule applied to freight elevators. *Springer v. Ford*, 88 Ill. App. 579.

Plaintiff, attempting to force door open and board an elevator in motion, was denied recovery. *Green v. Young Men's & Co. Assn.*, 65 Ill. App. 459.

It was negligence to leave the door to a passenger elevator shaft open and unguarded. *Haymarket Theatre Co. v. Rosenberg*, 77 Ill. App. 183.

See, also, *Colorado & Co. Inv. Co. v. Rees*, 21 Colo. 435; *Rosenbaum v. Shoffner*, 98 Tenn. 624.

The liability of the constructor of an elevator in store runs to the proprietor only and not to his customers. *Field v. French*, 80 Ill. App. 78.

That an elevator started up while a passenger was in the act of alighting was *prima facie* evidence of negligence. *Franklin Printing &c. Co. v. Behrens*, 80 Ill. App. 313.

*Hartford Deposit Co. v. Sollitt*, 172 Ill. 222.

Absence of safety appliances on elevator used for passengers held evidence of negligence. *Morris v. O'Brien*, 81 Ill. App. 202.

Safety appliances need not be provided for freight elevators not intended to carry passengers. Ordinary care, the measure of duty on such elevators used to carry employes to and from work. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642.

Negligence to leave door to elevator well open when hallway leading thereto was dark. *People's Bank v. Morgotofski*, 75 Md. 432.

Action by servant to recover for injury by fall of an elevator, upon which plaintiff was ascending. Question whether any precautions to prevent men from injury on the elevator were required and whether defendant's direction to foreman to warn men against it was sufficient, was for the jury. *Avilla v. Nash*, 117 Mass. 318.

A policeman, entering an open door of a building at night, fell down an elevator which was without statutory railing, and recovered. *Parker v. Barnhard*, 135 Mass. 116.

A hotel proprietor was not liable for injury to a passenger by the fall of an elevator with proper safety appliances and operated with care. *Shaddock v. Rand*, 142 Mass. 83.

In such cases, even where statute prescribes precautions, the plaintiff must show authority to be on the premises and that he was exercising care and that the defendant did not. *Gordon v. Cummings*, 152 Mass. 513.

Boy on errand to a building entered an elevator, although on previous occasions warned not to do so and although confronted by notice in elevator "This elevator is for freight only and not for passengers," and, operating it himself, went up to room above where he left elevator; after five minutes he came back in a hurry and opened the elevator well, heard some one speak to him, turned around quickly toward the speaker, did not look at the well or see it, but supposing elevator was there tried to step on it. Elevator had been lowered and boy fell. Boy was negligent and did not recover. *Patterson v. Hemenway*, 148 Mass. 94.

Employe riding on an elevator, against rules and without knowledge of owner that elevator was so used, cannot recover. *McCarthy v. Foster*, 156 Mass. 511.

When the statute provides as to elevators that some device, approved by the inspector of factories, shall be provided that will be "securely held in the event of accident" does not require a device that will always

surely and securely hold the car, but a device to be approved by the inspector. *Bourgo v. White*, 159 Mass. 216.

It was *per se* negligent to put one's head into the shaft to shout for the elevator. *Ramsdell v. Jordan*, 168 Mass. 505.

Owner was not liable to stranger, who, ignorant of the use of elevators, and without any implied invitation, fell into the well through an open elevator door. *McCarrel v. Sawyer*, 113 Mass. 540.

*Res ipsa loquitur*, held not to apply where passenger was injured by the sudden starting of elevator, due to fall of operator when his stool was jerked from under him by the janitor who was riding in the car. *Gibson v. International Trust Co.*, 117 Mass. 100.

Where a freight elevator is marked "danger," one seeking to enter without permission, cannot complain that the shaft was not guarded. *Bennett v. Butterfield*, 112 Mich. 96.

Owner of freight elevator knowing of actual defects, must notify one invited to ride. *Hall v. Murdock*, 114 Mich. 233.

Lessor, retaining control over an elevator and bound to keep it in repair, is liable for failure to do so without notice. Lessee is not chargeable with notice of certain defects by the fact that he has knowledge of other defects which would not cause the injury. *Olson v. Schultz*, 67 Minn. 494; s. c., 36 L. R. A. 190.

Statute, imposing the duty of guarding wheel holes and elevator wells, construed to devolve upon the owner of the building before leasing it. *Tredt v. Wheeler*, 70 Minn. 161.

Negligence, in allowing a 15-year-old boy to operate a shaky uninclosed elevator in shafts with niches at landings large enough to admit a man's body, was for the jury. *Lee v. Knapp & Co.*, 137 Mo. 385.

Rules regulating degree of care required of common carriers of passengers, applied to operators of elevators. *Lee v. Knapp & Co.*, 155 Mo. 610.

Employé, aged ten, slipped while opening elevator door, when door could safely have been opened, negligence was not inferable from this nor from the fact that another boy of twelve years was operating the elevator. *Smillie v. St. Bernard &c. Store*, 47 Mo. App. 402.

It was negligence, after leaving an elevator for a few minutes, to walk backwards into the shaft without looking to see if the elevator was there still. *Smith v. Van Seiver*, 58 N. J. L. 190.

Boy of 16 or 17, familiar with the surroundings and knowing that the shaft guard had been temporarily removed, was *per se* negligent in putting his head into the elevator shaft to see if his employer was there. *Knapp v. Jones*, 50 Neb. 490.

Where a boy, after his legitimate use of an elevator is finished, re-

mains in it for amusement he is a trespasser, and cannot complain of injury, in the absence of willfulness. *Hinds v. Breckenridge Co.*, 16 Oh. C. C. 12.

An elevator in a store, necessarily used by delivery boys about their duty, must be kept in a condition of reasonable safety. *Strawbridge v. Bradford*, 128 Pa. St. 200.

The same degree of care is required of a carrier of passengers by an elevator as of other carriers of passengers. *Riland v. Hirschler*, 7 Pa. Super. Ct. 384.

One employed to load, ride on, and unload an elevator is not *per se* negligent in assuming that it is safe. *Mulvey v. Rhode Island &c. Works*, 14 R. I. 204.

Fall of an elevator is *prima facie* evidence of negligence. *Ellis v. Waldron*, (R. I.) 188; 33 Atl. Rep. 869.

Operator of an elevator from a cellar to the sidewalk is negligent in not protecting those passing on the street by guarding the opening. *Pawtucket v. Bray*, 20 R. I. 17.

Lessor not liable for injuries on elevator under sole control of lessee. *Hanson v. Beckwith*, 20 R. I. 165; s. c., 38 L. R. A. 716.

Opening the door before reaching the floor was not an invitation to alight before the elevator had reached it and stopped. *Bullock v. Butler Exch. Co.*, (R. I.) 46 Atl. Rep. 273.

The same degree of care is required of a carrier of passengers by an elevator as of other carriers. *Southern Build. &c. Asso. v. Lawson*, 97 Tenn. 367.

Leaving a shaft, in close proximity to where a customer is obliged to inspect goods, without a guard was negligence. *Rosenbaum v. Shoffner*, 98 Tenn. 624.

Landlord who runs an elevator for the use of his tenants and their visitors, becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants. *Marker v. Mitchell*, 54 Fed. Rep. 637.

Operator, after opening door, told intending passenger to "wait a minute," and attempted to close it again while he brought car up even with floor. The passenger, by stumbling against him, started the car and was thrown into the well. Negligence was for the jury. *Oberndorfer v. Pabst*, 100 Wis. 505.

## ESTOPPEL.

The negligence of one who, by mistake, pays another a sum of money to which he is not entitled does not prevent an action to recover it. *Lawrence v. American National Bank*, 54 N. Y. 432.

*The Kingston Bank v. Eltinge &c.*, 40 N. Y. 391; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 237; *The Union National Bank of Troy v. Sixth National Bank, &c.*, 43 id. 452; *Duncan v. Berlin &c.*, 46 id. 685; *Waite v. Leggett*, 7 Cow. 195; *Kelley v. Solari*, 9 M. & W. 54; *Marriott v. Hampton*, 2 Smith's Leading Cases, 403, notes.

A bank is not bound to know the handwriting or the genuineness of the filling up of a check drawn upon and paid by it, but is legally concluded only as to the signature of the drawer and its own certification. *Price v. Neal*, 3 Burr. 1355; *Nat'l Park Bank &c. v. Ninth Nat'l Bank &c.* 46 N. Y. 77; *Mather v. Lord Naidstone*, 18 C. B. 273.

When, therefore, a bank has paid by mistake to a bona fide holder a certified check, which, after certification, had been fraudulently altered by raising the amount, it can recover back the sum thus paid, unless such holder has suffered loss in consequence of a mistake. A mistake, in recognizing a forged instrument as genuine is binding only when the forgery is such that it ought to have been detected by a bare inspection of the instrument, without reference to anything outside of it, not even to the memory of the party as to the obligations he has issued. Where there is an alteration in the body of an instrument, the recognition of the altered instrument as genuine is only binding upon the party who made the body of the instrument, as well as the signature thereto. *National Bank of Commerce in New York v. National Mechanics' Banking Association &c.*, 55 N. Y. 211.

Although a party paying forged paper without an opportunity of inspection may recover the money back, yet he must, when such opportunity occurs, make the inspection and use diligence to advise the person receiving the money of the forgery, or be liable for the damage. *Allen v. Fourth National Bank*, 59 N. Y. 12.

Distinguishing *Price v. Neal*, 3 Burr. 1351; *Goddard v. Merchant's Bank*, 4 N. Y. 147.

A person wrongfully obtained a draft and had it certified, then raised it and changed the date. The drawee's agent, the paying teller, after payment on the draft had been stopped by the drawee, told the plaintiff, who was about to take it, that the certification was correct. Defendant was liable. *Clews v. Bank of N. Y. N. B. Association*, 114 N. Y. 70; demurrer to complaint overruled, 8 Daly 476; judgment for plaintiff on verdict reversed 89 N. Y. 418; nonsuit reversed, 105 id. 398; judgment for plaintiff affirmed 114 id. 70.

Distinguishing *Security National Bank v. National Bank*, 67 N. Y. 458, which was not for negligence but on contract of certification.

See *Bills, Notes, &c.*, p. 166.

A bank depositor is not estopped by the retention of the account stated by the bank from showing that some of the checks paid by it were forged, where the delay is accounted for by showing that in the ordinary course of business the book and vouchers were given to the depositor's bookkeeper, who had forged the checks, and that he availed himself of this opportunity to conceal the forgery.

To constitute negligence on the part of the depositor in such a case it must be shown that the agent was untrustworthy, and that his principal had some notice thereof or that the acts or omissions were out of the usual course of business. *Wachsman v. The Columbia Bank of the City of New York*, 8 Misc. 280.

Neglect on the part of the owner of personal property contributing to its loss will not bar an action against an innocent purchaser for conversion, unless negligence amount to consent to the theft. *Peuse v. Smith*, 61 N. Y. 477.

See *Hills v. Snell*, 104 Mass. 173; *Stricksaul v. Barrett*, 20 Pick. 415.

Where a surgeon was sued for negligence in his professional duties, a judgment in his favor of the value of the services in which the negligence was alleged to have occurred was held a bar to the second action, although the plaintiff in the second action had, in the first, confessed judgment without trial. *Gates v. Preston*, 41 N. Y. 113.

It was held that a judgment in an action to recover for freight was a bar to an action by the owner of the goods on account of the destruction of the same during the course of carriage. *Dunham v. Power*, 77 N. Y. 76.

See this doctrine affirmed in *White v. Merritt*, 7 N. Y. 352; *Davis v. Talcott*, 12 id. 184; *Schwinger v. Raymond*, 83 id. 193; *Blair v. Bartlett*, 75 id. 150.

This doctrine seems to be disputed, as will be seen by reference to *Bigelow on Estoppel* (5th ed.) pp. 177, &c., citing *Resseguie v. Byers*, 52 Wis. 650; *Goble v. Dillon*, 86 Ind. 327; *Sykes v. Bonner*. (Cinn. Sup. Ct. R. 464) involving negligence of a physician; *Bascomb v. Manning*, 52 N. H. 132, and other authorities.

If notice of sale be ambiguous as to the amount of land to be sold (premises described as "farm of 'D.' containing thirty-one acres") the plaintiff is negligent, if he relies upon it. *Dennerlein v. Dennerlein*, 111 N. Y. 518.

In an action to have a deed set aside as fraudulent, which had been executed by the plaintiffs to one of the defendants, in reliance upon the statement of such defendant and her attorney, that it was a power of

attorney, it was held that the plaintiff's right to relief was not defeated by the omission to read the deed before execution. *Smith v. Smith*, 134 N. Y. 62.

*Albany City Savings Bank v. Burdick*, 87 N. Y. 40.

Agent of debtor, without authority, received part payment on notes in his possession and the principal discovered it, although he kept silent for three years, and in computing the amount due allowed it. The agent received another payment; principal's negligence in not communicating with debtor, and he was bound. *Wardrop v. Dunlop*, 1 Hun. 325.

Defendants, warehousemen, delivered to the owners negotiable warehouse receipts for certain imported goods stored in their warehouse deliverable on payment of charges. The warehouses were designated in the receipt as "free warehouses," meaning that an internal revenue tax on goods stored therein had been paid. The receipts were pledged as security for a loan, believing that the goods were free. In an action to recover the value of the goods it appeared that the warehouses named were bonded warehouses and the defendants refused to deliver the goods without payment of internal revenue tax. Held, that the defendants were responsible to the plaintiff for the goods as free goods, and were properly held liable to persons accepting the receipts. *First National Bank v. Dean*, 137 N. Y. 110.

A warehouseman is not estopped by his bill of lading in regard to an error or misstatement, unless it amount to a representation as to a fact which was, or in the ordinary course of business ought to have been within his knowledge, and which a third person, acting reasonably, would have a right to rely and act upon.

The defendant had a bonded warehouse under the United States government and received in store a number of barrels similar to those in which "Portland Cement" is packed, and having the usual marks thereon; they came from a port from whence such cement is imported, were represented to him to contain, and he in good faith supposed that they did contain, that article, and he issued a warehouse receipt stating the number of barrels, describing them as "Portland Cement" and giving the marks thereon. The receipt was pledged as security for a loan. The barrels did not contain "Portland Cement," but a worthless material. In an action to recover damages, held, that no warranty as to the contents of the barrels could be implied from the language of the receipt, which was merely descriptive, and that the defendant was merely warranted that the number of barrels stated were delivered, that they were marked as stated, and that there was nothing in their appearance which would reasonably lead to any suspicion that the contents

were not what was represented, and an action was not maintainable. *Dean v. Driggs*, 137 N. Y. 274.

Distinguishing *Meyer v. Peck*, 28 N. Y. 590; *Armour v. M. C. R. Co.*, 65 id. 111; *Miller v. H. & St. John R. Co.*, 90 id. 439; *First Nat. Bank v. Dean*, 137 id. 110, citing *Sears v. Windgate*, 3 Allen, 103, 107; *Hastings v. Pepper*, 11 Pick. 41; *Nelson v. Woodruff*, 1 Black. (U. S.) 156, 160; *Warden v. Greer*, 6 Watts. 424; *Hale v. Mildock Co.*, 23 Wis. 276; 29 id. 482.

See *Brook v. Railway Co.*, 108 Pa. St. 529; *R. Co. v. Larned*, 103 Ill. 293; *Savings Bank v. R. Co.*, 20 Kas. 519; see, also, *Williams v. R. Co.*, 93 N. C. 42; *National Bank v. Railroad Co.*, 44 Minn. 224.

See "Agency," p. 7, and cases cited.

Failure to present claim after notice from executor prevents creditor from asserting his claim after distribution. *Miller v. Morton*, 89 Hun. 574.

Plaintiff executing individual note without reading, in belief that it was joint, estopped to deny its true character. *Jaycox v. Trembly*, 42 App. Div. 416.

Owner was not estopped to petition for removal of encroachments, because she did not object while they were building. *Ackerman v. True*, 71 App. Div. 143.

That plaintiff was able and had an opportunity to read the instrument was no defense, where he was induced to rely on misrepresentations as to its contents. *Tillis v. Austin*, 117 Ala. 262.

See, also, "Bills and Notes," *ante*.

Failure of creditors to interfere in fraudulent attachment suits of other creditors held not to act as an estoppel in suits to compel the latter to account. *Glasser v. Meyrovitz*, 119 Ala. 152.

Where owner allowed railroad to spend large sums upon constructing and improving its road on his land without protest, he was estopped to bring ejectment. *Hendrix v. Southern R. Co.*, 130 Ala. 205.

By allowing her husband to invest her funds in his name, a wife was estopped to set up her rights as against those who gave credit in reliance thereon. *George Taylor Commission Co. v. Bell*, 62 Ark. 26.

While, of two innocent parties, he whose negligence causes loss must suffer, yet, where the plaintiff, though innocent, and not negligent, has not suffered loss, because his consideration was a pre-existing debt, he cannot claim the property of the innocent and negligent party. *Macdonald v. Cool*, 134 Cal. 502.

Where goods levied upon were left in such a condition as to give the custodian the appearance of ownership, the sheriff was estopped to set up his rights as against those who had given money on the faith thereof. *Gottlieb v. Barton*, 13 Colo. App. 147.

Where there is no confusion of the goods and no fraudulent intent,



but a warning that certain goods are not a wife's, the husband is not estopped from instituting a suit against the constable for wrongful levy by the mere fact that his goods were kept in her store. *Norwalk v. Ireland*, 68 Conn. 1.

By executing a deed in escrow and having it recorded without anything on the record to show its non-delivery, a grantor estops himself from setting up the facts as against an innocent purchaser. *Equitable Mortgage Co. v. Butler*, 105 Ga. 555.

Where the maker of a note signed a renewal thereof, which recited that the fertilizer for which the note was given "had the guaranteed analysis on each sack as required by law" and that he "purchased on his own judgment, waiving all guarantee as to its effect upon the crops," with knowledge that crops had failed under it and without making any inquiry as to the analysis, he was estopped to set up the facts as a defense to the note. *Montford v. Americus Guano Co.*, 108 Ga. 12.

Woman, by letting her property stand in the name of her husband, was estopped to withdraw it as against his creditors, who had given credit on the faith thereof. *Hauk v. Van Ingen*, 196 Ill. 20; aff'g s. c., 97 Ill. App. 642.

By allowing another to appear to be the owner, a party is estopped to assert the truth as against innocent purchasers. *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123.

Mere consent that husband should have possession of wife's stock of goods were held insufficient to estop her from showing invalidity of unauthorized mortgage by him. *Kiefer v. Klinsick*, 144 Ind. 46.

Obligor must not rely solely on the statements of the other party as to the contents of a contract. If he is negligent in learning its purport, he cannot assert, against an innocent party, that he was induced to sign by fraud or misrepresentation. *McCoy v. Gourion*, 102 Ky. 386.

See, also, *Engstad v. Syverson*, 72 Minn. 188.

Ability to read a contract and failure to do so precludes objections to it, in the absence of fraudulent inducement to sign. *Bonnot v. Newman*, 108 Iowa, 158.

*James v. Dalbey*, 107 Iowa, 463; *Olsen v. Fish*, 75 Minn. 228.

Where no credit is given husband on appearance of ownership presented by possession of wife's property, she may show her title. *McAdow v. Hassard*, 58 Kan. 171.

Failure to protest against creation of nuisance did not bar suit for damages. *Louisville &c. R. Co. v. Walton*, (Ky.) 67 S. W. Rep. 988.

See, also, *Matthews v. Stillwater Gas. Co.*, 63 Minn. 493.

Owner of stock certificate, purloined and pledged by cashier of bank

where it had been deposited for safe keeping, recovered from pledgee. *O'Herron v. Gray*, 168 Mass. 573.

Owner of a piano leased it to the proprietor of a piano salesroom, who sold it. Owner recovered from purchaser. *Oliver Ditson Co. v. Bates*, (Mass.) 63 N. E. Rep. 908.

Where chattel mortgagee or conditional vendee withholds his mortgage from the record so as not to effect the mortgagor's or vendor's credit, he cannot set up his rights as against creditors dealing on the faith of the apparent clear title to the goods. *Clark v. Richards Lumber Co.*, 68 Minn. 282.

Stockholder not allowed to set up invalidity of amendment of charter increasing stock, as against creditor relying on increase made pursuant thereto. *Palmer v. Bank of Zumbrota*, 72 Minn. 266.

It is not negligence to have non-negotiable instruments, indorsed in blank, in a drawer where they are accessible. *Young v. Brewster*, 62 Mo. App. 628.

By conferring an apparent title on another, an owner is precluded from asserting his right against one who has dealt on the faith of the appearances. *Walters v. Tielkemeyer*, 72 Mo. App. 371.

Maker of a note for a certain amount was held negligent in allowing the face amount to be reduced to the amount of the intended obligation, by the indorsement in pencil of a credit, which was subsequently erased. *Bank of Billings v. Wade*, 73 Mo. App. 558.

A mortgagor who had the right to collect insurance money was not allowed to defend a suit for the mortgage debt on the ground that the mortgagee had failed to collect it. *Breckinridge v. White*, (Mo. App.) 67 S. W. Rep. 715.

One who assisted a dealer in delivering to a purchaser cattle, among which one of his own had been mixed without his knowledge, was allowed to recover of the purchaser. *Bright v. Miller*, (Mo. App.) 68 S. W. Rep. 1061.

Failure to examine corporate books before giving credit, held not to prevent a creditor from claiming fraudulent overvaluation of property. *Gilkie &c. Co. v. Dawson &c. Gas Co.*, 46 Neb. 333.

Plaintiff is not bound by his representations, where no action in reliance upon them was intended or naturally to be expected. *Laing v. Evans*, (Neb.) 90 N. W. Rep. 246.

See, also, *State v. Bank of Commerce*, 61 Neb. 22.

Where one is requested to sign his name for the purpose of exhibiting his signature, he cannot be charged with negligence in failing to see what else was on the paper he was signing. *Alexander v. Brogley*, 63 N. J. L. 307; aff'g s. c., 62 id. 584.

Maker of a note, concluding that the original payee still owned the note from the fact that he had the interest coupons, which were in fact sent to him by the indorsee for collection of interest, paid the principal of the note to such payee. Indorsee was not estopped to recover from maker. *Hollinshead v. Stuart*, 8 N. D. 35; s. c., 42 L. R. A. 659.

Grantor, who delivered deed in escrow and put grantee in possession, was estopped to set up non-delivery of the deed against innocent purchaser from the grantee, who obtained possession of the deed from the holder and exhibited it as evidence of title. *Shurtz v. Colvin*, 55 Oh. St. 274.

One who innocently believed he had title and induced another to advance money on the faith thereof, was not allowed to assert, against the latter, a subsequently acquired interest. *Keenan v. Van Dusen*, 19 Pa. Co. Ct. 282.

Delivering to another the documentary evidences of title estops the owner to assert his rights against one dealing on the faith of the appearance of title or authority so created. *Adler v. Corning & Co.*, 26 Pitts. L. J. (N. S.) 244.

By permitting the mortgaged property to be sacrificed for less than its market value, a mortgagee lost the right to recover a deficiency. *Island &c. Bank v. Galvin*, 20 R. I. 158.

Where one of two innocent parties must suffer, he whose acts caused the loss should bear it. *Persons v. Van Tassel*, (S. D.) 89 N. W. Rep. 861.

See also *Maher v. Title Guarantee &c. Co.*, 95 Ill. App. 365. *Russell v. American &c., Teleph. Co.*, 180 Mass. 467; *Leonard v. Marshall*, 82 Fed. Rep. 396.

An agent with funds to invest, by an unrecorded assignment gave his principal a mortgage held by him as mortgagee. The land, afterwards acquired by the agent and sold under execution against him, was held to be free from the principal's claim in the hands of the vendee of the execution purchaser. *Persons v. Van Tassel*, (S. D.) 89 N. W. Rep. 861.

Failure to object to proceedings for an extension, by a city, for eight years, held a bar to subsequent action. *State v. Pierre*, (S. D.) 90 N. W. Rep. 1047.

Stockholders, who had received dividends, were not allowed to defend a suit for its debts on the ground that the stock was invalid. *Latimer v. Bard*, 76 Fed. Rep. 536.

Drawer of check accepted payee's statement that the check was lost and paid him the money, whereas plaintiff had received the check for value from the payee with the request not to present it at present. Plaintiff recovered. *Andrus v. Bradley*, 102 Fed. Rep. 54.

Corporate officer, notified that all debts of the corporation had been

paid by stock, and joining in direction for distribution of remaining stock in silence as to a claim of his own against it, was estopped to set it up. *Pyper v. Salt Lake Amusement Asso.*, 20 Utah, 9.

Wife estopped to assert wrongful record of conveyance to husband after silence of four years. *Murphy v. Ganey*, (Utah) 66 Pac. Rep. 190.

Delay of 18 months in having date in recorded deed corrected, estopped owner to assert his rights against subsequent grantee of record. *Mercantile &c. Bank v. Brown*, 96 Va. 614.

Delay of seven months in learning the facts as to performance of conditions of an escrow, estopped owner to assert his rights, as against innocent purchaser from grantee, who surreptitiously obtained and recorded the deed. *McConnell v. Rowland*, 48 W. Va. 276.

Failure to speak does not create an estoppel, where the information is equally open to both parties. *Cawtley v. Morgan*, 51 W. Va. 304.











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